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Controls and Safeguards of Delegated Legislation: a Case Study of Tanzania

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This work examines the safeguards and controls of delegated legislation, with particular emphasis on Tanzania, in order to ascertain whether they are effective in enhancing the protection of citizens' rights and the promotion of the rule of law. The author concludes that the safeguards and controls in Tanzania are not effective to ensure the protection of the citizens rights or the promotion of the rule of law. Hence, there is a need for intervention in the legal framework and practice regarding control of delegated legislation. This has to be supported by a political will and deliberate efforts of ensuring that delegated legislation, which takes the larger part in legislation, is indeed enhancing the protection of citizens' rights and the promotion of the rule of law.

A. Introduction

I. Introductory Remarks

Tanzania is a United Republic in which Zanzibar enjoys autonomy in all matters that are classified by the 1977 Constitution of the United Republic of Tanzania as non-union matters.[1] On the other hand, the Union Government handles all non-union matters for mainland Tanzania. In Zanzibar the executive, legislature and judicature handle non-union matters. This paper does not cover Zanzibar. It restricts itself to mainland Tanzania and the Union Government. The parliament of the United Republic has competence to enact laws for all union matters and non-union matters for mainland Tanzania.[2]

Constitutionally, in Tanzania like in other democratic states, the power to enact laws is vested in the parliament.[3] However, just as it is accepted in the Westminster tradition, the parliament cannot enact detailed laws covering every aspect of the subject matter that is being legislated upon. The reasons for that approach are, among other things, pressure of time and lack of technical knowledge required for making laws on complicated subjects, flexibility for rapid adjustment to meet changing circumstances, opportunities to experiment, and convenience to handle emergency situations.[4] So, Tanzania being a welfare state adopted the system whereby the legislature outlines matters of policy, and leaves the details regarding

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1 Art. 64 (2) Constitution of the United Republic of Tanzania, Printed by the Government Printer, Dar es Salaam (1998).

2 *Id.*, Art. 64 (1).

3 *Id.*, Arts. 63 (3) (c) and 64.

4 P. Oluyede, Administrative Law in East Africa 60 (1975).

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implementation of the policy to the executive.[5] In other words, the parliament delegates its law-making powers on aspects that require technical details to other administrative organs of the state.[6] Hence, this brings with it the need for delegated legislation (hereafter referred to as "DL"). Under this arrangement, the parliament considers only broad principles and lays down substantive and procedural aspects of its policies in general terms in respect of the law it wants to be enacted and then it delegates powers to the executive so as to put flesh on the skeleton of Acts of parliaments.[7] The concerned departments of the government implement the delegated legislative power by making the DL.[8]

However, the inevitability of DL does not mean that the way in which it is made is satisfactory for the protection of citizens' rights.[9] This is because sometimes principles of legal statutes and good governance and rule of law may not be adhered to, when making DL.[10] Also, the executive may make DL, which violates citizens' rights and liberties. This fact shows the need for effective checks and controls to ensure accountability and prevention of abuse.

The doctrine of separation of powers serves the purpose of providing checks and balances, as among other things it checks the manner in which the executive makes DL.[11] Also, the common controls and safeguards, which are employed in Tanzania,[12] like in other countries, are statutory such as antecedent publicity, consultation, publication and laying of DL in parliament. These are meant to enhance parliamentary oversight, in which the parliament monitors the use of power it has delegated.[13] In other words, there are both pre-enactment checks

5 *Id*., at 57.

6 Prof. Vishweshwaraiah, *Delegated Legislation*, at 14. Available at http://elearning.vtu.ac.in/syllabus/PRG-III%20Notes/Vishweshwariah-Compiled%20notes.doc; *See also* O. K. Dingake, Administrative Law in Botswana: Cases, Materials and Commentaries 7 (1996).

7 Sir Justice V. C. R. A. C.Crabbe, *Shorter Parliamentary Enactments and Longer Regulation*, 7 Statute Law Review 4, at 6 (1986).

8 The Office of the Speaker Lok Sabha, Inaugural Address at the 21st International Training Programme in Legislative Drafting, New Delhi, 12 December 2005, at http://speaker/loksabha.gov.In/SpeechDetails.asp?Speechld=125.

9 G. Palmer & M. Palmer, Bridled Power: New Zealand's Constitution and Government 207 (2004).

10 A. Kasements & M.-L. Liiv, *The Use of Social- Legal Information in the Draft Acts' Explanatory Memoranda: A Precondition For Good Governance* 5 (2004). Available at http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN018453.pdf#search=%22aare%20kasemets%22.

11 D. Meyerson, *The Rule of Law and the Separation of Powers*, 4 Macquaries Law Journal 1, at 1 (2004). Also available at http://www.austlii.edu.au/au/journals/MqLJ/2004/1.html.

12 Oluyede, *supra* note 4, at 62.

13 The Parliament of Commonwealth of Australia, Senate Standing Committee on Regulations and Ordinance, Commonwealth Conference of Delegated Legislation Committees, Vol. 1 Report of Conference, Parliamentary Paper No 271/1980, at 3; In some cases the parliament is given power to amend or modify the delegated legislation. In few jurisdictions, such as India and Victoria, the disallowance or annulment requires the consent of both houses. The British procedure whereby some instruments are subject to affirmation by both houses has not been extensively adopted elsewhere. In some jurisdictions such as Western Australia and India, the parliament is given power to amend or modify delegated legislation. Only in Canadian jurisdiction is there a notable absence of formal powers vested in the parliaments to take action in relation to delegated legislation.

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on the granting and the use of delegated powers and the post-enactment checks on the legality of DL.[14] Another control mechanism is judicial review whereby the courts look at the consistence with the enabling provisions, legality[15] and reasonableness.[16]

However, despite the presence of safeguards and controls, there are incidences where the passed DL caused problems. As observed by one High Court of Tanzania judge, Justice Mwalusanya, judicial review is an important weapon in the hands of judges in Tanzania by which ordinary citizens can challenge an oppressive administrative action.[17] This applies to instances where the persons entrusted to make DL abuse those powers. The assumption of this study is, however, that effective controls and safeguards on DL can enhance the protection of citizens' rights and the promotion of the rule of law.

It should be noted that this paper does not discuss in-depth the control by way of judicial review. Judicial review emanates from the ineffectiveness of other control mechanisms. For instance, DL could be proclaimed for a purpose it was not intended for or it could be made by a person or body to whom the power to make DL was not delegated. Judicial review is a 'last resort' control mechanism. In other words, the judiciary is a tool or facility sought to be employed as a means to an end.[18] It can be said that judicial review does not have many problems (especially in common law countries) due to the doctrine of precedent (*stare decisis*) whereby it follows the common law practice. The courts in Tanzania have invoked the principle of *ultra vires* as part of judicial control of DL. However, as earlier stated, this paper does not focus on judicial controls and safeguards.

II. Research Problem

This paper examines the available controls and safeguards for DL to see whether they can help to improve DL in Tanzania for the protection of citizens' rights and civil liberties. It intends to discuss the available controls and safeguards and analyse their effectiveness and efficacy. To this end the research question is: are the controls and safeguards on DL effective in Tanzania in ensuring protection of citizens' rights and promotion of the rule of law? In an endeavour to answer the research question the paper will be guided by the following research issues:

a) What is DL?
b) What is the importance of DL in a democratic state like Tanzania?
c) What are the available controls and safeguards in Tanzania?

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14 A. McHarg, *What is Delegated Legislation?*, *in* K. Vincent (Ed.), 50th Anniversary Year, Public Law Autumn 2006, 539, at 555 (2006).

15 *J. Yusuph v. Minister for Home Affairs* (1990) TLR 80, at 82.

16 *Adecon Fisheries (T) v. Director for Fisheries and Others* (1996) TLR 352, at 360.

17 *John Mwombeki Byombalirwa v. The Regional Commissioner and the Regional Police Commander, Bukoba* (1986) TLR 73, at 73.

18 C. McGowan, *Congress, Court and Control of Delegated Power*, 77 Columbia Law Review 1119, at 1120 (1997).

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d) Are the controls and safeguards adequate or sufficient to promote the rule of law in Tanzania and to protect citizens' rights and liberties?

The main concern of this paper is that since delegated legislation is a major source of law in Tanzania, it needs to be responsive to the basic principles of the rule of law and the protection of citizens' rights. Otherwise, given the enormous quantity of DL, it could be a major source of violation of citizens' rights and liberties. Also delegated discretion that is not controlled appears not to be acceptable to the public at large, since it would leave them, as John Adam thought, vulnerable in both mind and body.[19] But why explore and research in this area? There are several reasons, which prompted this study as will be shown in the following section.

III. Justification of the Research

This paper focuses on statutory and parliamentary controls and safeguards mechanisms on DL produced by the departments of state or other governmental agencies. The reason for examining this area is based on the fact that the bulk of legislation in Tanzania is DL, which has not been directly enacted by parliament. The making of DL by the executive leads to a lot of questions on the effectiveness of the separation of powers between the parliament and the executive. This is because DL is usually seen to pass through a less legitimate procedure and hence providing greater potential for abuse.[20] The bodies or other persons who make DL have no full autonomy as the parliament itself. Thus, they have to be controlled.

Another reason for conducting a study on the safeguards of DL is the increase of the quantity of DL in Tanzania.[21] The same trend is observed in other jurisdictions such as the UK[22] and the USA.[23] Comparing the quantity of primary legislation and DL made in Tanzania, DL takes the bigger share of legislation than the primary legislation, hence, is a major source of law.[24] This suggests that the protection against abuse has to be tested. Hence, an updated study is generally needed. Also, in Tanzania no academic study has been made in the area of DL. This explains the

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19 *Id.*, at 1131.

20 McHarg, *supra* note 14, at 555.

21 The information from the Revision Section in the Parliamentary Drafting Department indicates the increase of delegated legislation as shown by the following date: 1995-424; 1996-444; 1997-493; 1998-456; 1999-492; 2000-543; 2001-504; 2002-594; 2003-730; 2004-674 and 2005-784.

22 C. Stefanou & H. Xanthaki, Manual in Legislative Drafting 106 (2005); *See also* S. H. Bailey, B. Jones & A. R. Mowbray, Cases, Materials & Commentary on Administrative Law 207-208 (2005).

23 N. J. Singer, Statutes and Statutory Construction, Vol.1A (2002), at paras. 17:1-32A, 19 at 709, para. 31:1.

24 P. A. Joseph, Constitutional and Administrative Law in New Zealand 890 (2001). This is true in the case of Tanzania where the parliament passes an average of thirty Acts annually against a minimum of 300 DL per year.

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dearth of literature on DL focusing on its controls and safeguards in Tanzania.[25] Therefore these factors concretize the need to conduct a study on Tanzania in this area.

IV. Methodology

A comparative study by way of demonstrative approach will be employed in relation to various controls and safeguards exercised in the making and after the making of the DL in New Zealand, the UK, the USA, Botswana, and Tanzania. The study will involve a general survey of the relevant literature on DL, statutes, reported cases and articles, which will reflect theoretical perspective of the study. The literature survey will help in outlining various types of controls and safeguards because the controls and safeguards are not taken in a similar fashion. The survey also includes the identifying strategies for making it successful. Throughout the study, a literature survey will be used to collect and analyse the data. Interviews with some relevant persons will also be utilized.

The countries chosen were seen to make a good comparison because they are all Commonwealth countries, except for the USA. This means that legislative practices throughout the Commonwealth have much shared experience.[26] The USA with a different legal system has been chosen to provide insights on how the matter has been dealt with in a different legal system. The difference in parliamentary constitutional set up between, for example, the USA and other countries was another factor to opt for these jurisdictions. The UK and New Zealand, which have more advanced legal systems, were chosen in order to provide insights on what mechanisms are applicable in controlling DL in view of protecting citizens' rights and promoting the rule of law. The difference in development in legal system is also another comparative factor because it provides different experiences on how the issue is handled in different environments. Botswana was chosen to represent the African and the developing countries perspective towards control mechanisms of DL. The objective is to see what controls are exercised in other jurisdictions and whether they can enhance the protection of citizens' rights and promote the rule of law.

The paper also identifies problems relating to control mechanisms of DL in Tanzania. Due to the increase in DL it is likely that Tanzania could be faced with abuse of powers by those who are entrusted to make DL, as observed by Justice Mwalusanya.[27]

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[25] Palamagamba John Kabudi, Principal Lecturer in the Faculty of Law, The University of Dar es Salaam; The lecturer informed me about the fact that there is no academic material in relation to DL in Tanzania.

[26] P. A. Joseph, *Delegated Legislation in New Zealand*, 18 Statute Law Review 85, at 85 (1997).

[27] *See* note 17.

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V. Outline of the Research

This paper is divided into five sections. Section B introduces the subject matter. It provides general insights of DL and explains the need of its existence, its dangers and some controls and safeguards. The Section also sets out the research problem and issues to be discussed as well as the justification and the methodology of the research. This Section creates the basis of the analysis of DL control mechanisms. Section C explains in-depth theories of DL as perceived worldwide. It provides the meanings of DL, its importance, advantages and the critique of it. Also it introduces the controls and safeguards that are generally applied, and sets out their importance. If they are effectively used they can enhance protection of citizens' rights and promotion of the rule of law.

Section D gives a comparative analysis of the control mechanisms used in various jurisdictions with different legislative drafting development status and systems. It shows how, if the safeguards and controls are well established and utilized, it can enable the enacted DL to protect citizens' rights and promote the rule of law. Section E discusses the Tanzanian DL framework and the available controls and safeguards in this country. It seeks to establish whether the available controls and safeguards enable the DL to protect the citizen's rights and promote the rule of law in view of what prevails in other jurisdictions. Section F provides a conclusion and recommendations. The general conclusion is that Tanzanian controls and safeguards mechanisms are not sufficient to enable DL to promote the rule of law and to protect citizens' rights and liberties and therefore needs to be reviewed in view of changing the practice.

B. Delegated Legislation and Their Controls

I. Introductory Remarks

This section sets out a general conceptual framework by examining theories on DL and exploring definitions of DL by various authors. It explains mechanisms of identifying what should be included in the Act, Schedule and Regulations. It provides the justification and critique for the use of DL. Thereafter the section introduces various controls and safeguards of DL in order to build the basis for the next two sections, which discuss controls and safeguards in more detail. Generally it shows that safeguards are very important to enable participation by those who might be affected by the DL, as well as to provide parliament the opportunity to exercise its control. Also it enables citizens to be governed by the DL, as the control serves the purpose of ensuring protection of citizen' rights and promotion of rule of law. However, as has been pointed out in the preceding section, this paper focuses on statutory and parliamentary control rather than judicial review.

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II. Definitions of Delegated Legislation

Various authors and jurisdictions have offered definitions relating to DL. According to Puttick, DL means legislation made by a body or person by virtue of powers conferred by statute; or sub delegated legislation made by a delegate of an original recipient of powers to legislate.[28] DL takes many forms but the main ones include orders, regulations, proclamations, rules, schemes and byelaws.[29] Beatson, Matthew and Elliott define DL along the same lines. However, they add other forms of DL such as Orders in Council, circulars, guidance, directions and codes of practice used to describe it.[30] Some of these forms are not even included under Section 21(1) of the UK Interpretation Act, 1978[31] that lists some forms of subordinate legislation and generalises other instruments. Their definition seems to be more elaborate and wider than those provided by others.

Ntanda Nsereko, who, like the UK's Interpretation Act, uses the term "subordinate legislation," defines it as the legislation made by a person or a body of persons under the authority of parliament. He then names persons or authorities, that may make DL, including the President, minister, a head of a government department or institution, a statutory body like the university, a professional body, a district council, or town or city council.[32] In Botswana the DL also includes proclamation, regulation, rule, rule of the court, order, byelaw or other instrument.[33] In Tanzania, the term "subsidiary legislation" is used and is defined to mean "any order, rule, proclamation, rule of the court, regulation, notice, bylaw or other instrument made under Act or other lawful authority."[34] It emphasizes that the DL has to be made through the force of law and also prescribes the instruments, which fall under the DL. However, like in the UK[35] the definition is not complete, as it does not mention all the rules that fall under subsidiary legislation. Craies notes that "[a]ll legislation can be classified as either primary or subordinate … legislation is subordinate if it owes its existence and authority to other legislation: if it does not it is primary."[36] Clearly, his classification is source-based whereby it traces the validity from the authority of another law.

The few cited definitions indicate that the terms DL, subordinate legislation or subsidiary legislation are used synonymously. In some instances terms like rules[37]

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[28] K. Puttick, Challenging Delegated Legislation 4 (1988).

[29] *Id*.

[30] J. Beatson, M. Matthews & M. Elliott, Administrative Law Text Materials 634 (2005).

[31] The Interpretation Act, 1978 9(UK) Section 21 (1), which defines "subordinate legislation" to mean Orders in Council, orders, rules, regulation, schemes, warrants or byelaws and any other instrument made or to be made under any Act.

[32] D. D. Ntanda Nsereko, Constitutional Law in Botswana 50 (2001).

[33] The Interpretation Act, 1984, The Republic of Botswana, Statute Law, Vol. LXVIII, 1984 (No 20 of 1984), Section 49.

[34] The Interpretation of Laws Act, Cap 1 R.E, 2002, Laws of Tanzania, Section 2.

[35] *See* note 31.

[36] D. Greenberg, Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation 9 (2004). *See also* McHarg, *supra* note 14, at 541.

[37] Indian Law Institute New Delhi, Delegated Legislation in India 1 (1964).

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and regulations[38] are used to cover DL. Also other terms that are commonly used to mean the same thing include secondary legislation or statutory instrument. This is confirmed by Professor Sathe's observation: "We don't have terminological consistency in the family of delegated legislation."[39] MacLeod,[40] Nsereko[41] and Crabbe[42] have clearly explained the reasons behind the use of different terms and correctly conclude that these actually mean the same thing.

Nevertheless, basically, the meanings provided indicate that DL has to be made by individuals and institutions acting under a grant of legislative authority from the parliament by an enabling Act. The definitions also may be said to be descriptive of the various forms DL may take and persons who may make such legislation.[43] Despite the fact that many of the authors provide a source-based approach definition, some authors have criticised it as it does not reflect the true picture of DL and therefore, it is incomplete.[44] Reasons advanced to support this proposition are that definitions, like the one in the UK Statutory Instrument Act, just state the type of subordinate legislation and include other instruments made or to be made, which is a very general approach. They also argue that they refer to executive-made DL thus ignoring the derivative powers exercised by legislative bodies like in Northern Ireland.[45] Furthermore, they state that countries with written constitutions will never have primary legislation because all law-making power has its origin in the constitution.[46] Finally, the DL can be identified by the fact that parliament can require it to be amended or revoked despite the fact that it is made by the executive, while an Act of parliament can be amended by parliament itself.[47]

On the claim that the definition provided by the statutes is not exhaustive, it can be said that the responsible department should look at the purpose of the whole Act in order to identify other instruments to be made. But all the same, it is dangerous to generalize areas, in which the departments can legislate. It is better to state them specifically in order to guide those who make DL and

[38] Palmer & Palmer, *supra* note 9, at 202-203.

[39] Professor Sathe, as quoted by Vishweshwaraiah, *supra* note 6, at 15: http://elearning.vtu.ac.in/syllabus/PRG-III%20Notes/Vishweshwariah-Compiled%20notes.doc.

[40] I. MacLeod, *Delegated Legislation*, Paper presented at the Sir William Dale Centre for Legislative Studies, Institute of Advanced Legal Studies, University of London, Summer School 2006, at 2. Since the legislature delegates the power to legislate to other people, the legislation which they make is called delegated legislation. But the terms "subordinate legislation" and "secondary legislation" also mean the same.

[41] Ntanda Nsereko, *supra* note 32, at 47-48, Ntanda too provides an explanation why it is called "subordinate legislation": it is subordinate to the parliament's supreme legislative authority; and it is called "delegated legislation" because the parliament, being the supreme law-making authority, delegates by enabling Act some legislative functions to other persons or bodies.

[42] V. C. R. A. C. Crabbe, Legislative Drafting 213 (1993). Crabbe says "it is subsidiary because it is subsidiary to an Act of Parliament."

[43] The rules which tend to be identified by all authors are orders, rules, regulations, proclamations and by laws.

[44] McHarg, *supra* note 14, at 544.

[45] *Id*.

[46] *Id*., at 545.

[47] *Id*.

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those involved in controlling them. The concern that the constitution delegates powers to the legislature and therefore the law made by it can be treated as DL, can be countered by the fact that the legislature is given the function of making laws by virtue of the doctrine of separation of powers. The constitution normally recognizes the difference between the law made by the legislature and the DL. Thus, it specifically empowers the legislature to delegate powers to make laws. But, even if one may see it as a delegation that is not the delegation that is intended to be discussed in this paper.

It can be conceded that there was a devolution of legislative powers to the Northern Ireland Assembly. While devolution is in place the principal method of legislating for Northern Ireland on devolved matters would be by Acts of the Northern Ireland Assembly. When devolution is suspended the principal method of legislating devolved matters would be by Order in Council.[48] This means that pursuant to devolution the Northern Ireland Assembly is empowered to make primary legislation and not delegated legislation. The Northern Ireland Assembly is also entitled to delegate legislative powers to the executive.[49] This paper will not deal with these kind of powers, which have been devolved to, for example, the Northern Ireland Legislature. This paper deals with delegated powers which parliament gives to the executive. It is true that the directive of parliament can amend or revoke the DL when it executes control of the use of delegated powers. The term DL will be used because it is the term most frequently used in the materials on legislation made by the executive and government agencies. But where appropriate the other terms will be used as well.

Though DL emanates from the delegation of powers, there is a rule which prohibits sub-delegation known by its Latin maxim *delegatus non potest delegare*.[50] This is very important for drafters as they should be aware of the scope of the authority delegated to the agency adopting it. Drafters must continually ask whether the rule is within the statutory authority of the agency and whether it is consistent with the description in the statute.[51] Drafters also have to know whether the delegated power constitutes sub-delegation or not. Furthermore, they should take into consideration what should be covered by the DL, as sometimes difficulties arise in identifying what is to be put in the principal Act, schedule and the DL.[52] The Committee on Procedure, in the UK known as the Renton Committee, suggested that statements of principles should be confined in the main body of the statute in order to simplify the substantive sections in the Act. It further suggested that matters of considerable significance and permanence to the

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[48] The Northern Ireland Act, 1998, Section 5, and para 1 (1) of the Schedule to the Northern Ireland Act, 2000.

[49] Greenberg, *supra* note 36, at 194, para 4.3.7.

[50] *Hawkes Bay Raw Milk Produces Coop. Co.Ltd v. NZMilk Board*, (1961) NZLR 218 (CA).

[51] R. J. Martineau & M. B. Salerno, Legal, Legislative, and Rule Drafting in Plain English 132 (2005).

[52] E. C. Page, Governing by Numbers, Delegated Legislation and Everyday Policy-Making, Department of Politics University of Hall, Oxford- Portland (2001), at 19. Page raised the concern that “Governments cannot freely pick and choose what they do through statutory instruments and what they do by Act of parliament or some other method of shaping public policy.”

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legislation should be provided in the schedules so that one does not loose track. The Committee suggested that details, which will involve frequent changes, should be provided for in the regulations.[53] However, in legislative drafting practice there have been instances of improper classification of such matters.[54] Due to difficulties in identifying what should be put where, it is important for drafters to be aware of this problem and how to approach it in order to minimize confusion.

III. Importance of Delegated Legislation

The famous constitutional law expert, Lord Hewart, criticised the practice of delegating legislative powers to the executive on the ground that it "… places the government departments above the sovereignty of parliament and beyond the jurisdiction of the courts."[55] He further stated:

> This course will prove tolerably simple if he (the ardent bureaucrat) can: (a) get the legislation passed in skeleton form; (b) fill up the gaps with his own rules, orders, and regulations; (c) make it difficult or impossible for parliament to check the said rules, orders and regulations; (d) secure for them the force of statute; (e) make his own decision final; (f) arrange that the fact of his decision shall be conclusive proof of its legality; (g) take power to modify the provisions of statutes; and (h) prevent and avoid any sort of appeal to a court of law.[56]

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[53] *The Preparation of Legislation*, Report of a Committee Appointed by the Lord President of the Council, Presented to Parliament by the Lord President of the Council by Command of Her Majesty, May 1975, London, Her Majesty's Stationary Office (1975), at 68-69 para 11.25:

> … it desirable to cut down the amount of detail at present contained in Bills … But where a considerable volume of detail is essential to the legislation we think that so far as possible this should be contained in the schedules to the Bill rather than in a separate statutory instruments, as this makes the statutory provisions more easily accessible as a whole … the body of the Bill itself should contain the general principles set out as clearly and simply as possible; detailed provisions of a permanent kind should be contained in the Schedules to the Bill; and only details which require comparatively frequent modification should be delegated to statutory instruments.

[54] The Value Added Tax Act, 1997 Cap 148, R.E 2002, Section 12, In Tanzania for example, matters such as exemption from payment of taxes to individual or certain classes of individuals are provided for in the schedules and are amended, as Crabbe puts it, through the Henry VIII Clause where the minister can be empowered to amend, vary or revoke. Though matters like these are matters of policy they are left to be amended by way of DL. Even jurisprudence of tax requires transparency. They are also not among matters, which can be dealt with by way of a schedule according to Crabbe who suggests that the object of the Henry VII Clause was to enable minor amendments to be made to the Act.

[55] Lord Hewart of Bury, The New Despotism 14 (1929); Joseph, *supra* note 26, at 90; The Legal and Constitutional Committee, Report to Parliament on the Subordinate Legislation (Deregulation) Bill, 1983, September 1984.

[56] *Id*., at 21; *See also* Joseph, *supra* note 26, at 90.

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Some commentators treat Hewart's criticism as the starting point of modern regulations jurisprudence,[57] as it prompted other states like Australia, the USA,[58] and New Zealand[59] to revisit the usage and importance of DL. The British Government, through the Committee on Ministers Powers (the Donoughmore Committee), countered Hewart's allegations by affirming that the use of DL was inevitable.[60] The Committee provided justification of DL being the best for technical matters, flexibility, experiments, emergencies, unforeseen contingencies and for serving parliamentary time.[61] Basically, DL was recognized to be inevitable in a modern and complex state where high technology was used. Due to the growth of DL and its usage in the modern state, DL has become an established feature in the law.[62] The Donoughmore Report paved the way of the continuance of the existence of DL in the commonwealth jurisdictions. However, the most important thing is that the Committee also saw the dangers of DL being abused and therefore the need for devising the best safeguards is called for.[63] That opened the door for

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[57] C. Morris & R. Malone *Regulations Review in the New Zealand Parliament,* 4 Maquaries Law Journal 9 (2004). Available at http://www.austlii.edu.au/au/journals/MqLJ/2004/2.html.

[58] P. L. Shriwastava, *Control of Delegated Legislation, (A Comparative Study)*.(Thesis submitted for the Degree of Ph D (Laws) of the University of London) (1961), at xxxi. In Australia the problem was examined in 1929-1931 by a Senate Committee on Standing Committee system; in the USA the Attorney General's Committee on Administrative Procedure examined the problem in 1941.

[59] Joseph, *supra* note 26, at 896-897.

[60] The Parliament of the Commonwealth of Australia, Senate Committee on Legal and Constitutional Affairs, *Report on Delegated Legislation* (September 1984), at 32.

[61] Joseph, *supra* 26, at 91 Justification for the use of DL include:

> a) Pressure upon parliamentary time. Delegating to the executive can relieve parliament of detail of legislation;
>
> b) Technicality of subject matter. The subject matter of much modern legislation is technical in nature and does not lend itself to parliamentary scrutiny and debate;
>
> c) Unforeseen contingencies. It is not possible for administrative machinery to foresee all contingencies for which provisions may need to be made;
>
> d) Flexibility. Delegated legislation allows for flexibility for change without need of amending legislation;
>
> e) Opportunity for experiment. Delegating Legislative power allows for experiment and yields benefits from the lessons learnt;
>
> f) Emergence powers. The executive should be equipped with such powers in advance so as to deal with national emergencies such as war, epidemics or natural disasters;

See also S. de Smith & R. Brazier, Constitutional and Administrative Law 338 (1998).

[62] G. Hogan & D. Gwynn Morgan, Administrative Law in Ireland 22 (1998).

[63] Great Britain: Committee on Ministers' Powers Report, Presented by the Lord High Chancellor to Parliament by Command of His Majesty (Cmd 4060) (1932), at 54 & 67-68. Where the Committee recommended that all rules and regulations should be required by law to be published, and that a Standing Committee be established by each House of Parliament for purpose of considering and reporting on every regulation and rule made in the exercise of delegated legislative power, and laid before the House in pursuance of statutory requirement.

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the introduction of controls to DL, which hitherto did not exist. It is imperative to note that the reasons for using DL, which were provided at that time, are still valid today, as can be seen in the modern trend of justifying DL.[64]

To date, the use of DL is beneficial to the executive because it allows the executive to introduce detailed rules and to have swift legislative responses to emergencies. Technical matters and the implementation of social policy are better dealt with by DL. It also reduces pressure of time on the floor to parliament[65] because parliament will be able to concentrate on matters of principles alone and not matters of details. From the administrative point of view, DL has the advantage of being easy to make and readily adaptive. Also it can be amended, revoked or superseded at short notice, without the need for further parliamentary approval.[66]

IV. Dangers

In spite of the justification and advantages of DL, it is possible that delegated legislative powers may be abused.[67] The tendency in many countries of providing a general description of the policy and general issues in laws, while leaving almost unlimited authority to individual ministries to issue implementing rules or determine how the law will be applied, may create some dangers. It is in the face of such dangers that make DL appear to be incompatible with the doctrine of separation of powers.[68] This situation in turn may strengthen the power of the executive to act as the arbiter of the rules they have designed.[69] This happened in New Zealand where the Economic Stabilization Act, 1948 allowed the Governor General to make regulations that appeared to him to be necessary or expedient for the general purpose of the Act. This situation enabled the executive to take

[64] R. Baldwin, Rules and Government 62-63 (1995). *See also* Oluyede, *supra* note 4, at 61; Crabbe, *supra* note 42, at 214; *see also* G. C. Thornton, Legislative Drafting 233 (1970). It is almost an agreed fact that Parliament has neither time nor the personnel to legislate on matters of detail since it could not, as presently organised consider and debate such issues. Hence, Parliament focuses on questions of broad principles and leaves other details to ministers and agencies. DL serves a valuable purpose in keeping primary legislation as clear, simple, and short as possible and in assisting Parliament to focus on essential points, policies and principles. Sometimes the legislation may be too technical to be understood and debated properly in Parliament. In such situations Parliament decides to allow ministers or agencies to employ or consult with experts on matters of details and produce considered rules. This process may allow consultation with particular constituencies (such as trade associations, specialists and unions). DL also allows rapid responses to be made into crises, unforeseen circumstances and emergences. Also it is useful to bring the Acts of Parliament into force at the appropriate time or in stages.

[65] T. S. T. J. N. Bates, *Parliament, Policy and Delegated Power*, 7 Statute Law Review 114, at 114 (1986).

[66] Puttick, *supra* note 28, at 18.

[67] Ntanda Nsereko, *supra* note 32, at 49.

[68] Dingake, supra note 6, at 8.

[69] A. Seidman, R. B. Seidman & Th. W. Walde, Making Development Work, Legislative Reform for Institutional Transformation and Good Governance 39 (1999).

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controversial measures such as wage, price and rent freezes by regulations.[70] It other words, in this case the executive was given enormous powers, which enabled the executive to act against the rule of law, and hence endanger citizens' rights.

Another danger lies in the possibility that DL could introduce matters that the initiators of the enabling Act failed to do in parliament. They may also transgress other parliamentary policies or other general standards of justice and may eclipse parliamentary authority and thus imperil representative democracy,[71] as parliament is responsible to the people.[72]

Also its legislative procedures could be a source of danger. Unlike primary legislation, which is subjected to massive scrutiny inside and outside parliament,[73] the legislative process of DL is internal to the government; hence, many stakeholders, such as the media, may not even be aware that regulations are going to be made. This leads in many instances to less scrutiny of DL by stakeholders outside the government.[74] Also, due to non-involvement of parliament there may be a danger that DL may make serious inroads into personal rights in the interests of the policy.[75] Thus, due to such problems Ojo suggests that: "a positive approach to dangers of DL is to develop many sided devices for safeguarding and improving its operation."[76] Holding a similar opinion is Crabbe who also suggests that: "the parliament can, and it should control the exercise of delegated legislative powers."[77] Murphy also supports this position.[78]

V. Controls and Safeguards of DL Generally

The common safeguards available for DL are mainly statutory and parliamentary scrutiny. Statutory safeguards are mainly procedural and are provided under the enabling law or the laws of general application, such as the Interpretation of Laws Act[79] in Tanzania or the Statutory Instruments Acts[80] in the UK and Botswana. The statutory procedural safeguards include antecedent publicity, consultation, publication, and laying of DL before parliament. The parliamentary safeguards

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70 G. Palmer, *Deficiencies in Delegated Legislation*, 30 Victoria University of Wellington Law Review 12 (1999). Available at: http://www.austlii.edu.au/nz/journals/VUWLRev/1999/25.html.

71 Ntanda Nsereko, *supra* note 32, at 49.

72 Dingake, *supra* note 6, at 7.

73 A. F. Bennett, *Uses and Abuses of Delegated Power*, 11Statute Law Review 23, at 25 (1990).

74 *Id*.

75 Morris & Malone, *supra* note 57, at 10.

76 A. Olanyika Ojo, *Delegated Legislation in Nigeria*, Thesis submitted for the Degree of PhD in the University of London (1967), at 455.

77 Crabbe, *supra* note 42, at 213.

78 Baldwin, *supra* note 64, at 62-63. Where Murphy urged for greater surveillance of certain secondary or delegated legislation by Orreachtas committees after noting that the government department had imposed obligations to individuals in an illegal manner and without authority on the Nursing Home Subvention.

79 The Interpretation of Laws Act, Cap 1, R.E 2002 of the Laws of Tanzania.

80 The Statutory Instruments Act (UK) and Statutory Instruments Act, 1984, Botswana Statute Law (No.21 of 1984).

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are procedural and structural oriented. They are procedural because they involve scrutinizing the DL based on the statutory safeguards and other principles set out under other existing laws.[81] They are structural because they involve the creation of special committees for examining DL and reporting to parliament.

1. Statutory Safeguards

The requirement to consult before making DL plays a significant role in ensuring accountability of the executive not only to parliament but also the public at large.[82] The Procedural Guidance for Ministers, for example, in New Zealand, requires the ministers to consult law officers if the departmental legal adviser is in doubt about the legality or the constitutional propriety of proposed subordinate legislation.[83] The process helps to ensure that constitutional matters are observed. Hence, it could facilitate the promotion of the rule of law and the protection of citizens' rights. Other forms of consultation can involve consulting people likely to be affected by the rule through antecedent publicity.[84] This process helps to inform people in advance about the rule that is about to be taken and solicits their views on how they think the rule should be couched. This requirement can be seen as a means to observe principles of good governance and transparency. It may facilitate improvement of the proposal which will be beneficial for both the maker and the affected, and hence promote swift implementation, which ensures protection of citizens' rights and liberties.

Publication and laying of DL before parliament are further steps of control.[85] Publication helps parliament to supervise and control DL and it helps those who are affected to comply with the requirements and limits imposed.[86] Complying with the rule means that citizens' rights and liberties will be protected. This is important as it amplifies the principles of the rule of law and democracy as well covered by Raz[87] and Dicey[88] who suggested that ordinary citizens have a right to know what the law says. On the other hand, by laying the DL, the parliament would be aware of the rule and therefore be able to exercise control over it to ensure that it does not violate peoples' rights and that it is within the intention of the parliament. Failure to comply with procedural requirements as laid down by the parent Act may cause the DL to be of no effect, as was upheld in *R v. Wakiso Estate*.[89]

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81 The New Zealand Legislation Advisory Committee: Guidelines on Process & Content of Legislation, Section 10A http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/appendix_5.html.

82 G. Craven, *Consultation and the Making of Subordinate Legislation, A Victorian Initiative*, 15 Monash University Law Review, at 1 (1989); *See also* The Indian Law Institute, *supra* note 37, at 39.

83 D. Oliver, *Improving Scrutiny of Bills: The Case for Standards and Checklists*, 50th Anniversary Year, Public Law Review 219, at 221 (2006).

84 Oluyede, *supra* note 4, at 63.

85 Thornton, *supra* note 64, at 241.

86 *Id.*, at 336.

87 G. de Q. Walker, The Rule of Law: Foundation of Constitutional Democracy 21-22 (1988).

88 A.V. Dicey, Introduction of the Study of the Law of Constitution 202-203 (1959).

89 (1955) 7 ULR 137, where the rules were required to be made by the Governor and to be laid

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2. Scrutiny Committees

Parliamentary committees also can perform a valuable function in relation to DL. They can, among other things, act as "sounding boards for the parliament's reaction to contemplated legislation and regulations."[90] This kind of scrutiny can be said to be a place where separation of powers comes into play. It enables the committees of the parliament, which, in fact, act on behalf of the parliament to scrutinize the acts of the executive. Taking into consideration that the executive is subordinate for purposes of enacting legislation, the committees would scrutinize DL in view of ensuring that the executive does not exceed its powers; it does not encroach on parliamentary powers; and, finally, that it does not violate existing legislation and citizens' rights and liberties. It means, they would scrutinize DL to ensure that it does not violate a number of aspects. In scrutinizing DL they can unearth objectionable grounds and advice the parliament accordingly. If they have criteria on which they shoudl base their examination, they can perform their work more efficiently because they will have a guide and hence it will enable them to concentrate on important aspects, and thereby avoid neglecting them. Upon the advice of the committee the parliament can take action of affirming, disallowing or nullifying or cause the DL to be modified.

C. Delegated Legislation: A Comparative Analysis of International Practice In Control of Delegated Legislation

I. Introductory Remarks

This Section deals with the international practice of DL in different countries. It explores the statutory and parliamentary controls of DL in both developed and developing countries and with different legal systems as to whether they can enhance the protection of citizens' rights and promote the rule of law or not. It reviews the practice in those countries so as to provide insights on how they control DL from different perspectives. It also explains what methods are used to make them effective. It is anticipated that this mode of treatment will facilitate comparison with what is applicable in Tanzania and thereby establish whether

before the Legislative Council and get approved or modified. The rule showed that they were made on 21 May 1946 but the approval by Legislative Assembly was made on 21 April 1946. It was not clear as to what was laid before the Legislative Assembly. The Court held that there was nothing that was laid before the Legislative Assembly.

[90] G. Lindell, *How (and What?) To Evaluate Parliamentary Committees – From a Lawyers' Perspective*, a paper delivered on 18 November 2004 at a Meeting of the Canberra Evaluation Forum, at 2, avaliable at http://www.aph.gov.au/house/house_news/magazine/ath24_lindell.pdf#search=%22geoffrey%20lindell%20on%20meeting%20of%20the%20canberra%20evaluation%20forum%22. *See also* Thornton, *supra* note 64, at 240.

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or not there is a need for improving the situation in Tanzania. A comparative method will be used to discuss the controls and safeguards, which are applied in the selected countries.

II. Comparative Study of the UK, the USA, New Zealand and Botswana

The various statutory and parliamentary safeguards, which are generally used to control DL, have been introduced in Section B of this paper. Those safeguards are generally applied in different jurisdictions and include antecedent publicity, consultation, publication, laying of DL in parliament and parliamentary scrutiny. This section will discuss the available safeguards in the UK, the USA, New Zealand and Botswana.

1. Antecedent Publicity

In the UK the Rules Publications Act, 1893, introduced the antecedent publicity. It required that all rules made under the Act would be layed in parliament, to provide at least forty days notice after the regulation has been promulgated in the *London Gazette* to enable the public to present their views. It also required the authority proposing the rule to consider all presentations made in writing within the forty days.[91] Though the Donougmore's Committee saw the procedure as "undoubtedly a safeguard of the highest nature" and recommended it to be applied to all rules, the Statutory Instrument Act, 1946, which repealed the Rules Publication Act, did not retain the same provision.[92] It was felt that the procedure was being observed because the trade or interests concerned are approached to hear what they have to say before making the rule.[93]

However, the repeal of the requirement was unfortunate because the rule could have become the standard of antecedent publicity, which could have ultimately led to a uniform result of the procedure. Also it would have been safe to keep it as part of the law so as to avoid laxity. To show its importance, the USA promulgated the rule in the same year that it was repealed in the UK. Antecedent publicity is used in preparation of byelaws whereby at least one month before the application for its confirmation is made, the notice of intention to apply is posted in one or more local news paper circulating in the area to which the byelaw will be applied, and a copy is deposited in the authority's office and open to public inspection without payment.[94] The confirming authority may confirm or refuse confirmation

91 The Indian Law Institute, *supra* note 37, at 34.
92 *Id*., at 34.
93 Olanyika Ojo, *supra* note 76, at 235-236. The Lord Chancellor said, "We no longer promulgate the regulations or rules in the *Gazette* and wait for representations to be made. We go to the trade or interest concerned and deal with it by getting them round the table, hearing what they have to say, and then drafting the rules after obtaining their views."
94 Bailey, Jones & Mowbary, *supra* note 22, at 233.

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and fix the operation date, if the authority does not fix a date, the byelaw would become operative one month after confirmation.[95]

In New Zealand before commencing the process of making a byelaw, the local authorities are required to determine whether the byelaw is the most appropriate way of addressing the problem. Thereafter a consultative procedure has to be used in making the byelaw. Then public notice is given after the byelaw is made.[96] It is not known what type of consultation is made. Even the manner of providing publicity is not clear. The objective of determining whether the byelaw is appropriate is to ensure that no unnecessary byelaw is made and that citizens participate in local government activities. This enhances the promotion of good governance.

In Botswana, if the Council intents to make a byelaw, it is required within at least four weeks before submitting it to the minister for approval, to let the inhabitants of the area affected know about the plans for byelaw. This is by posting notices on notice boards in the area and by publication thereof at such public meetings as the Council may determine.[97] Then the byelaw is submitted to the minister for approval. No byelaw can enter into force if it is not approved and published.[98] In Botswana the issue of publicity is given attention and prominence in the sense that a notice must be posted on several notice boards and also through meetings. Perhaps this mode of treatment reflects the real situation where there is no other means of circulating information and the type of people who are to be notified. Clearly, this method could enable as many people to know about the proposed law. Also reasonable time is afforded for the exercise.

While in the UK the requirement of antecedent publicity was repealed in 1946, in the USA, the Federal Administrative Procedure Act, 1946 introduced it. It requires the proposed rule to be published in the *Federal Register* and to afford the interested persons the opportunity to present their views in written form and the agency proposing the rule to consider those views.[99] Under this process the agency publishes the initial analysis of the subject matter asking for the opinion of the public. Then the agency publishes the proposed rule and the analysis behind the rule and the agency responses to the opinion. The publication of the rule again invites opinion from the public. The period for comments is between 30 days to 180 days. Then the agency publishes the final rule together with the response to the opinion and the analysis. In certain circumstances the interested parties file a suit before the court. Sometimes hearings and recordings are conducted.[100] The purpose is not to try a case but to enlighten the administrative agency and

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95 *Id*., at 234.

96 Palmer & Palmer, *supra* note 9, at 255.

97 The Local Government (District Councils) Act, 1965 Cap 40: 01 Laws of Botswana, Section 33(1).

98 *Id*., Section 32.

99 B. Schwartz & H. W. R. Wade, Legal Control of Government: Administrative Law in Britain and the United States 87 (1972); *See also* Martineau & Salerno, *supra* note 51, at 136

100 Constitution and Information, *The Roles of Government and Parliament, Backbenchers in the Introduction and Passage of Legislation*, http://www.asgp.info/Publications/CPI-English/1995_170_02-e.pdf.

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to protect private interests against uninformed or unwise action.[101] However, much as the requirement seeks to ensure that there is adequate participation of the public in the rule-making, it seems that it may cause delay for the rule to come into force. But, given the importance of good governance and the rule of law, the delay could be justified.

Looking at the antecedent procedure in the UK when it was used, and in the USA and Botswana, transparency and provision of enough time for people to provide their opinion and the agency to respond is of importance. Under this arrangement the public would be able to see what is being proposed. To this end, while the public will fight to ensure that their fundamental rights are protected, the maker of the rule will hesitate to pass the law, which is contrary to the basic criteria. In one way it will help to curb conferral of discretionary powers on government in the interest of policies. Also, citizens will be able to participate in decision-making. This would enhance the protection of peoples' rights as well as the promotion of rule of law.

2. Consultation

Consultation is an important safeguard and control mechanism when making DL. In the UK, particular statutes require the authority making DL to consult.[102] For example, a DL with financial implications may be made only with the consent of the Treasury.[103] Logically, the Treasury has to know the budgetary implications of the proposed rule. There is also a right to be consulted before DL is passed, which will adversely affect the rights.[104] Sometimes the requirement is to consult a specific body, and any DL made under such enabling provision will declare in its preamble that there has been consultation with the body specified. In some cases, proposals for DL are submitted to a body, which may report on the proposals, and if it does, the minister has to lay that report before the parliament when laying the DL to which the report refers.[105]

Much as consultations may sometimes be for budget purposes, in other instances it may be for purposes of ensuring that the intended objectives are met and are acceptable to other bodies or persons who would be affected by the DL. The other reason could be to minimize conflicts between agencies and to protect individuals' rights and liberties. The transparent procedure, such as the requirement of the minister to declare in the preamble of the DL that there has

[101] Attorney General's Committee on Administrative Procedure, Final Report, Sen. Dec. No. 8. 77th Congress, 1st Session (1941), at 104.
[102] M. Asmow, *Delegated Legislation: United States and United Kingdom*, 3 Oxford Journal of Legal Studies 253, at 261 (1983)..
[103] Thornton, *supra* note 64, at 235; *See also* Greenberg, *supra* note 36, at 265, paras. 6.1.3 & 6.1.4.
[104] *R v. Lord Chancellor ex parte Law Society,* (1994) 6 Admin. 833.
[105] T. S. T. J. Bates, *The Future of Parliamentary Scrutiny of Delegated Legislation: Some Judicial Perspectives*, 19Statute Law Review 155, at 160-161 (1998); *see also* Greenberg, *supra* note 36 , at 265-266, para. 6.1.4.

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been consultations, or the laying of the report of the consulted body in parliament, also serves the goal of providing adequate checks and balances, and therefore ensuring the promotion of the rule of law as no one will be an arbiter of the rule.

In the USA, rule-making authorities adopted the practice of receiving opinions and suggestions from groups that are likely to be affected by the proposed rule. Sometimes public hearings on the proposed regulation are forms of participation on rule-making. The hearings are announced in advance to enable any interested person to attend and testify. This practice can be seen as an element of give and take on the part of those present and affords an assurance to those attending that their evidence and points of view are known and will be considered.[106] Sometimes the procedure for negotiated rule-making is used. This involves the agency to convene a meeting of representatives of various interested groups to hear views so that challenges to the final rule are limited.[107] It means that this procedure in the UK and the USA, provides participation and will help to ensure the protection of citizens' rights and liberties.

3. Publication

Publication of DL is another control mechanism employed in various countries. In the UK the Statutory Instrument Act, 1946 requires consultation and publication of any DL classified as Statutory Instruments (Sis) and laying it before parliament.[108] The requirement is almost always complied with.[109] It means that those who would need to know about the rule, will be made aware of it within the required time. In New Zealand the Regulation Act, 1936, introduced the requirement of publication as well as printing, and sales of regulations.[110] In the USA, unless statutes or regulations provide otherwise, regulation takes effect upon publication. However, until 1935 there was a laxity in the USA in publishing regulations. This was mainly because the requirement was not stated in the constitution, like in specific constitutions in some states. Then, the federal government established the *Federal Register* where documents having general application and legal effect were to be published.[111] The enactment of the Federal Administrative Procedure Act in 1946 also solidified the requirement to publish all substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency. The Act also specifically exonerated persons to be adversely affected by a matter, which was required to be published in the Register and has not yet been published.[112] In

[106] Indian Law Institute, *supra* note 37, at 41.
[107] Martineau & Salerno, *supra* note 51, at 135.
[108] T. Daintith & A. Page, The Executive in the Constitution: Structure, Autonomy and Internal Control 258 (1999); *see also* Shriwastava, *supra* note 58, at 7.
[109] Beatson, Matthew & Elliott, *supra* note 30, at 641.
[110] G. Palmer, Unbridled Power: An Interpretation of the New Zealand Constitution and Government 171 (1987).
[111] Singer, *supra* note 23, at 715, para 31:3.
[112] *Id*., at 716 para 31:3.

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Botswana publication of all statutory instruments is provided under the law, and it has an effect on its commencement if the commencement date is not specifically stated under the instrument itself.[113]

Publication of DL is advantageous. It means in the UK, New Zealand, the USA and Botswana that the public have an opportunity of getting notice of the rule, which is promulgated in good time. Since the rule will be known, the parliament will be able to take control of measures they already know. On the other hand, those who would be affected by the DL will be able to comply because they know the rule to be complied with, which is in line with the principle of the rule of law. This requirement and its observance can facilitate the protection of individuals' rights. Again, as publication enables the DL to come into force, it means people will be governed by the rule in force because legally, unpublished rules cannot be enforced.

However, unlike New Zealand and Botswana where all DL is published, the publication requirement applies only to certain types of DL in the UK and the USA. In the UK it applies to rules categorized as SIs, whereas in the USA it applies to substantive rules, statements of general policy or interpretation, which are formulated by the agency.[114] In the UK, the requirement of publication for certain types of DL is fully complied with. However, this may cause problems because by being selective in the publication of DL, other instruments may be operational without being published nor seen by parliament. This can be contrary to the rule of law, which prohibits individuals to be punished or to be made to suffer, except in case of a distinct breach of law, which is known to everyone and established in court. Hence, it would be better for the UK and the USA to provide for publication of all DL to avoid these problems.

4. Laying DL Before Parliament

The obligation of laying DL before the legislature is also a control mechanism of DL that is applied in the UK, New Zealand and Botswana. However, it is used very rarely in the USA. Through this obligation the parliament can annul the DL, which does not comply with the requirements, or affirm the rule that has not yet come into force.[115] In the UK under the Statutory Instrument Act, 1946, the DL classified as statutory instrument is laid before the parliament, which has power to affirm or annul the rule by resolution of either House.[116] It means that DL other than SI is not laid before parliament.

The annulment or affirmation cannot take place unless the notice of motion to annul or affirm is given within forty days from the day of laying in parliament. Under the affirmation procedure the draft rules do not come into operation until each House has passed an affirmative resolution approving the same.[117] This

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[113] The Statutory Instrument Act, 1984, Botswana Statute Law, 1984 (No 21 of 1984), Section 4.

[114] Martineau & Salerno, *supra* note 51, at 134-135.

[115] G. C.Thornton, Legislative Drafting 337-338 (1996).

[116] Asmow, *supra* note 102, at 262; *See also* C. P. Ilbert, Legislative Methods and Forms 41 (2005).

[117] Bailey, Jones & Mowbray, *supra* note 22, at 222.

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procedure is stricter than the negative procedure because the initiator, which is the government, has to provide an opportunity to discuss it. In the UK it is much used because parliament cannot amend the DL.[118] This procedure can provide a great check of parliament as SIs are debated before coming in force. But, if it is used massively, it may cause unnecessary delays, and more importantly, it could defeat the purpose of DL by involving the parliament to deal with the details of legislation something which has to be avoided.[119] Under the negative procedure, rules come into operation when laid in parliament but may cease to have effect if disapproved by either House.[120] The negative resolution can provide an opportunity for challenging the Government's policy but it doesn't serve the purpose of having the DL corrected.

In New Zealand all regulations are required to be laid before the House of Representatives so that they can be discussed[121] The regulations have to be laid in the House not later that the 16th sitting day of the House after the day on which they were made, and the House may by resolution disallow any regulations or provision thereof, and the regulation ceases to operate.[122] In Botswana, under the Statutory Instruments Act, all the DL passed by anybody must be laid before the parliament as soon as they are made.[123] Within 21 days after it has been laid before the parliament, the National Assembly may pass a resolution that it be annulled. If the DL is annulled it becomes void.[124]

In the USA, the laying procedure is not a normal feature. This is because of the operation of the doctrine of separation of powers. The constitutionality of laying the DL in the Congress is in doubt. Instead, the control of administrative action is normally left to the courts.[125] But, there are very few cases in which the Congress employs the laying procedure. The DL laid can be subject to informative, negative or affirmative procedures.[126] The informative procedure takes the form of deferred operation after 90 days and under negative procedure the DL is laid with the deferred operation subject to disallowance by the Congress.[127] This procedure in the USA, like the one in the UK, does not allow for the modification of DL. Sometimes the Congress can exercise the legislative veto on rules, similar to the UK practice of laying regulations before parliament. But, due to a strong operation of the doctrine of separation of powers, it is controversial and its constitutionality is in doubt.[128]

The obligation of laying of DL in parliament is meant to enable the parliament to know what the executive has promulgated. Also it enables it to exercise its

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118 Greenberg, *supra* note 36, at 272 para. 6.2.3.
119 Shriwastava, *supra* note 58, at 116.
120 India Law Institute, *supra* note 37, at 167.
121 Palmer & Palmer, *supra* note 9, at 214.
122 *Id*.
123 The Statutory Instrument Act, Botswana Statute Law, *supra* note 80, Section 9.
124 *Id*.
125 India Law Institute, *supra* note 37, at 179.
126 C. T. Carr, *Delegated Legislation in the United States*, 25(3/4) Journal of Comparative Legislation and International Law 47, at 47 (1943).
127 Shriwastava, *supra* note 58, at 161.
128 Asmow, *supra* note 102, at 262.

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control in view of ensuring that the rules are within the ambits of the executive's authority and that those rules, which do not comply with the set of criteria, are nullified. In fact, it can help the parliament to discharge its constitutional responsibility of being a legislator. However, as can be seen, the purpose of laying the DL in parliament also tends to differ from one country to another. Whereas in the UK, and the USA (for few rules), both affirmative and negative procedures are applied, in New Zealand and Botswana only a negative or disallowance procedure is used. Both procedures applied by parliaments play a significant role. However, comparing the affirmative and negative procedure, the parliament supervision is stricter under affirmative procedure. The affirmative procedure obliges the government to allot time for the confirmatory procedure. The negative procedure does not require any action.[129] This means that the UK, by applying both procedures, provides for a more effective control compared to New Zealand and Botswana, which apply only the negative procedure.

While in the UK only DL classified as SIs and in the USA only some DL are laid before parliament, in New Zealand and Botswana all DL is laid before parliament. Certainly, laying of selected DL as in the UK and the USA may be advantageous for parliament because it would examine only DL of certain importance thoroughly. This would also serve both parliament's and the executive's time, as the executive would not be required to lay all the DL. But it could be disadvantageous because parliament may not be aware of DL considered to be of less importance, which did not comply with the requirements. Therefore, it can be said that laying of all DL is to be preferred as it will enable parliament to be aware of bad DL even if it is not rated to be of high importance.

Again, the laying of DL in parliament has other advantages. The mere fact that the DL has to be laid before parliament where it may be debated and criticized makes the executive more careful in framing the statutory rules.[130] Nevertheless, though laying of DL has been expressed to be useful; there are problems in the UK, New Zealand and Botswana in invoking the disallowance provision. It is rarely applied by the respective parliaments. For example, in New Zealand in a period of ten years it was invoked only three times.[131] Although it is not frequently invoked, it is considered "to act as a powerful incentive for a solution or remedy to be found so that disallowance does not occur."[132] So, it is useful in a sense. In Botswana, until 2001 the parliament had neither discussed any piece of DL nor invoked the provisions of the Statutory Instruments Act to nullify the DL.[133] Hence, its control over legislation may exist in theory but not in practice. In the UK as well it has been applied very rarely. Perhaps that is why Lord Hemingford said; "I don't hesitate to say that this (i.e. laying procedure) is in practice most ineffective."[134]

[129] Shriwastava, *supra* note 58, at 170.
[130] The Indian Law Institute, *supra* note 37, at 165.
[131] Joseph, *supra* note 24, at 897.
[132] *Id*.
[133] Ntanda Nsereko, *supra* note 32, at 51.
[134] The India Law Institute, *supra* note 37, at 172.

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This could imply that the rule is not the practical solution to the problem. Since it was introduced after Hewart's criticism, perhaps the reaction was too ambitious to see to it that abuse of delegated legislative powers would be restricted. With the time and increase of the quantity of the DL, which may suggest many instances of abuse, yet it is not invoked. Perhaps it is time to think about the rule, which will bring the desired result rather than having a rule in statute books, which brings unintended results.

5. Scrutiny Committees

In the UK there are three parliamentary committees which deal with DL. The House of Lords Delegated Powers and Regulatory Reform Committee examines Bills and it may report to the House on whether the provision of any Bill inappropriately delegates legislative power or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny.[135] It also pays attention to the Henry VIII powers and considers what form of parliamentary control is appropriate, the affirmative or negative resolution procedure.[136] However, the committee does not have the power to amend the bill, but it advises parliament to decide.[137]

The Joint Committee on Statutory Instruments scrutinizes all SIs laid before parliament. It considers technical and important issues such as whether the instrument is made within the powers conferred by the Act, and whether its drafting is defective.[138] After scrutiny, it may report both on the fact that the DL imposes any variety of charges and also on the legal issue of whether the DL is *intra vires*. So, the committee alerts the parliament not only on whether there is express parliamentary authority for imposing the charge, but also whether the circumstances in which the charge is to be imposed are properly stated.[139]

The Merits of Statutory Instruments Committee examines the secondary legislation, which results from the exercise of the delegated powers. It considers every negative or affirmative SIs or draft statutory instrument laid before the parliament with a view to determining whether special attention of the House should be drawn to, among other grounds, whether it gives rise to issues of public policy.[140]

In New Zealand the Regulations Review Committee,[141] considers any regulation-making power in a Bill before another committee and reports to the responsible committee.[142] If the Bill contains enabling powers, which are overly

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[135] Bailey, Jones & Mowbray, *supra* note 22, at 226.

[136] House of Lords Briefing, November, 2005 http://www.parliament.uk/documents/upload/HofLBpDelegated.pdf.

[137] Beatson, Matthews & Elliott, *supra* note 30, at 649-650.

[138] Bailey, Jones & Mowbray, *supra* note 22, at 223.

[139] Bates, *supra* note 105, at 164-165; *See also* Beatson, Matthews & Elliott, *supra* note 30, at 651.

[140] House of Lords Briefing, *supra* note 136, footnote 133.

[141] The Regulations (Disallowance) Act, 1989, Section 6. *See also* Standing Orders of the House of Representatives, Wellington, New Zealand (2005), Published by Order of the House of Representatives.

[142] Standing Order 377(3).

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broad in terms of the purposes for which regulations can be made, the committee can recommend changes to the Bill to remedy these concerns.[143] The committee also examines all regulations[144] and considers draft regulations.[145] It may draw a regulation to the attention of the House[146] on a number of specified grounds including trespassing unduly on personal rights and liberties.[147] The House may by resolution disallow any regulations or provision of regulations.[148] The committee may also call into question regulations that appear to depart from the spirit of the authority delegated by the parliament, and in so doing wade into areas of policy.[149] The role played by the committee can imply that the mere presence is enough to ensure promotion of constitutionally limited government and hence promote the rule of law and good governance.

In Botswana, the parliament has a Committee on Subordinate Legislation, Government Assurance and Motions for scrutinizing DL. The committee considers whether the DL is in accordance with the objects of the enabling Act; whether it trespasses unduly on rights; whether it contains matters which were supposed to be dealt with under the Act; whether by reason of its form or purport, calls for elucidation and whether it unduly subjects rights dependent upon administrative and not upon judicial decisions.[150] Then it can alert the parliament of any objectionable legislation.[151] This means that if the DL contravenes any of the above grounds it can be reported to the parliament for its decision of whether

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143 Morris & Malone, *supra* note 57, at 12.

144 Standing Orders of the House of Representative, *supra* note 142, S.O. 377(1); *See also* W. Iles CMG, QC, *New Zealand Statute Experience of Parliamentary Scrutiny of Legislation*, 12 Statute Law Review 165-185, at 169 (1991).

145 Standing Orders of the House of Representative, *supra* note 142, S.O 378(2).

146 *Id*.

147 S.O. 378(2) provides for grounds under which the committee can draw the attention of the House which are whether:

a) It is not in accordance with the general objects and intentions of the statute under which it was made;
b) It trespasses unduly on personal rights and liberties;
c) It appears to make some unusual or unexpected the use of powers conferred by the statute under which it was made;
d) It unduly makes the rights the rights and liberties of persons dependent upon administrative decisions which are not subject review on merits by a judicial or other independent tribunal;
e) It excludes the jurisdiction of courts without explicit authorization of the statute;
f) It contains matters more appropriate for parliamentary enactment;
g) It is retrospective where this is not expressly authorised by the empowering statute;
h) It was made in compliance with partial notice and consultation procedures prescribed by the statute; and
i) For any other reason concerning form or purport, calls for elucidation; *See also* Palmer & Palmer, *supra* note 9, at 214. The committee pays the attention of the House if the regulations trespass unduly on personal rights and liberties or that made some unusual or unexpected the use of the powers conferred.

148 The Regulations (Disallowance) Act, *supra* note 141, Section 6(1); *see also* W. Iles, *supra* note 143, at 169.

149 S.O 378(2) (a).

150 Ntanda Nsereko, *supra* note 32, at 50.

151 *Id*.

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to annul or not. However, the committee has not been effective due to lack of resources, personnel who are knowledgeable in law, and pressure of time due to the workload of the committee.[152]

The use of scrutiny committees in controlling DL seems to be the most proactive mechanism. Unlike the former mechanisms, which are spearheaded by the executive, a different government organ with an interest to protect its constitutional legislative authority spearheads this. In the UK and New Zealand special committees are used to scrutinize DL. Botswana has a committee, which seems to have other functions as well. Unlike New Zealand where there is only one committee, in the UK there are three committees. Each of the three committees scrutinizes DL according to its terms of reference. Having many committees may be advantageous because they can provide an incentive to each other. By knowing that the other committee is scrutinizing the DL, the other committees will make sure that they perform their duty. This mode of operation should result into a comprehensive scrutiny of DL, which may minimize passing a DL, which violates citizens' rights and liberties and principles of the rule of law. However, creating many committees may be costly, and may cause delays in getting feedback from each committee. On the other hand, it may cause laxity to some of the committees because each will bank on the other. But this problem can be resolved by the terms of reference for each committee, which will be required to report on. This means that in the UK the SIs may undergo rigorous scrutiny, which suggests that it may be difficult to pass a DL that does not meet the criteria.

On the other hand having only one committee may cause laxity, as there would not be an incentive to push it to work. An example of that trend is Botswana where until 2001 there was no scrutiny of any DL. Of course, other reasons such as pressure of work contributed to its inefficiency. But if the committee is well organized as in New Zealand, which deals with DL only and nothing else, with established tests and technical support, it can do a better job. However, notwithstanding the weaknesses pointed out, it can be summarised that the use of specialised committees is of great significance. They can act as a deterrent upon the departments when they realise that their work will be considered and scrutinized by committees.[153] Also, the mere presence of committees can encourage awareness and debate on the DL, which can help to ensure the promotion of a constitutionally limited government and hence support the rule of law and good governance.

Another advantage of the specialised committees is that they scrutinize regulation-making power before they are enacted into law. It means there is a sifting process in respect of those powers. Also they scrutinize the DL in-depth rather than the ordinary committees, which may have many duties to discharge. This process can unearth issues in DL, which are contrary to fundamental human rights and freedoms. This happened in New Zealand in 1997 where the committee criticized the regulations containing powers exercised in respect of children and young persons taken into residential care, which had an effect of violating the

[152] *See* note 134.
[153] Lindell, *supra* note 90, at 6.

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rights and civil liberties of children.[154] On top of that they play an important role of increasing control over the executive.[155]

Also in all countries examined specific criteria are used for scrutinizing DL. In New Zealand, for example, the tests enable the aggrieved people to complain.[156] It can be said that the presence of the criteria is a control in itself. They may guide the committees to deal with DL in a systematic manner, which may serve well the ends of the rule of law. It means that if the committees scrutinize the DL carefully according to the criteria, the danger of seriously violating personal rights in the interest of promoting policy would be minimized.[157] Furthermore, the presence of the criteria can help the committee to maintain consistency, to avoid neglecting important aspects and to inject a greater discipline of officials, because of awareness of what the committee would be examining.[158]

In the USA the approach to control DL is different from the approach in the UK, New Zealand and Botswana. This is largely due to the fact that the constitutional set up of Congress is different from that of the Commonwealth parliaments.[159] The Congress has no specific congressional committee concerned with the form or content of DL, as it is not considered as being responsible for scrutiny of DL. That is considered to be the task of the court in the USA.[160] Owing to the strict application of the doctrine of separation of powers, the administrative heads in the USA do not wield such broad control over the legislature as in Commonwealth countries where the executive is responsible to the parliament.[161] Therefore the congressional control of DL is mostly indirect.[162]

The most important control of rules in the USA is the requirement to the agencies in the executive to prepare "regulatory analyses of major proposed rules." The regulatory analyses are to contain cost benefit comparison[163] and have to be submitted to the Office of Management and Budget, which reports to the

[154] Ninth Australasian and Pacific Conference on Delegated Legislation& Sixth Australasian and Pacific Conference on the Scrutiny of Bills, at 10, available at http://www.vmc.vuw.ac.nz/vuw/fca/law/files/RRC74.pdf. The regulations provided for powers for seizure of personal effects, interception of mails, punishment or sanctions to be imposed on children or young persons, powers to carry out searches including strip searches and consensual internal examinations, the use of dogs in searches and permitting the use of physical force where necessary to carry out searches.
[155] K.J. Muylle, *Improving the Effectiveness of Parliamentary Legislative Procedures*, 24 Statute Law Review 169, at 170 (2003).
[156] Palmer & Palmer, *supra* note 9, at 215. This happened where a weighing machine bought at $500 in the UK was required to be registred in New Zealand at a fee of $2000. After the committee's inquiry it was seen to infringe citizens' rights and liberties.
[157] *See* note 76.
[158] Oliver, *supra* note 158, at 225.
[159] Schwartz & Wade, *supra* note 99, at 90.
[160] *Id*.
[161] Shriwastava, *supra* note 58, at 128.
[162] The Indian Law Institute, *supra* note 37, at 162-163, where the congress may require the executive to submit periodical reports of their activities, requiring administration to frame better regulation and setting up watch dog committees for implementation of some statutes.
[163] Asmow, *supra* note 102, at 259.

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President's office.[164] The office is responsible for monitoring the analyses and scrutinizing proposed rules before and after they are announced to the public. This is an office within the executive, and due to cost-related criteria, it explains why this office is relevant to provide checks of the rules. The reason is that it specifically deals with budgetary issues. Later on the legislature also created an executive agency, the Office of Administrative Law, with powers to veto newly adopted regulations on the grounds of *ultra vires*, poor drafting, inconsistency or unnecessary regulation. In addition, the Office is to review all the existing state regulations before 1985.[165] In principal, the Office of Administration looks at the validity of DL including poor drafting.

The control mechanism of DL in the USA is quite different from what is applied in other countries discussed in this paper. The regulatory requirement, which is cost-based, is different from the criteria used in common law countries where the main concern lies, among other things, on the use of delegated legislative powers and protection of rights and liberties. Also the requirement seems to exclude other rules made by the executive. Whereas in the UK they scrutinize SIs, and in New Zealand and Botswana all DL, in the USA the regulatory analysis is on "major proposed rules" only. It is not clearly stated what a "major rule" is. But, the element of the analyses, which is "cost benefit comparison," shows that the most important determinant element is the cost implication. If the rule does not involve costs, it does not qualify to have the analyses prepared and therefore cannot be scrutinized. Of course, in the UK also there is selection of SIs, which can be scrutinized. But according to the definition of statutory instrument[166] many forms of DL are covered, which suggests many will be subjected to scrutiny, which is not the case in the USA. With the whole intention of controlling and safeguarding DL, this method may not be of significant impact in the USA, because it may leave many types of DL unchecked.

The use of the Office of Management and Budget, which is an agency within the President's Office and the Office of Administrative Law, which is a government agency, with powers to veto the newly adopted regulations on grounds of *ultra vires,* poor drafting, inconsistence and unnecessary shows another diversion in the approach to control DL with the other countries under discussion. Whereas in common law countries a different organ of government scrutinizes DL, in the USA an agency within the executive takes care of it. Much as the aim is to provide adequate scrutiny, the question is how an agency, which is part of the executive, can scrutinize the DL, which is made by the executive? This makes Oliver to be pessimistic on how this method can be effective.[167] This seems to contradict the principles of the doctrine of separation of powers. It does not show that there are checks and balances. If the executive is allowed to check itself, it means there are no checks and balances. What if the agency decides to protect the executive? Also

[164] The Office of Management and Budget, http://www.whitehouse.gov/omb/inforeg/2005_cb/G_NAR.pdf.
[165] Asmow, *supra* note 102, at 261.
[166] *See* note 31.
[167] Meyerson, *supra* note 11, at 1.

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it looses the meaning of parliament being the body mandated to make law. This can be interpreted as Congress abrogating its powers, which was not the intention of delegating legislative powers.

D. Legal Framework for Delegated Legislation in Tanzania

I. Introductory Remarks

This Section examines the DL legal framework in Tanzania. It examines the validity of giving legislative powers to the executive and other authorised bodies. It also aims to assess the controls and safeguards employed against abuse of those powers by those entrusted to apply them. In view of what has been revealed in Section C, it examines whether the available controls and safeguards of DL in Tanzania are efficient in ensuring the protection of citizens' rights and liberties and promotion of the rule of law.

II. Delegated Legislation in Tanzania

After the end of colonial rule most of the countries (including Tanzania, although strictly speaking it was not a British colony or protectorate but a UN Trusteeship territory) still retained the colonial legal order bequeathed to them at independence.[168] Tanzania, for example, retained the British manner, procedure and form of legislation including the rules for delegated legislation.[169] After independence delegation of legislative powers was inevitable in Tanzania as it introduced policy reforms and development programmes that necessitated legislative intervention. Tanzania implemented a decentralization process in the 1970s that aimed at transferring as much as possible decision-making powers from Dar es Salaam, which is the headquarters of government, to regions. Under these circumstances the delegation of powers was necessary as a result of the major development programmes the government had embarked upon which would sometimes require immediate decision.[170] It meant the increase of the use of DL and that is why they became important.[171]

[168] A. Seidman & R. Seidman, State and Law in the Development Process: Problem Solving and Institutional Change in the Third World 51 (1994).

[169] The Interpretation of Law and General Clauses Act, Cap 1, Supp 55. This law was enacted during the colonial period and it contained provisions relating to delegated legislation.

[170] Oluyede, *supra* note 4, at 60.

[171] *Id*. Delegation of powers in Tanzania became necessary as a result of the gigantic development programmes the government had embarked upon, many of which required an immediate decision on the spot. This was necessary in order to afford more flexibility and make for rapid adaptation and progress in matters where legislation is experimental or where large general schemes of reforms have to be given local application, delegation of powers become inevitable. Other reasons for delegation of legislation are to be used as a means to deal with technical matters for effective handling of the

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As pointed out, to date the Tanzanian Constitution vests legislative powers in the parliament.[172] But as Crabbe stated, the power to delegate legislative power of parliament is now recognised constitutionally as an element of constitutionalism. Under the constitution the Tanzanian parliament is also empowered to delegate to any person or any government department powers to make subsidiary legislation that are enforceable.[173] However, it does not state the manner the powers are to be granted or the controls thereof. The practice in Tanzania is, like the practice of many parliaments, to lay down the law in a particular case and then to delegate authority to ministers, local government authorities or public institutions to make subsidiary legislation in form of rules, regulations, byelaws and other instruments on behalf of parliament.[174]

The Interpretation of Laws Act sets out the legal framework of DL in Tanzania. Part VI of the Act specifically deals with subsidiary legislation. It recognises situations where delegation of law-making power can be made and who can make it. Where the power has been given and there is no mention of the person who can make the DL, the President shall make it.[175] The Act contains general provisions regarding DL, including provisions prohibiting DL to be made that is inconsistent with the enabling Act or any written law,[176] powers to amend or repeal the DL, and the persons who can perform such duties.[177] It has provisions allowing DL to provide for offences and the penalty in respect of such offences,[178] and the application of the DL whether at all time or specific time; and whether throughout or part of an area.[179] The Act also provides for the requirement to publish all the DL in the *Gazette* and it sets the publication date as the commencement date of the respective DL unless otherwise stated. It also restricts retrospective operation of DL.[180] Under Section 38 of the Act, all DL is required to be laid in parliament within 6 days after publication. The DL has to be laid in parliament whereby, if it considers disallowing the regulation, it has to give a notice within 14 sitting days after the DL had been laid in parliament.

III. Current Practice in Tanzania

The Tanzanian parliament, like many parliaments, recognises the need for subordinate legislation. However, the problems are also present, because there is no adequate opportunity given for its criticism and necessary amendments

government, and to relieve pressure on parliamentary time and so enable parliament to concentrate on principles rather than details of social regulation as well as matters of local interest.

172 The Constitution of the United Republic of Tanzania, *supra* note 1, Art. 63(3) (d).

173 *Id*., Art. 97(5).

174 Oluyede, *supra* note 4, at 57.

175 The Interpretation of Laws Act, Cap 1, R.E 2002, Section 35.

176 *Id*., Section 36 (1).

177 *Id*., Section 36 (4).

178 *Id*., Section 36 (7).

179 *Id*., Section 36 (8).

180 *Id*., Section 37.

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in parliament before DL becomes law.[181] A general pattern of control of DL to be followed, has not been laid down. Each particular case depends largely on the enabling statute and the interpretation of laws. Hence, the procedures to be followed vary considerably from case to case. The most common and available controls and safeguards in Tanzania can be found in different existing pieces of primary legislation. They include antecedent publicity,[182] consultation,[183] publication, laying of the regulations in parliament,[184] and parliamentarian scrutiny as discussed below.

1. Antecedent Publicity

The antecedent publicity requirement is mainly applied to byelaws which are laws made by local authorities in respect of their own jurisdictional and functional areas. Pursuant to the Local Governments (District Authorities) Act and the Local Government (Urban Authorities) Act, the Council has to give notice to the inhabitants of the area of the intended byelaws in such a manner that all people likely to be affected shall be notified. The terms is within two weeks (for the Urban Council) and within an unspecified time (for the District Council) before a meeting to consider a byelaw is convened. The object is to allow persons who might be affected by the proposed byelaw to present their views or objections to the authority and even appeal to a higher authority.[185] The respective council is then required within the same period to consider all the objections before submitting the byelaw to the minister for approval.[186]

However, it is important to note that for a similar exercise, a different term applies of 40 days in the UK and 30 to 180 days in the USA. In Botswana a period of four weeks is provided. However, the period of "two weeks before consideration of the bylaw," which is stipulated in Tanzanian law, may be inadequate because of the big geographical areas that cover the district councils, and the lack of modern means to disseminate information. It means, practically, the rule may remain in books or in theory as it is doubtful whether the majority of the inhabitants in the councils would know in advance about the intended byelaw that is being promulgated by their councils.

Lack of education for the majority of the population in areas of rural jurisdictions, coupled with the barrier of the English language, as is used in most

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[181] Oluyede, *supra* note 4, at 62.

[182] Local Governments (District Authorities) Act, Cap 287, R.E 2002, Section 155 and The Local Government (Urban Authorities) Act Cap 288, R.E 2002, Section 90.

[183] Community Service Act, Cap 291, R.E 2002, Section 14.

[184] The Interpretation of Laws Act, supra note, Section 38.

.[185] The Local Government (District Authorities) Act, *supra* note 182, Section 155(1) where the local authority is required to give a notice to the inhabitants of the area of its intention in such a manner as may be probably to ensure that the notice shall reach all who are likely to be affected by the proposed by law; and The Local Government (Urban Authorities) Act, *supra* note 182, Section 155(2) and Section 90(1): the urban authority is required within 2 weeks before the meeting of the authority to consider the proposed bylaw to give notice to the inhabitants so as to enable those likely to be affected by the bylaw to lodge objections or representations in writing with the authority.

[186] *Id*., Section 155(2) and Section 90(2) respectively.

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of the byelaws, and incomprehensibility of the law,[187] could even complicate the problem. Perhaps this is contrary to the intended objective of consultation as was stated in the case of *R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities*,[188] where it was held that consultation is the communication method to invite advice. Sufficient information should be given to the consulted party to enable it to tender helpful advice. Sufficient time should be allotted to the consulted party to enable it to give advise and to the consulting party to be able to consider the advice. This is the position in the UK. Even the repealed Rules Publication Act, 1893 by then, saw the need of providing enough time of notice of at least forty-eight days to be given in *London Gazette* of the proposal to become law. It means that sufficient consultation may help the two sides to agree on a solution, which will enable the rule to be implemented swiftly. Clearly, for Tanzania, two weeks for the whole process is inadequate.

Considering the fact that DL made by local authorities is massive, proactive measures may need to be taken to enable effective presentation by those who are likely to be affected by the proposed bylaw. There is a need to provide more time, adequate publicity and to convene meetings, as is done in Botswana, to enlighten the people on what is proposed so that they can make a constructive contribution. This may require revisiting the provisions of the Local Governments Acts in view of amending them so that sufficient time can be given to the inhabitants to provide constructive presentations. The place for posting notice could be more clear to ensure that there will be more publicity before the byelaw is made. Also the issue of convening meetings can be incorporated in the Acts. All these measures could contribute to the protection of citizens' rights and the promotion of the rule of law.

2. Consultation

There are statutes, which require particular interests to be consulted. They require the minister before making regulations to consult with a particular body. But in Tanzania it seems that this requirement rarely applies except in a few acts, such as the Community Service Act.[189] Moreover, it does not provide for rigorous procedural checks as provided in the UK, where it has to be declared in the preamble of the DL that consultations took place or a report about the consultation has to be laid before parliament. Hence, this type of control in Tanzania does not have a big impact on improving DL because it is rarely employed. However, if consultation is to be applied on a greater scale in Tanzania with a rigorous procedure it could provide a good control on DL. Perhaps Tanzania could learn from the UK and the USA where the procedure seems to provide a great safeguard.

187 The United Republic of Tanzania Legal Sector Reform Programme, Medium Term Strategy, Vol.1, 2005/06-2007/08, at 21.
188 (1986) 1 All ER 164.
189 The Community Service Act, Cap 291 RE 2002, Section 14, where the minister is required to consult the National Community Service Committee before making regulations.

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3. Approval by the Minister

Approval of SIs by the minister as in the case of the byelaws in Tanzania, is another type of control.[190] In Botswana the ministerial approval is required as well. However, unlike in Botswana where the minister just approves, in Tanzania the minister can approve the byelaw with or without amendment. The law does not prescribe the procedure of approving the byelaw with or without amendment. It means that if the minister considers modifying the byelaw submitted to him, he can just modify it.

Though this control aims at constituting a great check on the part of the subordinate authority to be reckless,[191] it may not be objective. This is because the council, in making a rule may take into account certain aspects and exercise its own judgement as to what byelaws should be enacted.[192]

Allowing the minister to modify the byelaw without hearing from the originator may not promote good governance and the rule of law. Thus, in Northern Ireland, for example, when the minister considers that the byelaw or a provision thereof is objectionable, the minister notifies the local authority concerned, and if the local authority does not revoke or amend the byelaw in conformity with the notice, then the minister can do so by order with effect from the specified date.[193] But in the situation of Tanzania, the minister may without knowing the circumstances of the byelaw, modify it. This may cause chaos as happened in the Babati District Council where the councils' inhabitants objected[194] the development levy, changed by the minister.[195] This kind of action can deprive the inhabitants a sense of involvement in the political process that controls their daily lives,[196] and hence the right of political participation and decision-making. Perhaps, for purposes of promoting good governance, the minister should be required, like in Ireland, to involve the originator of the byelaw or seek more information before modifying because the council could have strong reasons for its decision. As such, this situation may require reviewing the provisions of Section 155 of the Local Government (District Authorities) Act and Section 90 of the Local Government (Urban Authorities) Act, in view of amending them so as to require the minister to consult the relevant council before effecting an amendment to the proposed rule.

[190] The Local Governments (District Authorities) Acts, *supra* note 182, Section 155 (3), (4) and (5); and the Local Government (Urban Authorities), *supra* note 182, Section 90 (3), (4) and (5).

[191] Oluyede, supra note 4, at 63-64.

[192] Bailey, Jones & Mowbray, *supra* note 22, at 234.

[193] The Local Government Act, 1994 (Ireland), Section 37(9), Hogan & Morgan, *supra* note 62, page 35.

[194] In Babati, the council made a Development Levy bylaw in 2003, which required its inhabitants to pay a development levy of Tanzanian Shillings 2500/=. The consideration of the council to fix that amount was the welfare of the inhabitants because their area was hit by drought. When the bylaw reached the Regional Commissioner it was changed to T SHS 5000/=. The minister later approved the same. The amount was increased by 100%, which was enormous.

[195] Babati District Council Development Levy Bylaw, 2003 No 167 of 2003.

[196] P. S. Reddy & T. Sabelo, *Democratic Decentralization and Central/ Provisional/ Local Relations in South Africa*, 10 International Journal of Public Sector Management 572, at 574 (1997).

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4. Publication

In Tanzania, like in New Zealand and Botswana, all subsidiary legislation has to be published.[197] Under the Interpretation Act, the DL cannot enter into force unless it is published.[198] This requirement also applies in the UK and the USA, though on selected DL. In the UK this works well. However, in Tanzania, there is a big problem of late publication, especially of the byelaws made by the local authorities. Much of it is published long after coming into force, which is a violation of Section 28 of the Interpretation of Laws and General Clauses Act.[199] Yet, some of the inhabitants may be required to pay levies and be penalised on the basis of byelaws which are unpublished and therefore not in operation.[200] This is contrary to the provisions of the Constitution.[201] Clearly, this is a violation of the rule of law, which prohibits that a man is punished or made to suffer, either his body or in his goods, except in case of a distinct breach of law established in the ordinary legal manner before the court.[202] It can also violate citizens' rights and civil liberties and frustrate principles of the rule of law. It means that even this mechanism is not reliable to enhance the protection of citizens' rights and it could frustrate the rule of law. Tanzania should consider taking serious measures as happened in the USA when they were faced with the problem of non-publication and laxity in publication. This could involve taking legal and administrative action to ensure that those entrusted with publication do it in time.

5. Laying Delegated Legislation Before the Parliament

In Tanzania, the requirement to lay all DL before parliament is provided for under Section 38 of the Interpretation of Laws Act. Under the requirement, the National Assembly may pass a resolution disallowing any regulations of which a resolution notice has been given within 14 sitting days of the National Assembly after such regulations have been laid before; or if any regulations are not laid before the National Assembly.[203] Unlike in the UK, where most of SIs is laid in parliament before coming into force, in Tanzania, the DL is laid in parliament after being published and coming into force. Also, whereas in the UK and the USA, the regulations laid before parliament may be subject to either negative or affirmative resolution,[204] in Tanzania, like in New Zealand and Botswana, the laid regulation can be subject to disallowance.[205]

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[197] The Interpretation of Laws, Cap 1, *supra* note 34, Section 37 (1) (a).
[198] *Id*., Section 28.
[199] The Interpretation of Laws and General Clauses Act, 1972, (No 1 of 1972) (This was the former Interpretation of Laws before 2002).
[200] The Parliament of the United Republic of Tanzania, Report of the Legal and Constitutional Committee on Subsidiary Legislation, The National Assembly Office, Dodoma, November (2001), at 14.
[201] The Constitution of the United Republic of Tanzania, *supra* note 1, Art. 13 (6)(c).
[202] Herwart of Bury, *supra* note 14, at 24.
[203] The Interpretation of Laws Act, *supra* note 34, Section 38(2).
[204] Oluyede, *supra* note 4, at 64 – negative resolution means disallowing the DL which is already in operation; affirmation resolution means the parliamentary approval of the draft regulation.
[205] G.N No 428 of 1998; *see also* the Parliamentary Debates, Ninetieth Session, 12 April 2000,

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Since the objective is to bring to the attention of parliament the fact that the regulation, rule or byelaw is being made or has been made, and permit the discussion on contentious DL, it means that the UK through the affirmative procedure has an added advantage because the scrutiny takes place before the legislation comes into force.[206] It is likely to facilitate protection of citizens' rights and liberties, because most of it will be checked before coming into force. The practice in Tanzania just as in New Zealand or Botswana can be disadvantageous because by scrutinizing the DL and probably disallowing it after coming into force, it might have already caused adverse effect to citizens before being looked into. Also experience has revealed that the affirmative procedure is stricter than the negative procedure. Perhaps Tanzania could consider utilizing the affirmative procedure together with tests geared towards improving DL.

In Tanzania, like in New Zealand and Botswana, all DL is laid before parliament. The laying of all DL before parliament could be advantageous in that parliament is made aware of all DL promulgated by the executive, though it may involve tedious work for the executive to ensure all DL is laid before parliament. The parliament can discuss any DL, which violates principles of DL, regardless of its significance. Though laying of some DL could facilitate concentration on scrutiny and save parliamentary time, it is not justifiable to leave the less important DL to violate principles of DL. So, it would be better to lay all DL before parliament to enable the parliament to act as watchdog to all the DL ,regardless of their importance.

Under Section 38 (2) of the Interpretation of Laws Act, the DL is required to be brought before parliament within six sitting days after publication. It may be subject to disallowance provided the resolution notice is given within 14 sitting days of the National Assembly after it has been laid before parliament. However, the practicability and effectiveness of the requirement may be questionable because while DL is published every Friday,[207] the National Assembly has only four sessions annually. It is almost impossible to lay every published DL before parliament within six sitting days of the National Assembly, because the National Assembly sits for two weeks in three short sessions and for almost two months during budget session. The Budget session basically deals with budget related matters only and DL issues cannot be raised at that session. So, the manner the parliamentary sessions are planned and held, may lead to difficulty in laying all the DL within six sitting days of the National Assembly and in passing the resolution of disallowance of the regulation of which a resolution notice has been given within 14 sitting days after the laying before the National Assembly. Perhaps this explains why the disallowance was invoked only once.[208] Of course, other countries have the same problem of not disallowing the DL. It means that, though

at 16-49. The parliament nullified the National Bank of Commerce (Holding Corporation) Order, 1998 for exceeding the delegated legislative powers.

[206] P. Cane, Administrative Law 362 (2004).

[207] The United Republic of Tanzania Presidential Circulars 1965-1998, at 175.

[208] Conversation with Charles Mloka, Senior Committee Secretary. In 2001 the parliament disallowed the National Bank of Commerce (Reorganization and Vesting of Assets and Liability) Order No 428 of 1998.

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the requirement was intended to be a controlling mechanism, it might not fulfil the intended objective. This, clearly, defeats the purpose of the requirement, which seeks to ensure that DL that does not comply with certain criteria, is disallowed. Probably it would be better if the section clearly states that the regulation will be laid before parliament within six days after publication and if the parliament is not in session within the same period after the commencement of the next session. This formula should apply to the disallowance procedure as well. Perhaps this could bring a meaningful protection against abuse of power and hence guarantee the rule of law and protection of citizens' rights.

6. Scrutiny Committees

Before 1984 there was no parliamentary committee in Tanzania, which could be considered to be responsible for DL. Due to the increase of legislation, the Parliamentary Committee on Constitutional and Legal Affairs[209] was established in 1984. Its functions were to "consider and report to the National Assembly on such matters as may be referred to it."[210] It means that the Committee had no specific criteria for dealing with DL. The Standing Orders of 1987 specifically prescribed the function and criteria for scrutinizing DL which is laid before parliament in the preceding session. These are: reporting to parliament if the DL prescribes payment from the Consolidated Fund; restriction of court review; it has retrospective effect; its publication and laying before the parliament was delayed; it exceeds the ambits of the enabling provisions; it calls for elucidation or any other reason which warrants to be notified to the parliament.[211] This position applied until 2003.

In 2003, following the merger of the standing committees and the select committees,[212] the Legal and Constitutional Committee was merged with the Administration Committee to form the Legal, Administration and Constitutional Affairs Committee. The functions of the new committee changed and the function of scrutinizing DL was not retained.[213] To date there is no committee which deals with scrutiny of DL. It should, however, be noted that, when the committee was dealing with DL, it could not do much due to lack of personnel with legal knowledge to help the committee to scrutinize DL.[214] In 2001, it was able to scrutinize DL for the year 1997. Since then there has been no DL, which has been scrutinized. In other words, the DL made since 1998 is not yet scrutinized.[215]

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[209] National Assembly Standing Orders, Printed by the Government Printer and Hansard Department in the National Assembly Office (Version 1984), s. o 72-73.

[210] National Assembly Standing Orders, Printed by the Government Printer and Hansard Department in the National Assembly Office (Version 1986) s.o 73 (1) (d).

[211] National Assembly Standing Orders, Printed by the Government Printer and Hansard Department in the National Assembly Office (Version 1987) s.o. 91(6) (a)-(f).

[212] Hansard dated 18 June 2003, at 1012-1013.

[213] National Assembly Standing Orders, Printed by the Government Printer and Hansard Department in the National Assembly Office (Version 2003) s.o 93 (2).

[214] The Parliament of the United Republic of Tanzania, Report of the Legal and Constitutional Affairs on Subsidiary Legislation (2001), at 10.

[215] Conversation with Charles Mloka, Senior Committee Secretary.

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The history of the scrutiny committee shows that there has been laxity on the issue of a committee for scrutinizing DL. The establishment of a committee responsible for scrutinizing DL has not been seriously considered. This can be shown by the parliament neglecting to assign the task to any of the committees. Also there is no special committee for dealing with DL. The Legal and Constitutional Affairs Committee, which dealt with DL, also dealt with other matters apart from DL. This suggests that protection of citizens' rights and rule of law are in jeopardy. The UK and New Zealand have special committees, specifically for DL. Though Botswana has a committee, which deals with DL, it deals with other matters as well. Perhaps this explains why it has not been effective. Due to similar problems in New Zealand, a special committee was set up. This may suggest that inefficiency of the committee to scrutinize DL, which is experienced in Tanzania, can be attributed to the increase of functions because the standing committees deal with many issues under their jurisdictions. This means that even if standing committees are used to scrutinize regulations under their respective jurisdictions, they may not be efficient. Ordinary committees cannot concentrate on scrutinizing regulations because they have too much other work to do.[216] This suggests that the establishment of a specialised committee for scrutinizing DL as applicable in the UK and New Zealand,[217] with a set of criteria to be applied, is called for.

Another factor, which can enhance the improvement of DL, is the use of prescribed criteria. Unlike in the UK, New Zealand and Botswana neither the Interpretation Act nor the Standing Orders in Tanzania contain criteria for scrutinizing DL. Nevertheless, scrutinizing DL without criteria, would be doing it haphazardly, which is dangerous. The parliament may decide to disallow a regulation based on trivial matter or neglect important aspects, which would warrant disallowance. Also, there will not be a careful, systematic and rational scrutiny. This could lead the committee to scrutinize regulation lightly and not in-depth. In the UK, NZ and Botswana where such criteria are applied, the parliament can scrutinize the DL carefully, systematically, and rationally.[218] Their scrutiny may be focused and guided. This suggests that perhaps Tanzania would need to have criteria in place to enable a careful, systematic, and rational scrutinization of DL to ensure the protection of rights and liberties.

E. Conclusions and Recommendations

This paper dealt with DL, particularly in Tanzania. It tried to explore whether the controls and safeguards of DL, especially in Tanzania, are effective in view of protecting citizens' rights and promoting the rule of law. While there is a long history of DL in Tanzania, DL is increasingly important in modern democratic

[216] Palmer & Palmer, (2004) *supra* note 9, at 214; *See also* the Report of the Legal and Constitutional Committee, supra note 214, at 55.
[217] *Id.*, at 214, the specialized committee produced a large number of reports and has provided a check on the wrongful the use of regulation.
[218] Oliver, *supra* note 158, at 225.

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governance. The paper compared control and safeguard measures in Tanzania with particular safeguards in the UK, the USA, New Zealand and Botswana. It was established that despite the inevitability of DL, the danger of misuse of delegated legislative powers could not be discounted. In all the jurisdictions there are measures to control abuse. The common controls and safeguards that are used in the countries examined are antecedent publicity, consultation, publication, laying of DL before parliament and parliamentary scrutiny. In Tanzania these safeguards are used as well. However, in order for antecedent publicity and consultation to have a meaningful result, transparency and adequate notice and publicity is of importance, to enable the consulted party to give a meaningful presentation and for the executive to make acceptable DL. This may help to minimize friction among the departments and to protect citizens' rights and to promote good governance and the rule of law.

Publication is advantageous as well for commencing the DL. It enables people to be governed by DL, which is in force, and facilitates compliance because people will know about the DL that is made. Also it enables parliament to know the existence of the rule and hence, parliament will be able to exercise its control over it. Though in most cases the laying of DL before parliament is a negative procedure, the affirmative procedure is also useful. It provides a stricter control than the negative procedure because it is done before the DL enters into force. It is likely to protect citizens' rights more than the negative procedure, which is applied after DL is in operation. The use of committees plays a significant role, especially when taking into account that they act on behalf of the parliaments. The committees are likely to be keener in ensuring that the delegated powers are not abused than other controls. Systematic use of special committees responsible to scrutinize DL based on specific criteria, are better placed to scrutinize DL in-depth than ordinary committees, which usually have other duties as well. Criteria help the committees to scrutinize the DL in a systematic manner, which can enhance the protection of citizens' rights and promotion of the rule of law. It has been evident that most of the controls are well established in the jurisdictions examined.

Tanzania uses the same controls and safeguards. It has nonetheless been concluded that practical problems of implementation of controls and safeguards in Tanzania arise, which do not sufficiently guarantee the rule of law or promote citizens' rights. This is substantiated with evidence of shortfalls in the available safeguards and controls, such as the provision of insufficient time for antecedent publicity and the laying of DL before parliament and the procedure for effecting disallowance on DL before parliament. Tanzania has opted for the negative procedure alone for DL laid before parliament, and yet it has not been applied or has rarely been applied. It does not utilize the affirmative procedure, which is more strict. Also there is laxity in implementation of the existing safeguards. For example, late publication of DL and the lack of systematic usage of parliamentary committees in scrutinizing DL has been evident. The reasons behind the problems are mainly financial, lack of human resources and lack of adequate equipment for publishing the DL. But also, the lack of political will to rigorously employ the controls and safeguards must not be discounted.

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In order to address these problems, solutions have been suggested. These include, revising the laws or standing orders so as to provide for sufficient time for antecedent publicity and consultation, and the time when the resolution for disallowance can be undertaken by parliament. Also, the law could be amended so as to incorporate the affirmative procedure for DL laid before parliament. There is also a need for having a special committee on DL to scrutinise DL based on specific criteria and advise the parliament accordingly. Other solutions could include strengthening the printing agency so as to publish the DL in time. Finally, independent bodies such as the Tanzania Law Society should be encouraged to report and monitor on the process and implementation of delegated legislation.