Mobile communication and the protection of children

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10 Government intervention – the need for regulatory alternatives?

As with Chapters 6, 7, 8, and 9, this chapter deals with the second part of the thesis, the legal perspective. The purpose of the chapter is to establish elements we regard as important and necessary in the protection of children and young people from the hazards raised and discussed in Chapter 4.

This chapter deals with RQ4: *"what are the important elements that should be included in the new regulatory framework?"* The chapter begins with a discussion on the justification for regulation (Section 10.1), wherein we consider whether there is actually a need for government intervention. By government intervention, we refer to direct government intervention. In Section 10.2, it is described what might be the objectives for content regulation before proceeding to articulate guiding principles for regulating content. In Section 10.3, we advocate the principles of good regulation. The importance of community participation is discussed in Section 10.4. From these discussions, we arrive at an alternative to state regulation (Section 10.5) and a mixture of controls (Section 10.6). We answer RQ4 in Section 10.7. In Section 10.8 we pay attention to a possible implementation of the combined regime in Hong Kong. We conclude the chapter in Section 10.9.

10.1 Justification for regulation

This section is intended to provide a straightforward reasoning as to whether government intervention (and in this respect we mean, direct government intervention in the form of hard law) is actually necessary to achieve its policy objectives (see Subsections 10.1.1 and 10.1.2). In Subsection 10.1.3 a checklist in the form of questions is provided. The checklist is meant to serve as a guide to regulators when designing and implementing regulations.

10.1.1 A straightforward reasoning

One way of looking at regulation is to consider what the regulation intends to achieve. Using this approach, we may say that regulation is a process by which regulators seek to influence the markets (or the environment) in order to achieve social and economic objectives. Thus taken at its most general level, law-making is driven by a number of objectives. In Section 3.3 and Figure 3.1, we have described various government objectives. We list them briefly here

as economic, social, and cultural objectives. Thus, in the form of "the social objective of consumer protection and privacy", we posit that regulation can exist either as an imposition of a constraint, or it can act as an incentive to encourage good behaviour. In Chapter 8, we have also observed how constraints can operate and be used together with incentives to reflect and implement a policy decision.

Nevertheless, regulation is usually justified on the basis that market forces alone are unable to deliver required public policy objectives.

Despite the argument that direct government intervention is necessary to address a 'failing market', one must accept that a perfect market simply does not exist.[1] Consequently, we argue that any impulsive government intervention intended to improve matters might instead worsen the situation. The United Kingdom Better Regulation Task Force (BRTF) (2005) had in their report provided five reasons why government intervention can make matters worse. We repeat them below.

1 Regulatory bodies who pass their costs to those they regulate may have little incentives to minimise these costs.
2 Some may want to impose high standards in order to avoid blame if things go wrong. (3) There may be little pressure to withdraw from regulatory areas, unlike in a competitive market where rivals will constrain growth. Instead there may be a tendency to expand.
3 There is also the possibility of 'regulatory capture' where a regulator becomes sympathetic to the interests of those they regulate and acts to protect their interests.
4 It is easy to underestimate the cost of regulation; this includes the cost of the regulatory body and the compliance cost of those being regulated.[2]

Consequently, we opine that it is more prudent for regulators to strive to seek an alternative, more viable, and cost-effective form of regulation in an attempt to reduce the prevailing concerns.

Further, in justifying regulation we are guided by a test proposed by Bishop (1998) where he said the following.

> "The real question the regulator must ask is not whether in theory the market can be improved but whether the defects found are sufficiently serious to outweigh the costs of intervention (…). This is not to argue that regulatory intervention is never warranted. What it does mean, however, is that intervention should not be

1 Ch. 5, No Intervention, in Imaginative Thinking for Better Regulation, a 2005 report by U.K. Better Regulation Task Force; available at www.brtf.gov.uk
2 Supra.

> undertaken on the whim or hunch of the regulator. A series of systematic rules should be followed to gauge whether regulation is likely to improve matters".[3]

What all this indicates is that direct government intervention is not an 'end all, be all' solution. There is no guarantee that government intervention via regulations will achieve its desired outcome.

10.1.2 A further discourse on content regulation

Apart from legislative and judicial pronouncements, rules guiding conduct can and do arise from individuals themselves. These can be seen in parties reaching informal contractual arrangements in the form of rules and by-laws with respect to, for example, conduct towards each other. Thus a newsgroup participant may be 'flamed' by posting inappropriate material or comments in a newsgroup. Another second form of self-help is that suggested by Trotter (1994) – unilateral self-help which is best amplified by stating "if you don't like it, don't do it". Thus, if the discussion in a particular discussion group does not interest the participant, the best solution would be for the participant to withdraw from that discussion group and move on to a discussion group which best reflects his interest. This is also an aspect of regulatory arbitrage reflecting the fluidity of the Internet previously discussed. Trotter opined that unilateral activity avoidance by individuals is an appropriate response when the activity has no significant effects.[4] The lack of external effects means that others will not be harmed or benefited so that the interest of others need not be taken into account.[5]

In so far as the discourse on content regulation is concerned, we surmise that the heart of the matter is the degree of control that the relevant stakeholders have over the content that is being offered, made accessible, and disseminated. We have discussed this in Chapter 6 with regards to Wong and Hiew's (2005) segmentation of mobile entertainment.[6] Thus, in Wong and Hiew's segment 1 (content offered within the mobile network provider's portal or 'walled garden') control is relatively easy and well defined. However, in comparison with unilateral self-help, bilateral self-help[7] (contracts) is a more

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3 Bishop, B., (1998), Antitrust Enforcement and the rule of law, Editorial, *ECLR* 1 in Ch.5, Cyber Regulation: Access – The European Example, p. 133 in Grewlich. K.W., (1999), *Governance in Cyberspace: Access and Public Interest in Global Communications*, Kluwer Law International, The Netherlands.

4 Trotter, H., (1994), The Proper Legal Regime for Cyberspace, 55 *University of Pittsburg. L. Rev*. 993.

5 Supra.

6 Wong, C.C., and Hiew, P.L, (2005), Mobile Entertainment: Review and Redefine, Proceedings of the International Conference on Mobile Business (ICMB '05), IEEE Computer Society; available at http://csdl.computer.org/dl/proceedings/icmb/2005/2367/00/23670187.pdf, see also Subsection 6.1.1, Ch. 6.

7 Supra Trotter, n.4.

viable option to regulating behaviour. This is because contracts can be tailored to an enormous variety of circumstances and can specify complex relationship and duties. For instance, in so far as the development of mobile content is concerned. We see that as parties to the agreement are fully appraised of the prohibition or restriction (as the case may be) as to the type of content that is considered suitable and appropriate for societal's access and consumption. The reasoning is even more relevant where the creation and development of content is outsourced to content providers (segment 2 content); in this situation, content is normally the subject of formal contractual agreement reached between parties. Further contract-based solutions are seen as more feasible in transactions that have a high value to the parties, relative to the costs of the transaction.[8] In such circumstances, the Coase theorem suggests that parties will reach an economically efficient result.[9]

In so far as the open mobile Internet is concerned, contract-based solutions are (although limited in its usefulness, see the discussion in Subsection 6.1.2) seen as a common form of control mechanism. An example of this form of control mechanism is a subscriber's agreement with a network provider.[10] All subscribers must register with their chosen provider whether it is done electronically or by paper mode. In the registration process, subscribers in addition to providing particulars of themselves and paying the prescribed fee, must agree to abide by the rules and regulations of the provider. In so doing, subscribers will most commonly agree to matters such as *inter-alia*, (1) not to infringe a third party's copyright without written approval of the owner of the copyright, (2) not to post racist and derogatory remarks, and (3) not to post and/or distribute illegal, harmful, obscene, or inappropriate materials.

10.1.3 A checklist of eight questions

We are not positing that regulations for all intent and purposes play a less significant role in modern age. Instead our investigations indicate that regulations are just as important, if not more important in the new age; but just as technology evolves and society advances in tandem with the adoption of the new technology, the law should progress and adapt to new environments and new circumstances. In such circumstances, we opine that greater guidance should be sought from, and better emphasis should be placed on the Organisation for Economic Development and Cooperation's (OECD) principles

8 Supra Trotter, n.4.

9 Coase, R., (1960), The Problem of Social Cost, 3 *J.L & Econ*. 1.

10 As examples, see Blue Zone Internet Access Service Agreement, available at http://www.thebluezone.com/ISPAgreement.htm and AOL Broadband Access Agreement, available at http://bbterms.aol.co.uk/memserv/tc_access_agreement.htm

for improving the quality of government regulation first enunciated in 1995.[11] We believe that the following checklist in the form of questions can positively guide and assist regulators in the development and implementation of regulations:[12]

a) is the problem defined?
b) is government action justified?
c) is regulation then the best form of regulation?
d) is there a legal basis for regulation?
e) do the benefits or regulation justify the costs?
f) is the regulation clear, consistent, comprehensible, and accessible to those regulated?
g) have all interested parties had the opportunity to present their views? and
h) how will compliance be achieved?

Indeed, these eight questions have to be considered when addressing regulation of content that is accessible via Internet-enabled mobile phones. For now, we contend that content regulation is a social objective in that it is a social responsibility of the state (regulator) to maintain an acceptable community standard which reflects the cultural and moral tone of society. We argue that the maintenance of an/any acceptable community standard is achieved by protecting the more vulnerable sections of the community from physical, economic, and psychological risks. As policy objectives can change according to the circumstances and needs of the society, social objectives such as content regulation can also change and vary in line with the requirements and expectations of the modern society.

10.2 Guiding principles for regulating content

We advocate that in the design of a viable content regulatory framework (for the protection of children and young people), it is important for regulators to take cognisance of what we view as underlying elements in the formulation of regulations. These underlying elements are principles for content regulation, principles of good regulation, and community participation. In this section, we (1) articulate and discuss the principles for content regulation, and (2) argue the applicability (in our view) of the principles of good regulation and com-

11 Recommendation of the Council of the OECD on Improving the Quality of Government Regulation, OECD Working papers (No. 74), Paris, 1995, OCDE/GD(95)/95, ; available at http://www.olis.oecd.org/olis/1995doc.nsf/LinkTo/OCDE-GD(95)95

12 Supra; see also Ch. 5, Cyber Regulation: Access – The European Example, p. 133 in Grewlich, K.W., (1999), *Governance in Cyberspace: Access and Public Interest in Global Communications*, Kluwer Law International, The Netherlands.

munity participation in framing and formulating regulations with a view of meeting the social objective of content regulation.

From our studies, we are reminded that in suggesting principles as guidelines for regulating content in relation to new media, one underlying and fundamental factor we should be remain mindful of, is the 'universal adaptability' of the principles. This means that the principles should be universally adaptable to a rapidly changing environment. With that fundamental factor in mind, we articulate the four guiding principles for content regulation as (1) acceptable community standards (Subsection 10.2.1), (2) protection from harm (Subsection 10.2.2), (3) informed choices and decision-making (Subsection 10.2.3), and (4) complaints procedure (Subsection 10.2.4).

10.2.1 Community standards[13]

We remark that the regulation of communication industries is culturally embedded and is generally reflective of the domestic environment. For example, most jurisdictions in the promotion and support of local talent stipulate the requirement of local content in the development of television programs. Since this is especially true in the context of content regulation, we view respect for community standards as our first guiding principle for regulating content. It is thus essential for the state (regulator) to ascertain the prevailing community's attitude towards obscenity or in other words, the community's definition on matters such as (a) "obscenity", (b) matters considered "indecent but not obscene", (c) "grossly indecent but not illegal", and (d) "harmful". It is not sufficient for the state to refer to the dictionary for the literal meaning of these words. Instead attention to the meaning should be directed to, from within the community to which the standard may be applied, since the standards and the terms adopted and used as a result of those standards are meant to reflect "the community's moral fiber". In other words, we need (1) to enquire and (2) to ascertain the moral strand of the community. It is possible to obtain a fair and reasonable assessment of that by asking (a) what the community is willing to accept in terms of the different levels of obscenity, indecency, potentially dangerous, and harmful materials, (b) what they (the community) would tolerate, (c) what they would regard as repulsive, and (d) what they would regard as seriously impairing the physical, psychological, and moral development of children and young people.

As a tentative conclusion, we may state that the standards or moral strand of the community are country and culture specific and can vary within regions

13 Standards are normally used to define the acceptable characteristics of a product, process, or service. Most standards are voluntary and are developed by consensus among the government, and various stakeholders. For example, the British standards for business are developed by the businesses in collaboration with the government. See www.bsi-global.com/index.xalter

or localities within each state. Furthermore, the standards are not constant in that they change according to the generations and the period of time in which the material is perceived.[14] In fact, Devlin (1965) remarked that "*Changing morality may* more accurately *be compared* not *with* the 'violent overthrow of government but *to a peaceful constitutional change in its form, consistent not only with the preservation of a society but with its advance"* (author's emphasis).[15]

As an aside, we also remark that as community standards are country and culture specific, it is difficult to reconcile such country and culture specific standards with the standards of the global community of the Internet. This is so since it is difficult, if not impossible to formulate or ascertain a community standard which accurately reflects the sum of the global community's moral fabric. In such circumstances, we opine that it is necessary for each country, region, locale, regulator, parent and child carer to establish boundaries as to what is, or is not acceptable and/or appropriate materials for children and young people to be exposed, and to have access to. We expect that this might be done via wide public consultation.

10.2.2 Protection from harm

In so far as the regulation of content is concerned, it is clear that a prime objective of content regulation is the avoidance of harm. We argue that the objective is based on communications technologies' ability to influence, harm and offend individuals. Thus, our second guiding principle is seen in terms of protection of consumers from financial (economic), physical, and psychological harm. Indeed, since the advent of the Internet and the development of new communication technologies, we observe that the discourse on content regulation has shifted mostly towards the protection of children from illegal and harmful content made easily accessible over the Internet via mobile handheld devices. So, we remark that a measure worth pursuing is the establishment of an independent organisation (similar to Australia's ACMA) to monitor and regulate content delivered using new technologies including content delivered via mobile phones.

10.2.3 Informed choices and decision-making

It is clear that a good decision-making process involves the provision and easy accessibility of information. This is our third guiding principle. It is truism that every community and every individual within a community requires

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14 See Rettig, S.,and Pasamanick, B., (1959), Changes in Moral Values over Three Decades: 1929-1958, *Social Problems*, Vol. 6, No. 4, Spring 1959. Although this paper reports on a study conducted decades ago, we view it as providing some support that moral standards do change over time.

15 Devlin, P., (1965), *The Enforcement of Morals*, Oxford University Press, London, New York.

timely and up-to-date information to be able to make informed decisions and good choices. In fact, an important element of consumer protection law requires consumers to be provided with sufficient information. Situations can arise whereby individuals would prefer to be informed of the risks, and be left to decide the next best step rather than be subjected to regulations imposed by the state. For example, some societies prefer to be provided with information as to the risks and dangers of smoking and to be left with the decision as to whether to inculcate or continue the habit of smoking or to kick the habit. In a liberal and open society, the choice is left to the individual. In comparison, societies do exist where state regulators continue to regulate firmly menial social conduct and activity. Singapore provides an example. Since 1992, the Singapore government had banned the import, manufacture, and sale of chewing gum in order to reduce littering. The penalty for smuggling chewing gum into Singapore was a year's imprisonment and a fine of SGD10,000 (approximately 5,300 euros).[16] Below we emphasise the notion of accurate information in relation to consumer empowerment.

Accurate information

Since we are of the view that informed choices and decision-making is an aspect of consumer empowerment, we posit that consumers are neither empowered nor can they be held responsible for the decisions they make if they are not provided with the benefit of accurate information. Thus, accurate information about the nature and type of content is important since it facilitates decision-making and furthers the availability of informed choices. For instance, parents as responsible individuals providing a safe environment for children and young persons, for example, should be assisted in deciding what materials are regarded as suitable and appropriate for a child to be exposed to, to access, to view, and to share.[17] This is in spite of Art. 12 of the CRC which stipulates that when adults are making decisions that affect children, children have the right to say what they think should happen and have their opinions taken into account, since the Article does not interfere with the parents' right and responsibility to decide and express their views on matters affecting their children.[18]

Thus, there is an urgent need for greater emphasis in educating parents with respect to the materials and activities that are appropriate for children

16 The gum ban is now partially lifted in view of Singapore Free Trade Agreement with the U.S. See Singapore to partly lift gum ban, March 15 2004 BBC News available at http://news.bbc.co.uk/2/hi/uk_news/3512498.stm

17 In this regard, we are using and viewing the parent as having the sole responsibility of caring for the child's welfare and acting in his best interest. We are neither disputing nor are we disregarding the roles played by 'de facto parents' such as care givers or children placed in the care of the local authorities.

18 Supra, see also Convention on the Rights of the Child at http://www.crin.org/resources/treaties/CRC.asp?legal&ID=6

and young people. While contents such as those which contain adult elements are clearly inappropriate for youngsters and require no education,[19] there is immense benefit (1) for educating parents and child carers into enhancing greater awareness of the potential hazards lurking around the use of new technologies and (2) for providing information of proactive measures that can be adopted to assist in the reduction of potential hazards. These hazards were raised and discussed in Chapter 4 as the three Cs (content, contact, and commercialism). We briefly repeat them[20] in this section: (1) Pornographic and violent materials may be viewed and shared amongst children and young people via peer-to-peer sharing and via on-line chatrooms (inappropriate adult material). This is content. (2) There is a real danger that children may be accosted and solicited by on-line predators via on-line chatrooms and social networking sites (grooming activities). Children may also be bullied via their mobile phones (cyber-bullying). These concerns relate to contact. (3) Children and young people may also be drawn to spending large amounts of money consuming mobile content as a result of aggressive marketing tactics. This is commercialism. We state that it is vital for parents to be acutely aware of the three Cs and the appropriate measures that can minimise the hazards. Thus, measures such as education, media literacy and awareness programs can greatly assist in increasing the resilience of children and young people to potential hazards.

Parents should be educated to improve their understanding as to (a) filtering technologies, their availability, and effectiveness and (b) the restrictions (technological or otherwise) that can be adopted to reduce the potential hazards. Indeed, we have observed in our study of approaches adopted in comparative jurisdictions (in Chapter 7) that media literacy programs and self-help mechanisms are important factors in consumer empowerment. We believe well informed parents who are sufficiently aware of the risks and hazards play a correspondingly important role in managing the risks faced by youngsters. While we agree that the measures are not new to creating awareness of the hazards of the Internet, we remark that it is vital that the community and the government are not complacent in addressing the concerns and in implementing the measures. This is especially important taking into account the characteristics and functionalities of the mobile phone discussed in Chapter 4. In this regard, we re-iterate our answer to RQ1: what (sociological, cognitive, mental and psychological) impact does the rise in the use of mobile technology have on children and young people?; we reiterate that mobile telephony and its applications does indeed (as we have examined in Chapter 4) have a

19 Adult content is not restricted to sexually explicit themes and undertones, but also, explosively violent images in video and online gaming and gambling.

20 We have not provided the list of hazards as this has already been fully discussed in Chapter 4.

significant transforming (sociological, cognitive, mental, and psychological) impact on children and young people.

10.2.4 Complaints procedure

As the fourth guiding principle for content regulation, i.e., the complaints procedure, we posit that an accessible, transparent, and independent complaints procedure will significantly enhance vigilance against (1) the availability of inappropriate materials, and (2) the reporting of inappropriate conduct within the community. As with media literacy and self-help mechanisms (discussed in greater detail in Chapter 7), we regard the establishment of a user friendly complaints mechanism as one of the essentials spokes in the wheel of an efficient regulatory framework. With a complaints mechanism established, it is necessary for the complaints body to act promptly in their handling of complaints and investigations to instill community confidence. This proactive measure promotes 'shared responsibility' amongst members of the community and stakeholders, making them interested participants in the protection of younger and more vulnerable strata of society. We may conclude that the establishment of an effective, user friendly complaints mechanism is a significant contributory component to regulating content.

10.3 GOOD REGULATION

In addition to the four guiding principles for content regulation, we advocate that regulators should work by the principles for good regulation in framing a new regulation. Consequently, reference is made to the United Kingdom's Better Regulation Task Force (BRTF) on Principles of Good Regulation.[21] The five principles of good regulation are (1) Proportionality, (2) Accountability, (3) Consistency, (4) Transparency, and (5) Targeting.[22] Although the Principles of Good Regulation are normally referred to and/or are adopted in relation to promulgation of hard laws, we opine that these Principles prove to be equally beneficial when considering alternative forms of regulations.

In proportionality, regulators should ensure that solutions advocated should be in tandem with the perceived risk in that a prudent regulator would evaluate the problem at hand to ensure that a heavy handed approach is not

21 The Five Principles of Good Regulation has been revised and updated as at 2007. See Better Regulation Commission available at http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principles.pdf

22 Principles of Good Regulation, Better Regulation Task Force, December 1997; available at www.brtf.gov.uk . See also supra 'Five Principles of Good Regulation', as revised in 2007 at Better Regulation Commission available at http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principles.pdf

utilised to resolve a minor inconvenience.[23] An example of this is seen in IMCB's implementation of content controls as envisaged in the code wherein an initial breach of the code would attract the issuance of a yellow card, a red card for a subsequent breaches, and a termination of business for repeated breaches (see Subsection 7.3.5 B). We remark that IMCB's implementation of the code with the issuance of coloured cards, the colour of the cards issued reflecting the severity of the breach of IMCB's code is a good example of Ayers and Braithwaite's (1992) responsive regulation theory. Ayers and Braithwaite's (1992) suggests that " (…) regulatory cultures can be transformed by clever signalling by regulatory agencies that every escalation of non-compliance by the industry or collective group can be matched with a corresponding escalation in the punitiveness by the state, thus resulting in a more interventionist strategy".[24] Ayers and Braithwaite's (1992) theory has been discussed in greater detail in Section 9.7.

When making rules, regulators must be able to justify, and more importantly be held responsible for the decision-making process and the decisions made (accountability principle).[25] In doing so, in addition to ensuring that policy, decision making and standard implementation are consistent and fair, regulators must ensure that the policy objectives, the decision-making process, and the implementation of standards is open, accessible and communicated (consistency and transparency principle). Finally, it is necessary to ensure that focus is maintained by regulators to avoid duplication and unintended consequences upon implementation (targeting principle).[26]

10.4 COMMUNITY PARTICIPATION

We strongly advocate and support community participation. We regard this as an integral and essential ingredient to rule-making. We believe that consultation and participation leads to a good regulation. Furthermore, it improves the chances of successful compliance especially important for self regulation. As we have discussed in Chapter 8, "it is only through the allegiance and consent of an individual living within the demarcated space that the laws within this space achieve legitimacy". Our investigations reveal two significant roles played by the user or community participation. First, it facilitates legitimisation of authority, and second, it reduces the likelihood of regulatory capture. By allowing community members to partake in policy and decision-making, an avenue is provided for them to be stakeholders thus enabling them

23 Supra.
24 Ayers, I., and Braithwaite, J., (1992) *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, Oxford, England.
25 Supra.
26 Supra.

to have a voice, provide input (be it positive or negative), and to exercise choice. Indeed by inviting participation, the state is entering into a relationship with the community in which the state can outline their expectations and the participants can know what to expect. This opens the regulatory design process to 'outside' scrutiny; thus making the design process open and transparent (thereby adhering to the transparency principle advocated by BRTF). The challenge for regulators, however, is to find ways to assist the community to make informed decisions about how they will contribute, so that they "own" their participation and trust the process.A number of obstacles exist in relation to community participation. We name one obstacle and that is, the likelihood of such participation by the community. It is apparent that insufficient participation merely weakens the rule-making process. The question that must be answered then is, what is the likelihood of the community, participating in consultations, and reviews?

Generally we find a community's willingness to participate to be positive, particularly in matters which concern them separately as individuals or collectively as a community. We find support in our view by research conducted by the National Consumer Council (NCC) which indicated that consumers are most likely keen to participate directly in issues that have an immediate and local impact on their lives. Further, the research indicated that tension exists between the consumers and the regulators in that it was discovered that (1) consumers are poorly informed about the role of regulators and (2) the regulators are poorly informed about the concerns of the consumers.[27] Thus consultation and participation encourages regulators to operate in a more open and transparent way, resulting in them becoming more answerable to their stakeholders thereby earning their respect.[28]

Our analysis further reveals that (i) community participation in the design and (ii) the implementation of regulation does add value to the information gathered by regulators and help inform the process. In fact, participation reflects and re-inforces Hood, Rothstein, and Baldwin's (2001) second element of a viable control system within the control theory, which is information gathering.[29] This is further supported by Murray and Scott's (2002) hybrid control theory.[30] According to Murray and Scott, under a community-based

27 Putting up with second best: Summary of research into consumer attitudes towards involvement and representation. National Consumer Council (2002) in Bridging the Gap – Participation in Social Care Regulation, September 2004 (last updated 15/3/2007), Better Regulation Commission, available at http://archive.cabinetoffice.gov.uk/brc/publications/bridgegap.html

28 Supra Bridging the Gap – Participation in Social Care Regulation.

29 See discussion in chapter 8 and Hood, C., Rothstein, H and Baldwin, R., (2001), The Government of *Risk: Understanding Risk Regulation Regimes*, Oxford University Press, Oxford, England., p. 21-27

30 Murray, A and Scott, C., (2002), Controlling the New Media: Hybrid Responses to New Forms of Power, Vol. 65, 4 *MLR*, p. 491-516

control system, information can be gathered regarding the effectiveness and the viability of the system by interacting with members of the community.[31] The importance of community participation is best illustrated in Figure 10.1.

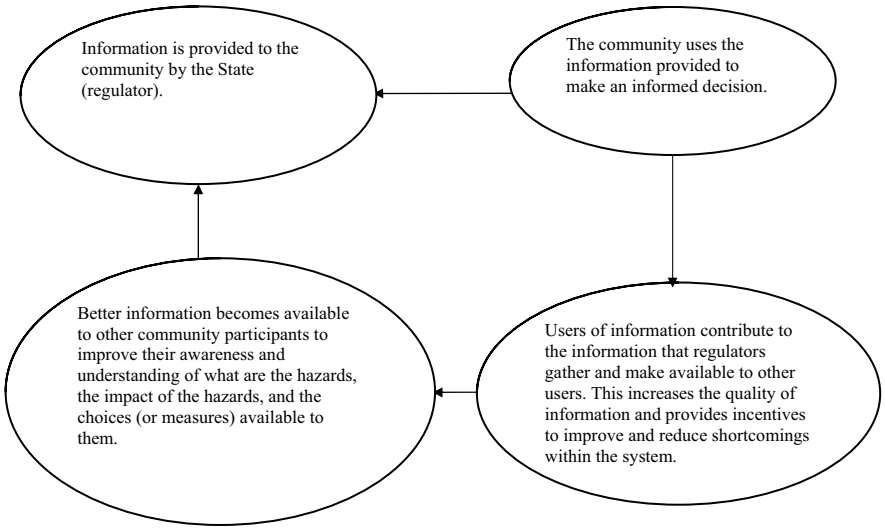

Figure 10.1: The importance of community participation (Murray and Scott, 2002).

Without input from those on whose behalf regulation is carried out, regulation lacks the legitimacy it requires. Then a gap opens up between the regulator and the regulated, endangering the process of vital information and the feedback on which good regulatory decisions depend.[32] Participation thus reduces dissention and encourages better compliance of regulations. Additionally, we argue that community participation can better reflect Teubner's law as an autopoietic system. This is especially so if the law's role is to ensure that each system is responsive to its environment by considering and taking into account that the operations of other subsystems with a view to inducing integration between various systems and subsystems, are performed adequately.

10.5 AN ALTERNATIVE TO STATE REGULATION

Our analyses of the challenges faced by regulators in the design and implementation of hard laws did not result in a proper way to be followed. How-

31 Supra. See also discussion in Chapter 8.
32 Supra.

ever, the deficiencies of state-imposed law have provided us with fertile ground to propose in this section, the application of alternatives to state regulation. In addition to the proposal, the next section articulates how the use of 'a mixture of controls' might serve as a better means to achieving the desired policy objective.

Below we start proposing a more astute approach to achieving policy objectives. For regulators it means to seriously consider alternative ways to state regulation. In this proposal, we find support from the OECD Report of 2002. Although we accept and agree that the OECD report is dated, we opine that the views posited in the 2002 report on the consideration, and adoption of a combination of regulatory and non-regulatory instruments can be usefully applied in a modern setting. We thus note OECD's argument and suggestions of various policy instruments. In its report, the OECD (2002) had argued that

> " (…) a crucial challenge for regulatory policy is to encourage cultural changes within regulatory bodies so that regulatory and non-regulatory policy instruments are systematically considered when objectives are pursued".[33]

The OECD report continued by suggesting a number of policy instruments that might be used to encourage changes within the regulatory bodies. These policy instruments include (1) information campaigns, (2) performance-based regulation, (3) process regulation, (4) voluntary commitments, (5) deregulation, (6) contractual arrangements, (7) co-regulation, (8) taxes and subsidies, (9) self regulation, (10) insurance schemes, and tradable permits.[34]

Indeed, we have observed a shift in the regulatory responses/strategies adopted from a pure hard law stance to a 'softer' approach; an approach that is more open to adopting 'a mixture of controls'. This was already referred to in, for example, the UK's Better Regulation Task Force (BRTF) 2000 report.[35]

The BRTF 2000 report recognised that state regulation (which is the conventional command control hard law approach) was not necessary and even not the best way to achieve policy objectives. Although we understand that the BRTF was established, not for the purposes of the evaluating the deficiencies and the inefficiencies of regulatory responses in the online world but rather was established to reduce real world's (a) bureaucracy and regulatory inertia and (b) was particularly aimed at 'considering the needs of "small business

33 OECD, Regulating Policies in OECD Countries, (OECD, Paris, 2002); available at http://rru.worldbank.org/Documents/PapersLinks/Regulatory_Policies_in_OECD_Countries_ch5.pdf

34 Supra. See also Baldwin, R., (2005), Is Better Regulation Smarter Regulation?, Autumn 2005, Public Law, p. 485-511.

35 In fact the European Commission's gave a commitment to giving greater consideration of alternatives as a way of delivering policy and as an important tool for regulatory improvements. See European Commission, Action Plan for Better Regulation, 2002 at http://europe.eu.int/eur-lex/en/com/cnc/2002/com20020278en01.pdf

and ordinary people",[36] we argue that the essence of the BRTF's objective is not restricted to the deficiencies, inefficiencies, and bureaucracy of government departments and local authorities alone. Conversely, we believe that the objectives and principles enunciated by BRTF should be a reference point to be taken into account (1) when considering improvements to a regulatory system and (2) when formulating and implementing a regulatory design. For example, an issue we have previously highlighted is the issue of compliance *vis a vis* enforcement. We posit that the quality of regulation depends not merely on its design (whether based on the command control approach, architectural or system design-based approach, market-based approach or social-norms-based approach), but on how the controls/constraints are applied and effected. In other words, we submit that the rules are only as good as its enforcement. Thus, we may tentatively conclude that in designing and formulating alternatives to state regulation, regulators must remain open to the fact that direct state regulation is not necessarily the best regulatory approach. Instead what might be required is the consideration of a combination of regulatory and non-regulatory instruments.

10.6 A MIXTURE OF CONTROLS

Our shift in regulatory strategies to one which involves a mixture of controls is continued below. We may consider this shift to be acknowledged by BRTF when they recognised the restrictions in adopting and implementing a purely conventional strategy. Consequently, BRTF proposed the use of 'imaginative thinking' in the form of alternative methods of regulations (BRTF 2003).[37] The 2003 report divided regulatory strategies into five types, namely (1) classic regulation, (2) no intervention, (3) an incentive-based scheme, (4) information and education, and (5) self regulation and co-regulation. The report went on further to hold that

> "(…) changes need to be made so that businesses and others are not necessarily burdened by prescriptive regulation where it is not necessary. Regulatory intervention can be necessary, but generally should be used as a last resort".[38]

Our study also reveals strong support for the proponents of 'smart regulation' with respect to alternative methods of the regulation. In the proponent's view,

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36 Supra.

37 BRTF, Alternatives to State Regulation, (Cabinet Office, London 2000); available at http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/stateregulation.pdf;see also Imaginative Thinking for Better Regulation', (Cabinet Office, London, 2003) ; available at http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/imaginativeregulation.pdf

38 Supra BRTF, Imaginative Thinking for Better Regulation.

it would be rash for the state (regulators) to exclude a "combined" regulatory regime as a means of achieving social policy and regulatory objectives. Gunningham and Grabosky (1998), for example, argued that "(…) designing good regulatory systems requires a central focus on how best to combine different institutions and techniques".[39] According to them, a smart regulatory design involves five principles. These five principles have been summarised by Baldwin (2005) as

1 prefer policy mixes incorporating a broader range of instruments and institutions,
2 prefer less interventionist measures,
3 ascend a dynamic instrument pyramid to the extent necessary to achieve policy goals, (4) empower participants that are in the best positions to act as surrogate regulators, and (5) maximise opportunities for win-win outcomes.[40]

Thus, Gunningham and Grabosky suggested adopting a combined method or a mixture of control methods. They opined that

> "(T)he challenge is to envisage what combination of instruments will be the most appropriate in a given setting and to design strategies that mix instruments and institutional actors to optimal effect".[41]

In fact, this was also recognised by Jessop (1998) when he identified governance as "the mode of conduct of specific institutions or organisations with multiple stakeholders, the role of public-private partnerships, and other kinds of strategic alliances amongst the autonomous but interdependent organisation".[42] Jessop believed that the concept of governance does not draw a line between the public and private sectors or between the market and the state (…),[43] rather it enables a clearer understanding of the role played by non-governmental and non-corporate institutions and organisations of the civil society and social movements, alongside the state/public and corporate interests as well as the ways in which such processes increasingly cross territorial jurisdictions.[44]

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39 See Gunninghan, .N., and Grabosky, P., (1998), Smart Regulation, Clarendon Press, Oxford, England.,; see also Baldwin, R., (2005) Is Better Regulation Smarter Regulation?, Autumn 2005, Public Law, p. 485-511.
40 Supra Baldwin, n. 39.
41 Supra Gunningham, N., and Grabosky, P., n. 39.
42 Jessop, B., (1998), The Rise of Governance and the Risk of Failure: The Case of Economic Development, *International Social Science Journal,* 50 (1) p.29- 45.
43 Supra.
44 Murphy, B.M., (2002), A Critical History of the Internet, in G. Elmer (eds.) *Critical Perspectives on the Internet*, Rowman & Littlefield, Lanham, Md., p.27- 45.

Looking around, we observed the adoption of a combined approach in Australia. As we have seen in Chapter 7 Australia's regulatory approach is a co-regulatory approach that encompasses (what we regard as) three core elements (see Subsection 7.1). We repeat the elements here as (1) industry codes of practice and a complaints mechanism, (2) a comprehensive scheme of prescriptive laws which underpins the codes of practice, and (3) self-help measures (which can include technological self-help measures).

Closely similar to the Australian co-regulatory approach, we recall the UK's approach which focuses on self regulation (see Subsection 7.3.5). We have seen that the self-regulatory approach worked well in the UK, and that it forms the basis in the formulation of the EU Framework (see Subsection 7.3.1)

Both jurisdictions have adopted different regulatory approaches which are relevant and perhaps specific to their domestic requirements and circumstances (this being in line with Ayers and Braithwaite's (1992) responsive regulation, that different regulatory approaches are identified and applied depending on the legal, constitutional, social, and historical context). Yet, we do see a common denominator in the strategies adopted. The common denominator is accepted by the respective states in agreement with a wider community. It includes (1) industry participation and collaboration and (2) a combined approach of various measures. This is precisely what is required if the states are serious in meeting the challenges of modern communication technology and its hazards.

10.7 An answer to RQ4

In pursuing and achieving social objectives, it is vital for the state to remain vigilant and mindful of the needs and demands of society for which the regulations are intended. It is apparent that the requirements of society are quite dependent on social, cultural, and environmental tendencies of the community. In order to achieve the objectives of content regulation, we analysed the influence of the state. Based on the analysis, we take as a point of departure that there is little room for the state; admittedly, we even believe that it would be unwise for the state

1 not to take cognisance of the principles of good regulation,
2 not to consider, adopt, and implement proactively the four guiding principles for regulating content in the new environment, and
3 not to acknowledge the importance of the participation of numerous stakeholders in the formulation and implementation of regulatory framework.

Returning to RQ4: *"what are the important elements in the new legal framework?"*, we develop a diagram (see Figure 10.2). The diagram provides the three main elements of the legal framework: (A) regulatory purpose, (B) regulatory means,

and (C) regulatory framework. We discuss the three elements below. We start remarking that the three elements encompass and reflect Hood, Rothstein, and Baldwin's (2001) suggestion of elements that represent (i) standard setting, (ii) information gathering, and (iii) behaviour modification. We claim that these elements must exist in a viable control system.[45] In addition, we remark that the eight lessons learnt and the three additional elements laid down in Section 7.7 greatly influenced the formulation of elements in (B) regulatory means and in (C) regulatory framework.

A: Regulatory purpose

The first element deals with the objective and purpose of the enacting regulations – are we regulating for political, economic, social or cultural purposes? In so far as our study is concerned, we lay down as our regulatory purpose – to implement the social objective of content regulation with the aim of protecting children and young people in a mobile environment. In line with the purpose, we need to evaluate the state's regulatory capacity to act. The capacity to act is generally dependent on the degree of risk involved. In our discussions, we have appraised (1) the potential hazards that are accessible via the use of mobile phones, and (2) the significant impact that the hazards might have on children and young people. We have concluded in Chapter 5, that the risk of harm is high.

B: Regulatory means

Under regulatory means we deal with regulatory options. Essentially, it requires a consideration of no regulation, self regulation, co-regulation, and statutory regulation, and adopting the best approach to promote the regulatory purpose and objectives set out. When considering the best approach to adopt, it is necessary to take into account the appropriateness of alternative forms of regulations as opposed to conventional approaches. In this regard, we list five factors which might prove useful:

(a) the risk of regulatory failure in terms of law enforcement results;
(b) ineffective cost of enforcement;
(c) the rapidly evolving environment of new technologies;
(d) the degree of responsibility that should be attached to various stakeholders; and
(e) the importance of stakeholders' consultation and participation.

C: Regulatory framework

Below, we consider the regulatory framework and in particular the appropriate mechanisms with a view to optimising the desired outcomes. The regulatory

45 Hood, C., Rothstein, H., and Baldwin, R.,(2001), *The Government of Risk: Understanding Risk Regulation Regimes*, Oxford University Press, Oxford, England., p. 21-27; see also discussion in Chapter 8.

framework describes the central mechanism aimed at optimising the desired regulatory outcomes. In terms of legal controls, we advocate the adoption of a combined regime, i.e., a mixture of controls designed to reflect (a) the participation of stakeholders as surrogate regulators and (b) the flexibility and effectiveness of other instruments of control. We thus articulate the following as necessary ingredients:

1 co-regulation underpinned by clear statutory regulation;
2 a separation of roles and responsibilities in that there should be independent bodies for the design, monitoring, and enforcement of regulation;
3 a user friendly and accessible complaints mechanism;
4 a transparent and effective sanctioning system; and
5 a body to review regulations to ensure that the regulations are meaningful and up-dated.

10.8 Implementing the combined regime in Hong Kong

In Chapter 7, we listed three broad criteria for measuring regulatory efficacy. For ease of reference, we repeat them here as (1) the appropriateness of the regulatory approach, (2) the clarity of the regulatory approach, and (3) the review of the regulatory approach. In Section 7.5, we have provided further details of the three criteria by illustrating and presenting in the form of a table (Figure 7.4) the approaches adopted in Australia, the UK, and Hong Kong. Also in Subsection 7.6.1 we have provided a summary of the Territory's regulatory weaknesses. Thus, if we accept that the combined (i.e., a mixture of controls) regulatory regime is a viable regulatory strategy for Hong Kong, we must then consider who should partake in its implementation in the Territory. How do we adequately address the regulatory weakness in meeting the challenges of child protection concerns *vis-à-vis* inappropriate materials and activities brought about by mobile communication technology?

10.8.1 The Territory's weaknesses

In this section, we repeat our observation in identifying the weakness in the Territory's existing regulatory framework. We continue by identifying the stakeholders that might be better placed to improve matters.

Our study has revealed that there is a distinct lack of a comprehensive protective regulatory framework which should have as its core focus, the protection of youngsters from the hazards accessible via the use of mobile phones. We specifically observed five shortcomings.

There is *little or no consultation* and/or collaboration between and amongst industry players on the development of a relevant and proactive code of practice. The shortcoming can be appropriately addressed by the Territory's mobile operators, mobile virtual network providers, third party content pro-

viders, NGOs, child protection agencies, educational institutions, and other organisations. In this respect, it is important to encourage as far as possible a wider community for consultation and participation. The code of practice, for instance, is intended to cover the activities involving the 3Cs. The Territory *does not have an independent regulator(s),* they should (2a) regulate the provision and the delivery of mobile content services and (2b) oversee, monitor, supervise and enforce the strict compliance of the code of practice. While we have noted in our investigations, a 2006 proposal for establishing a Communications Authority (CA) (see Subsection 3.9.2 and Section 7.6), we remark that there was no indication in the proposal that the CA would be an independent regulator strictly for mobile content services. The proposal to establish the CA has been delayed pending further public consultations and review. We had expected the government to act for example, by addressing the regulatory inadequacies of the mobile communications industry. The government should recommend the establishment of independent bodies to monitor the development, the compliance, and the enforcement of regulations. However, we remark that as at the date of writing, there were no further developments on the proposal. There is *the lack of consumer awareness campaign* to educate and keep the community and mobile phones user informed of risk-management issues in relation to mobile phones. Risk-management issues can include the proper use of mobile phones, its applications and functionalities, and the potential hazards that can arise from the use or abuse of mobile phones. In our view, this shortcoming can be dealt with by mobile manufacturers, mobile operators and providers, educational institutions, and the government sharing the responsibility for educating the community and end users, and empowering them.We observe that *none of the four possible protection mechanisms are offered* by the industry players. Four important protection mechanisms for mobile users are (i) empowering the users to make informed choices as to the suitability of mobile content, (ii) the provision of self-help mechanisms such as filtering technologies, (iii) a hotline mechanism for reporting inappropriate content or activity, and (iv) a transparent complaints mechanism for addressing the concerns of users. In our view, (i), (ii), and (iii) should be within the purview of mobile operators. Below, we provide brief reasons for our view.

As for (i), it is appropriate for mobile operators and content providers to collaborate, perhaps in conjunction with the regulator, in the development of a standard classification scheme for identifying mobile content. Additionally for (ii), we regard mobile network operators and service providers as being better placed to monitor and filter mobile content. However, while as previously mentioned, the monitoring and filtering should be the responsibility of industry players, such measures are restricted to mobile content and services provided by them via their portals.[46] As far as the author is aware, there is

46 Mobile content provided by third party content providers are regulated via commercial agreements with mobile operators.

no efficient mobile filtering mechanism that can be utilised as a standard blocking measure for mobile phones.

The author believes that should such a mechanism be developed, its application will be encouraged and it is likely that the mechanism will face similar shortcomings as faced by fixed Internet filtering. As for (iii), it is only appropriate for mobile operators and providers to establish hotlines since they would be the 'front-liners' for complaints of inappropriate content and activities accessed. It is essential that in the event mobile operators and providers fail to address adequately the complaints of mobile users, that users can resort to an independent body to handle the matter. We view (iv) the responsibility of the regulator. Thus, a user friendly and easily accessible complaints mechanisms should be in place. However, together with a transparent and effective sanctioning system the establishing of a complaint mechanism can go a long way in enhancing user's confidence in the regulatory mechanism.

As prescriptive law under-pins co-regulation, we opine that it is *high time* for the Territory's main regulatory arrangements to be reviewed in relation to content regulation and privacy. The Control of Obscene and Indecent Articles Ordinance (COIAO), the Prevention of Child Pornography Ordinance (PCPO), the Basic Law, the Bill of Rights Ordinance (BORO), the Personal Data (Privacy) Ordinance (PDPO), and to a smaller extent, the Unsolicited Electronic Messages Ordinance (UEMO) were not enacted to deal specifically with the new environment and so fail to provide adequate means for addressing the hazards raised in Chapter 4 (see discussion in Chapter 6). Without comprehensive legislative arrangements to underscore and support the workings of self regulation, we believe it would be difficult to implement successfully the combined strategy and address the Territory's regulatory weakness adequately. This shortcoming falls within the jurisdiction of the regulator.

Thus, we have established a mixture of controls theory that (1) recognises the important role played by other stakeholders, i.e., the state, quasi-regulators, and corporations, and (2) envisages control by the stakeholders in the formulation and implementation of a regulatory design. Moreover, we observed that while the theory is workable, the question whether it can be effectively applied in Hong Kong is to be answered by the Territory's shared commitment and responsibility towards the problem of children and mobile telephony.

10.9 CONCLUSION

We may conclude that a new regulatory framework is required. The framework should address the social objective of content protection and should have as its desired outcome, the protection of children and young people. This entails a review and consideration of the existing framework in the light of the elements we have proposed. We posit that it is meaningless if in the state's review and design of a new regulatory framework, the state fails (1) to under-

stand the rapidly evolving nature and tangibility (or intangibility) of the technological and regulatory environment, (2) to appreciate the potential hazards of new communication technologies *vis a vis* children and young people, (3) to appreciate the significant impact that the hazards can have on youngsters, and (4) to accept the restrictive nature of conventional regulatory approaches. We remark that although the state's position as the 'sole regulator' no longer holds true in the new age of digital modern communication, we firmly believe that the state does still play an important role in encouraging, facilitating, and supporting the adoption of a combined method of control. The approach should encompass both regulatory and non-regulatory instruments. Moreover, we believe the approach is viable and efficient in addressing the societal concerns of protecting children and young people from the hazards of new communication technologies.

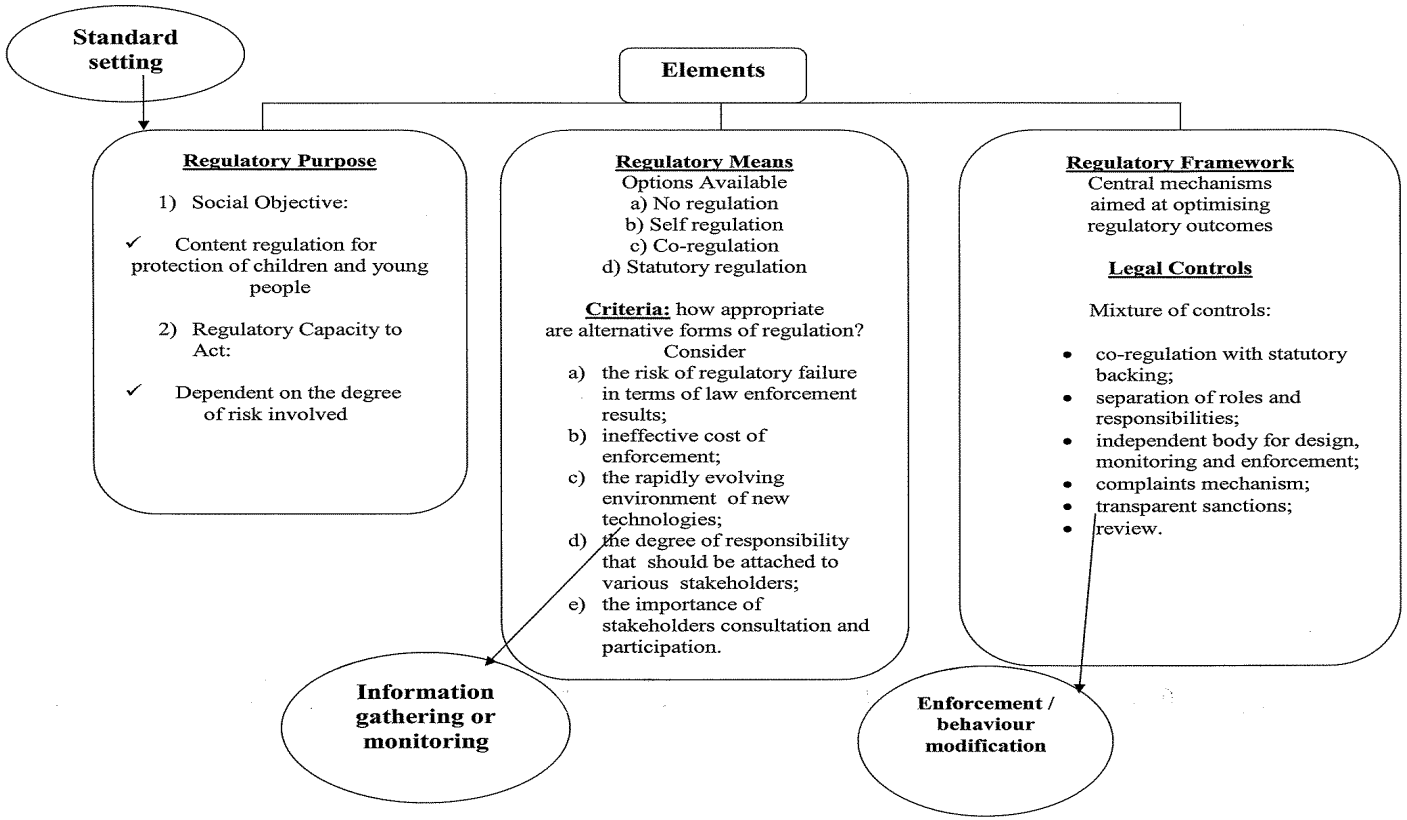

Figure 10.2: The Three Main Elements of the Legal Framework