The 'perfect storm' of REACH: charting regulatory controversy in the age of information, sustainable development, and globalization

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Abstract:

The European Union's new chemicals regulation, REACH, has been one of the most controversial pieces of legislation in EU history. Indeed, the debate over REACH is akin to a 'perfect storm' in that the intense controversy over it has been caused by three regulatory aspects of the regime. First, REACH privatizes information collection, provision and assessment. Second, REACH represents a significant application of sustainable development and in so doing, redefines the conditions on which the EU chemicals market operates. Third, REACH will inevitably have inter-jurisdictional impacts for both supranational and national legal cultures including trade law implications, REACH being a template for international initiatives, it being a policy/legal irritant in other jurisdictions, and it providing information for public and private action in other jurisdictions. A charting of these different aspects of the regime not only provides a more nuanced account of REACH but also provides a clearer understanding of the challenges of regulating environmental and health risks in an era of market globalization.

Introduction

… Looking on from the semi-detached gaze of the legal scholar, the debate over REACH is akin to a 'perfect storm'. Not only is the debate dominated by forceful views but the controversy is due to a range of different issues. Sebastian Junger popularized the concept of a 'perfect storm' in his book of the same name. He wrote: Meteorologists see perfection in strange things, and the meshing of three completely independent weather systems to form a hundred year event is one of them. (Junger 2007, 150)

Legal scholars also tend to see perfection in strange things. The perfection I see in the debate over REACH is that it epitomizes the inherent challenges involved in the shift to new risk regulatory strategies that reconfigure the role of private actors and the market in the pursuit of the goals of environmental and health protection. In particular, a study of it highlights the way in which market globalization makes that reconfiguration process a particularly polycentric one (Fuller 1978).

In light of this, the purpose of this article is to chart the controversy over REACH before it was passed into law in December 2006. I do so by replacing the polemic and apoplexy that has tended to dominate the REACH debate with a careful charting of the aspects of the REACH regime which made it so controversial. Indeed, just as Junger's perfect storm was the product of three independent weather systems, I see the controversy over REACH being due to three different independent but

interdependent regulatory aspects of it. These are: its placing the responsibility for information generation and assessment on private actors; its redefining of the conditions of entry into the market place in pursuit of sustainable development; and the fact that in an era of globalization, it has profound implications for other jurisdictions.

…**Two initial points: the controversial and culturally embedded nature of risk regulation**

In studying a regulatory regime that is concerned with the regulation of environmental and health risks, two inherent features of risk regulation must be noted from the start (Fisher 2007, Chapter 1) – that such regulation is controversial and that any regulatory regime is embedded in socio-political and legal culture. It is useful to consider these two points at some length because they highlight the impossibility of untangling chemicals regulation from wider regulatory conflict or jurisdictional culture.

The first of these points to appreciate is that chemicals regulation is inherently controversial. This is for a number of reasons but mainly due to the fact that conflicts over chemicals safety are a classic example of 'risk society' politics in that regulation gives rise to a politics fuelled not only by competing values and scientific uncertainty but also by debates over the way in which risks are distributed, managed and regulated by a state (Beck 1992 1996). A key feature of this debate has been debate over the legitimacy of regulatory institutions which have been overwhelmingly administrative in nature (Fisher 2007). These debates over legitimacy not only relate to what is an acceptable risk but also to how regulatory institutions 'frame' chemical risk problems and how they assess such risks (Rayner and Cantor 1987; Wynne 2003). As will be seen below and I have discussed elsewhere, these controversies do not dissipate when the role of the state is more marginal due to the utilization of more self-regulatory or market based strategies (Fisher 2006b).

The second feature of chemicals regulation which follows on from the above is that chemicals regulation regimes are inevitably deeply embedded in legal and sociopolitical cultures (Brickman, Jasanoff, and Iglen 1985; Royal Commission on Environmental Pollution 2003). Such regimes are part of the 'thickness' of such cultures (Fisher 2007; Geertz 1993; Renn and Elliott forthcoming) where the 'thickness' is not simply due to their being different rules but is also to do with the ideas, philosophies and modes of action in operation (Jasanoff 2005; Nelken 1995). Such 'thickness' cannot be captured in comparing the levels of formal protection in a jurisdiction or even comparing regulatory strategies, but can only be understood by studying the ideas, institutions, animating concepts and processes which operate within a particular culture. In particular, chemicals regulation raises difficult questions about the role of the administrative state (Fisher 2007).

These two features of risk regulation have been arguably overlooked in much recent comparative risk regulation literature which has tended to treat regulation in instrumental or 'outcome based' terms (Hammitt et al. 2005; Wiener and Rogers 2002). Appreciating the importance of these two points cannot be overemphasized; however, because what they highlight is that in studying a regulatory storm such as that over REACH, any analysis must be broader than law 'in the books' and its operation. It is for this reason that this article focuses on the debate over REACH rather than its final product as that debate is a means of relating the legal regime of REACH to the socio-political and legal cultures it is embedded in, and other cultures it interrelates with. As we will see below, it is

this latter process of interrelationship that is particularly significant in an era of market globalization. (pp. 541-543)

…The final set of reasons for the controversial nature of REACH is to do with how the requirements of registration regulate the market. Historically, most environmental regulation operates as a limit on market activity, 'you can do what you like but not x'. Such laws dictate what particular kinds of behavior are not allowed. In contrast, registration is operating as a precondition to market activity: without registration, a manufacturer cannot even begin to operate in the Community market. Moreover, the information requirements of registration are resulting in the production of information which is making the market work more effectively. In other words, REACH is playing a constitutive role in that it regulates who can participate in the market and on what basis they do so. As Levi-Faur notes: Regulation is both a constitutive element of capitalism (as the framework that enables markets) and the tool that moderates and socializes it (the regulation of risk). (Levi-Faur 2005) (pp. 552-553).

As noted above, most environmental laws fall into Levi-Faur's latter category but REACH is part of the former category because registration is part of the framework for a market. The significance of this is twofold.

First, REACH is a distinct departure from other techniques of environmental regulation not just because it is 'innovative' or 'market-based' but because its role is far more to do with creating the market than just regulating it. While reconstituting markets is at the heart of the sustainable development agenda, there have been relatively few examples of it actually occurring in practice. Second, REACH as a law concerned with the constituting of the market is a reminder that markets are social constructions whose existence owes much to state action (Egan 2001; Fligstein 2001). **The significance of this reminder is not particularly great in the EU where it has always been appreciated that the internal market is a creation of legal and political forces** (Egan 2001; Fligstein 2008; Fligstein and Maro-Dita 1996; Maduro 1998). It is more radical, however, in those jurisdictions where markets have tended to be understood as domains of action that exist before the state. Moreover, such reminders are reminders that both law and markets are creation of particular legal and socio-political cultures (Fligstein 2001; Nelken 1995). **Regimes such as REACH are not playing purely functional roles but are deeply embedded in ways of economic and legal thinking in a specific jurisdiction. Thus, for example, some critics of REACH have argued that it is problematic because it represents a 'socialist orientated regulatory model' that is part and parcel of a planned economy (Kogan 2005, 99)**. (pp. 553)

…**The third and most significant conclusion to be taken from this charting of the REACH storm is in relation to the inherent tension between the culturally embedded nature of regimes such as REACH and the inter-jurisdictional impact**

that they have. I say tension because this is a conflict between the cultural particularity of a regulatory regime and the strong pressure for the application of such a regime in other jurisdictions. **REACH represents a redefining of the market, an activity which is not seen as unusual in the EU because, as seen above, the market is a creation of law and the state.** Thus while REACH is radical, it is not as radical in the EU as it would be in other jurisdictions where the market is understood as being quite separate from state activity. **Much of the reaction to REACH is thus a reaction to the EU conceptions of the role of the state in the market place (Kogan 2005). This is particularly the case in the USA where the presumption is that the market does not depend for its existence on the state.** The dominant focus in recent years has thus been on whether the benefits of market interference outweigh the costs (Sunstein 2002) rather than upon how a state fashions a market. De-regulation has also been a theme (Fligstein 2008). **The problem of course is that the impact of REACH is not confined to the EU. As seen above, REACH is both a blueprint for policy reform at the global level and is an irritant for policy reform in other jurisdictions.** The point is that the irritant is not just the regulatory strategy itself but the legal and sociopolitical culture it is embedded in. (p. 556)

It is this process of transferring not just regulatory techniques but also regulatory cultures which is becoming an increasing feature of technological risk regulation. Indeed, **REACH itself encompasses US legal irritants such as risk assessment and cost/benefit analysis and the debate over its legitimacy also encompassed regulatory impact analysis** (Fisher 2006a; Wiener 2006). Examples can be seen in other areas of European regulation being grounded in US regulatory ideals, particularly with regard to regulatory impact assessment (Baldwin 2005; Radaelli 2005; Wiener 2006). As already noted, this process is not straightforward in that **a regulatory idea transferred from one jurisdiction to another is more a policy or legal 'irritant' than a straight transplant and in so being leads to often unexpected regulatory developments in other jurisdictions** (Legrand 1997; Levi-Faur 2005). The overall point is that in thinking about environmental regulation, one can neither presume the generality nor the specificity of regulatory techniques. **Legal systems are neither fully sealed off nor totally porous**. As Jasanoff and Long Martello have noted, **the globalization of the environmental agenda has led to a 'rediscovery of the local'** (Jasanoff and Long Martello 2004, 4).

The key point about these three conclusions is that they add new dimensions to thinking about technological risk regulation and its reform, particularly in an era in which *sustainable development is a dominant ideology*. In particular, they force a greater engagement with culture without necessarily negating the possibility of reform and that reform having an impact upon other jurisdictions. In other words, a study of the REACH debate leads one back to my initial starting point about **risk regulation**, that it **is controversial and** that it **is culturally embedded**. (p. 557)

… **References**

…Kogan, L. 2005. Exporting precaution: How Europe's risk free regulatory agenda threatens American free enterprise. Washington, DC: Washington Legal Foundation.
(p. 561)