Bodies and Embodiment –

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Realising A Post-Normative Legal System for a Postmodern Era?

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Biography

I currently teach contract, tort and EU law at Bournemouth University as a lecturer – a post I have held since June 2017. My PhD (completed 2016 at the University of Manchester) looked at the regulation of artificial reproductive technologies and the inclusion in legal regulation of value judgements in the selection of embryos. I looked at a rational choice approach to determining reform of regulation. However, I have since come to the view that such an approach is too limited. I have therefore begun to look at an alternative way of constructing law. I am currently looking at an approach that is based upon the idea of value systems as inter-subjectively constructed but not objectively justified and how legal regulation of the body might be reformed in line with this view. This may enable the law to respond more to an increasingly heterogeneous society but could remove the normative authority of law.

Key words

Law

Body

Post-normative

Regulation

Abstract

The legal regulation of individual bodies requires a broad regulatory rethink due to moral error theory, postmodernism and pragmatism. Currently the law of England and Wales regulates and proscribes bodies in a number of ways. For example, criminal law governs consent to modification practices and medical procedures, medical notions of the ‘healthy’ body inform surgical practice, the Gender Recognition Act 2004 regulates gender recognition prescribing the permitted genders and how to access them and reproductive decision-making occurs under a watchful regulatory eye (both artificial and ‘natural’ reproduction. Moral error theory, postmodernism and pragmatism suggest a post-normative perspective that is anti-foundationalist, anti-representationalist and anti-essentialist. Thus a sceptical metaethics would deny that legal systems are justified in imposing limitations on what are acceptable body-related practices on the basis that they are true normative principles. Such a sceptical metaethics would require that the law renounce its claim to regulate acceptable/permitted bodies opening up space for self-constituted embodiment. This rethink would not mean that protections are not possible – indeed it may make it easier to protect decision-making by protecting agency rather than normative principles. But by removing the unjustified normative prescriptive restrictions about bodies and refocusing legal attention on the freedom of agents the law can empower people living by their own personal normative standards. In the absence of foundational normative claims, agency becomes paramount for there are no justified normative restrictions on the exercise of agency. This makes agency an issue of pragmatism and politics which could form the basis of a reorientation of legal regulation of the body. Three main areas of bodily regulation will be considered here; criminal law, medical law and gender identity/recognition. An analysis of these areas under a post-normative legal perspective will be offered with an indication of potential changes in regulation resulting from this framework. A post-normative legal approach to the body would need to adopt a sceptical metaethical perspective to justify its meditative role between different value-systems and justify the enforcement of its decisions. This would be a radical shift from the perception of law as a source of normative authority.