

CASE COMMENT: R V R [1991]**Sanket Keshav*****INTRODUCTION**

The common law is a body of law that evolves from precedents, which are the decisions held by the courts of law in similar matters. The earliest origin of common law dates back to the 11th century. It emerged in England and consequently also applied within British colonies.¹ It differs from the other major legal system, civil law, which relies primarily on written codes and statutes. The benefit of the common law system is its flexibility and adaptability to unforeseen societal changes. In such systems, changes in statutes and codes are not required to be passed by lawmakers, which can be a lengthy and time-consuming process. Instead, higher courts have the ability to overrule prior decisions as “bad law” without waiting for lawmakers to take action. This is in contrast to civil law systems.²

The United Kingdom has an unwritten constitution, meaning there is no single document that governs the individual citizens. The constitutional conventions play a critical role. They are unwritten and are binding upon the operators of the constitution but are unenforced by the courts. These do not require a procedure in order to be created.³ As such, the common law is flexible and can adapt to societal changes much easier than the other legal systems. The case of R v R [1991]⁴ is one of the best examples of the aforementioned feature and shows how India, which shares the Common Law roots, can also have a similar impact.

FACTS OF THE CASE

The defendant and the complainant were married in August 1984. On 11th November 1987, they separated for two weeks but returned back after the period. However, their marriage did not work out and the complainant moved out with her son to live with her parents in October

*LLB, FIRST YEAR, UNIVERSITY OF BRISTOL, ENGLAND.

¹ ‘The Common Law And Civil Law Traditions’ (Berkeley Law Review) <<https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivillawTraditions.pdf>> accessed August 22, 2023

² ‘Common law: Defining what it is and what you need to know’ (Thomson Reuters, 15 November 2022) <<https://legal.thomsonreuters.com/en/insights/articles/what-is-common-law>> accessed August 22, 2023

³ Professor Suzanne Rab and Serle Court, ‘Legal Systems in the UK (England and Wales): Overview’ (Thomas Reuters) <[https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=\(sc.Default\)#:~:text=Within%20the%20English%20common%20law,precedent%20for%20the%20lower%20courts.](https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=(sc.Default)#:~:text=Within%20the%20English%20common%20law,precedent%20for%20the%20lower%20courts.)> accessed August 22, 2023

⁴ R v R [1991] UKHL 12

1989. At the time of the incident on 12th November 1989, they were separated but not legally divorced. The defendant broke into the complainant's parents' home who were out at the time, and attempted to have non-consensual sexual intercourse with her. In the course of this, he also assaulted her by squeezing her neck with both hands. He was charged with attempted rape under s1(1) of the Sexual Offences (Amendment) Act 1976 and with assault occasioning actual bodily harm under s47 Offences Against the Person Act 1861. The defendant was sentenced to three years in prison for attempted rape and an additional 18 months for assault, to be served concurrently. He then appealed his conviction on the grounds that the judge's ruling was incorrect.

LEGAL ISSUES

- Is a husband criminally liable for raping his wife?
- Does the long-supposed principle under the Common Law still stand?

The appellant appealed to the Court of Appeal against s1(1) of the Sexual Offences (Amendment) Act 1976 on the grounds that the husband cannot be guilty of rape committed by himself upon his lawful wife in a contract which has not been revoked by the court or by an agreement between the parties under the common law of England.

OBSERVATION OF THE COURT

Journal of Legal Research and Juridical Sciences

Sir Matthew Hale had written about the mutual matrimonial consent and contract that the wife has given up herself unto her husband.⁵ This was published in 1736. He had also written about how a husband could not be guilty of rape upon his lawful wife. The same notion was adopted in multiple cases such as *Popkin v. Popkin* (1794), *Pleading and Evidence in Criminal Cases* (1822), etc.⁶

The idea that husbands have absolute power over their wives has been around for a long time. This may help to explain why the statement that a husband cannot be guilty of raping his wife was accepted as an enduring principle of the common law. In other words, the common law reflects the historical belief that husbands have complete control over their wives, including

⁵ *History of the Pleas of the Crown* (1736), vol. 1, ch. 58, para 629

⁶ *R. v R* [1991] UKHL 12 (Bailii.org, 23 October 1991)

<<https://www.bailii.org/uk/cases/UKHL/1991/12.html>> accessed 24 August 2023

their bodies. This belief made it difficult to see how a husband could commit rape against his wife since she was considered to be his property.

The first change came in the case of *Reg. v. Clarence* (1888)⁷ where it was mentioned that if the intercourse constituted an assault on the part of the man, then it must be rape. As such, the effect of Hale's proposition was reversed.

The court discusses three possible solutions to the question of whether a husband can be criminally liable for raping his wife. The first solution called the "literal solution," argues that the Act of 1976, which defines rape and includes the word "unlawful," preserves the husband's immunity. The second solution called the "compromise solution," suggests that the word "unlawful" should be interpreted in a way that allows for exceptions to the husband's immunity. The third solution, called the "radical solution," argues that Hale's proposition, which is based on fiction and is inconsistent with modern relationships between husband and wife, should be rejected. This solution suggests that a husband should be punished for treating his wife with violence in the course of rape.

The court ultimately observed that the idea of what Hale had meant is not acceptable anymore and can never have been anything but fiction. The court's duty is to take steps towards societal advancements and what had initially been thought of as the position of women in society, no longer represents the then present-day scenario.

VERDICT

The Court (Lord Lane C.J., Sir Stephen Brown P., Watkins, Neill and Russell L.JJ.) dismissed the appeal. Such a concept of irrevocable consent of a wife to her husband was unacceptable in modern times and the demands of changing society had to be taken in mind. The ambit of the word 'unlawful' was broad enough to include marital rape under the alleged Sexual Offences (Amendment) Act 1976.⁸ In modern times, the court declared, the supposed marital exception in rape forms no part of the law of England.

⁷ All Answers ltd, 'R v Clarence' (Lawteacher.net, August 2023) <<https://www.lawteacher.net/cases/r-v-clarence.php?vref=1>> accessed 24 August 2023

⁸ Sexual Offences (Amendment) Act 1976

CONCLUSION

In the Indian legal system, Section 375 of the Indian Penal Code (IPC) criminalises the offence of rape. However, much like in the U.K. before the landmark case of *R v. R*, there is an exception in the Indian laws for "sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age."⁹ Such archaic exclusion takes away the bodily autonomy of a married woman and infringes upon her right to life and freedom of choice by presupposing consent.¹⁰

R v. R showed how the common law can be used to overcome such archaic barriers and *impose fairness in the law*, as laid down in the landmark Indian case of *Maneka Gandhi v. Union of India*, 1979.¹¹

In the United States as well, marital rape has been illegal since 1976 and is now punishable in every state.¹²

There is no doubt whatsoever that India should move on from this archaic concept. Other nations, in particular the United Kingdom, with which India shares historical common law roots, have done away with it for good. Marital rape has an irreversible impact on the victims¹³ and should be treated in much the same manner as rape in any other form.

⁹ Indian Penal Code 1860, s 375

¹⁰ Swarati Sabhapandit, 'Criminalising Marital Rape in India' (The India Forum, 31 July 2023) <<https://www.theindiaforum.in/law/criminalising-marital-rape-india>> accessed August 25 2023

¹¹ *Maneka Gandhi v Union of India* (1978) AIR 1978 SC 597

¹² Rebecca Pirus, 'Marital Rape Laws' (Criminal Defines Lawyer, 12 October 2022) <<https://www.criminaldefenselawyer.com/marital-rape-laws.html>> accessed August 25 2023

¹³ Agarwal N, Abdalla SM and Cohen GH, 'Marital rape and its impact on the mental health of women in India: A systematic review' (PLOS Glob Public Health, 21 June 2022) <<https://doi.org/10.1371/journal.pgph.0000601>> accessed August 25 2023