Marital Rape: The Advantages And Disadvantages Of The Judge-Made Law

In this essay, we will be introducing marital rape, we are going to look at one article of Marianne giles which talks about the judicial law making in the criminal courts, and we will evaluate it using cases and scenarios. In addition, we will also, outline the advantages and disadvantages of the judge-made law.

Firstly, marital rape is a form of sexual assault under the UK law in breach of the sexual offences Act 2003. The offence happens when an individual commits a sexual act without the will of their wives or even their ex-wives, or against their will. Marital rape will also be considered as a form of family assault and may also include declarations of assault or that the accused has acted in a controlling and compulsory manner. Now, before 1992, forced sexual activity within a marriage was not illegal, as the wife had already provided their continuous will through the contract of marriage [1]. The article by Marianne, considers the recent case law and suggests that the courts have gone far away from their bounds of their law-making powers. Now, both the law commission and the courts have come to an agreement that even if they are married the husband can still be charged for rape. Nevertheless, even though these two parties agreed, there were also some exceptions. For instance, before the 1976 Act, Geoffrey lane L.J stated that there was no doubt about the principle that a man cannot be guilty of raping his wife. In the case of R v R, for example, the facts are that the husband was indicated that he wanted a divorce but a little time later, he broke into the parent's home and attempted to sexually assault his wife without her consent, using force and causing actual bodily harm[2]. The decision in this case fits uneasily within the explanation of the judge's role given by lord Simon in Knuller. Lord chief justice, decided in the court of appeal, that a husband can be found guilty of raping his wife. House of Lords decision was quite similar to the court of appeal. The house of lords, here is openly declaring a correction in the common law and it is a change which will result in the prosecution and judgement of men who were far away from the reach of the criminal law, in this subject. Lord keith, brings together the common law developments and the significance of the 1976 statute. It is unclear, from his discussion of illegitimacy, and of the common law position, whether Lord Keith is saying that the common law had developed and changed prior to the 1976 Act, or whether he is saying that the Act itself put an end to the exception. Issues between unlawfulness and consent cannot be separated. The exceptions are based on the situations where the wife has legally withdrawn consent, then the intercourse is no longer lawful [3].

Secondly, judicial precedent is a reigning or legal case law that establishes a rule or principle that courts and other bodies of the justice system can apply when deciding a similar or following case. We are going to look at some advantages and disadvantages.

First things first, judicial-made law creates a system which focuses on fairness. We need judges to follow judicial precedent because when the law is compatible, then it gives future victims a chance for protection. In addition, judicial precedent offers the legal system access to compatibility and predictability. The goal of any justice system should be to create a level of legal fairness throughout society. By providing value to the concept, of judicial precedent, then there is an element of consistency and equality that everyone can rely on when there is an issue that they face personally or professionally in court. Judicial precedent also offers flexibility.

It may create a level that applies to similar cases and situations, but it is not an unbreakable result. This system creates a series of checks and balances which influences other departments of government to serve and protect the population in the best possible way every time.

On the other hand, people may not agree on what the judicial precedent actually is in a case. There is no guarantee that another judge will see the law in the same way that another judge could see. There can be differing opinions on what the actual purpose of a regulation happens to be, creating a measure of doubt that can never be resolved until the next court order is issued. Furthermore, it forces the justice system to look backwards instead of looking towards the future. A judicial precedent must always be looking backwards for it to create a quality in the first place. If someone, for example, finds themselves breach a rule based on what a judge has said in the past, that it creates an unfair system of justice because the offence comes from the judgement instead of legislation. That is why a system of statutory laws that always looks for future acts is usually considered to have a more fair and reasonable system of justice. Moreover, this process can introduce unnecessary reduction into the law. Judges can rule on specific cases in ways that a legislative body would never count on. Although it is necessary for legal systems to stay up-to-date with the changing circumstances in society, this disadvantage often makes it difficult, for judges to develop the legal belief that is necessary to provide a reasonable outcome. This states that judges rely on previous decisions which may not apply under the current circumstance [4].

In order to sum up, we have evaluated the statement of Marianne, we have used cases and declarations from other judges, we have also talked about the advantages and disadvantages of the judicial precedent. so, based on the information that we collected and examined, we can establish that judge-made law is objectionable in point of principle as means of law reform.