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Marital Rape: The Past and Present Discussions

By Pastor Cedric Moss

Executive Summary

After an eight-year hiatus, the national discussion on marital rape has resumed. Once again, we are being reminded that forced sexual intercourse in marriage remains a sad reality. It is regrettable, therefore, that the 2009 discussion did not result in any legal provision to provide protection against sexual abuse in marriage and to punish those who perpetrate such abuse. We now have another opportunity. It is my hope that this current discussion will allow for reasoned and civil discourse that will result in the passage of commonsense laws to protect against spousal sexual abuse without undermining the institution of marriage.

My purpose for publishing this paper is twofold. First, I wish to contribute to the current discussion by reviewing the 2009 attempt to criminalize forced sexual intercourse in marriage and sharing why I believe that attempt failed. I believe a failure to appreciate what happened in 2009 will likely result in the commission of the same or similar mistakes. Second, I wish to contribute to the current discussion by restating my views on spousal sexual abuse, which I publicly espoused in 2009. I trust both the review and restatement are helpful.

Proposed Recommendations

This paper concludes with the following recommendations, albeit in a more detailed fashion:

1. The government should pass legislation to make forced sexual intercourse in non-estranged marriages a crime.

2. The punishment for forced sexual intercourse in marriage should range up to life in prison to cover heinous acts.

3. Complainants in cases of forced sexual intercourse in marriage should not be allowed to drop the charge.

4. It should be made an offence for a spouse to fabricate an allegation of forced sexual intercourse in marriage.

While it is a reality that men are sometimes subjected to acts of forced sexual intercourse by women, it is generally accepted that men are the predominant perpetrators of forced sexual intercourse, and women are the predominant victims. Therefore, this paper discusses the issue of forced sexual intercourse in marriage with the view that husbands are primarily the perpetrators, and wives are primarily the victims.

The Background

Before engaging in the current discussion, it is important that we revisit and understand the 2009 proposed amendments (hereafter referred to as "the proposed amendments") to the Sexual Offences and Domestic Violence Act (hereafter referred to as "the Sexual Offences Act") and consider why they failed.

In 2009, there was overwhelming agreement in all sectors of society that forced sexual intercourse in marriage is wrong and that it should be made a crime and punished. However, there was fierce division over how the same should be legislated.

The First Proposed Amendment

The Ingraham administration proposed to prohibit and punish forced sexual intercourse in marriage under the existing legislation for rape (Section 3 of the Sexual Offences Act). It proposed to do so by deleting the words "who is not his spouse" from Section 3 of the Sexual Offences Act, which defines rape as follows:

> **"3.** Rape is the act of any person not under fourteen years of age having sexual intercourse with another person **who is not his spouse**-
>
> (a) without the consent of that other person;
>
> (b) without consent which has been extorted by threats or fear of bodily harm;
>
> (c) with consent obtained by personating the spouse of that other person; or
>
> (d) with consent obtained by false and fraudulent representations as to the nature and quality of the act" (emphasis added).

Currently, those five words, "who is not his spouse," make it legally impossible for rape to occur in marriage. However, once those five words are removed, any and all sexual intercourse (including sexual intercourse in marriage) for which consent was not obtained would be defined as rape.

What made this proposed amendment especially troubling for me and many other members of the clergy and wider society is that, coupled with the definition of sexual intercourse in Section 4 of the Sexual Offences Act, it would have rendered as rape a very wide range of sexual acts for which consent was not obtained, even if there was no force, threat, or fear of bodily harm involved. Here is how sexual intercourse is defined in Section 4 of the Sexual Offences Act:

> **"4.** For the purposes of this Act, 'sexual intercourse' includes-
> (a) sexual connection occasioned by **any degree** of penetration of the vagina of any person or anus of any person, or by the stimulation of the vulva of any person or anus of any person, by or with-

(i) **any part** of the body of another person; or

(ii) any object used by another person,

except where the penetration or stimulation is carried out for proper medical purposes; and

(b) sexual connection occasioned by the introduction of any part of the penis of any person into the mouth of another person,
and any reference in this Act to the act of having sexual intercourse includes a reference to **any stage or continuation** of that act" (emphasis added).

That's a very broad definition of sexual intercourse, especially the last part, which reads: *"and any reference in this Act to the act of having sexual intercourse includes a reference to **any stage or continuation of that act**."*

As it currently stands, Section 3 of the Sexual Offences Act applies to unmarried people. And bearing in mind the definition of sexual intercourse in Section 4, it means that consent to sexual intercourse between two unmarried persons is NOT absolute; it is subject to withdrawal at a moment's notice and at any stage in any act of sexual intercourse. Therefore, from the moment of sexual contact up to the split second before climax, a woman who initially gave consent to sexual intercourse can withdraw her consent and tell the man to stop. If he does not, according to Section 3 of the Sexual Offences Act, he commits the offence of rape (even if his act of rape is never reported or if he is not convicted, if charged with that offence). And it makes absolute sense to have such a law to govern sexual intercourse between two unmarried persons because, unlike married people, unmarried persons have no marriage covenant or contract that implies open-ended sexual consent; therefore, specific moment by moment consent is required between them.

However, would it be reasonable to place married couples under such definitions of rape and sexual intercourse whereby moment by moment consent is required for every stage of every act of sexual intercourse (as was intended in the proposed amendment in 2009)? Is it reasonable that a married man who cohabits with his wife should have his initiation of any and

all acts of sexual intercourse with his wife subjected to Sections 3 and 4 of the Sexual Offences Act and have them defined as rape if he did not obtain consent for such initiation? Clearly, the answer to both questions is a resounding no. Now let me hasten to say that I'm not talking about forcing one's self on a spouse where it is clear that there is no consent; that's wrong, and it should be punishable by law, if it can be proven. Instead, what I'm talking about is spontaneous initiatory sexual actions by spouses in marriage that might be met with a refusal after such initiatory actions have already taken place.

For example: A man comes home, his wife is dressed for bed, and he embraces her, and, while doing so, he touches her in an intimate way in the area of her vulva or vagina (defined as sexual intercourse in Section 4 of the Sexual Offenses Act). If she tells him she is not in the mood and he stops, he would have already committed the offence of rape if the proposed amendment had passed in 2009. Such is the case because the offence is committed as and when the prohibited act takes place, even if the act is not reported to the police.

Here's another example: A husband arrives home and meets his wife asleep. He joins her in bed and is desirous of having sex. He gently uses his fingers to stimulate her vulva (which is defined as sexual intercourse by Section 4 of the Sexual Offences Act), hoping she would respond and get up. However, she is fast asleep and does not respond. So, he rolls over and goes to sleep. If the proposed amendment had passed in 2009, that conduct by the husband would be defined as rape. And not even 'marital rape', it would be defined as rape.

Here is further example where a wife who takes sexual initiative without the consent of her husband would be defined as a rapist under the proposed amendment of 2009. A husband is lying in bed, and his wife decides to take sexual initiative, and, without his consent, puts her mouth on his penis (ANY PART, according to section 4 is defined as sexual intercourse). If her husband is tired and not in the mood and pushes her away, she would have already committed the offence of rape based on Section 3 of the Sexual Offenses Act.

I can go on with examples, but I believe the point is sufficiently clear: While the law should require a man to obtain consent for any and all acts of sexual intercourse with a woman to whom he is not married (as Section 3 of the Sexual Offences Act requires), such should not be the case with a married man who cohabits with his wife, so long as there is no force, threat, or fear of bodily harm involved.

I and others repeatedly registered our opposition to the proposed amendment to Section 3 of the Sexual Offences Act and proposed that forced sexual intercourse be covered otherwise. Our suggestions were ignored, and in the end, the proposed amendment was abandoned.

The Second Proposed Amendment

Second, it was being proposed to amend the Sexual Offences Act to increase the time limit in which summary offences must be brought from 6 months to 2 years. This proposed amendment was an excellent one because it would have given more time for charges to be brought in cases like where adult men have sex with minor girls. There was no objection to this proposed amendment, so it is regrettable that the Ingraham administration allowed it to die together with the ill-advised attempt to try to govern sexual intercourse in marriage a law that was written to prohibit rape between unmarried people.

The Third Proposed Amendment

Third, and finally, a wholesale repeal of Section 15 of the Sexual Offences Act was being proposed. In a nutshell, Section 15 says that any person who has sexual intercourse with his spouse without the consent of that spouse where their marriage is in some form of legal separation or dissolution is guilty of the offence of **sexual assault by spouse**. In essence, what Section 15 does is it puts a distinction between estranged marriages (where sexual consent is deemed to have been suspended by virtue of the marriage being in state of legal separation or dissolution), and non-estranged marriages (where sexual consent is deemed to be continuing).

In the proposed repeal of Section 15 existed a fatal flaw because it sought to remove the explicit protection of Section 15 that is currently enjoyed by wives in estranged marriages and place them under a general protection from rape under Section 3. But the continuation of Section 15 is important because women whose marriages are in separation or dissolution should have special, explicit legal protection against unwanted sexual acts from their estranged spouse because their marriage is in state or suspension or termination and so is their previously implied sexual consent.

Breaking the House Down

In 2009, I described the government's attempt to criminalize forced sexual intercourse in non-estranged marriage as trying to break down the whole house [the existing laws governing forced sexual intercourse between unmarried persons (Section 3) and estranged married persons (Section 15) to make one big room to govern all acts of forced sexual intercourse between all people, unmarried and married]. And it made absolutely no sense. And I proposed that we leave the existing house (Sections 3 and 15) and simply add one room to cover forced sexual intercourse between married persons whose marriages are not covered by existing law? And at the time I proposed that Section 15 could even be appropriately expanded to include non-estranged marriages (as Attorney General Carl Bethel has recently indicated the likely approach will be).

Why the Amendments Failed

So why did the amendments fail? I'll offer three main reasons. First and foremost, it is my view that the 2009 amendments pertaining to criminalizing forced sexual intercourse in marriage failed because the framers, knowingly or unknowingly, sought to treat in the same manner sexual conduct between married persons and unmarried persons. They wanted a husband to relate to his wife sexually in the exact same manner as a man should relate to a woman to whom he is not married (i.e., cover every act of sexual intercourse with consent, otherwise it is rape). Those who have a high view of marriage according to God's word and who understood

this to be the effect of the proposed amendment to Section 3 of the Sexual Offences Act, could not and did not lend support to such a proposition.

It is hoped that this time around any proposal to criminalize and punish forced sexual intercourse in non-estranged marriages will take into account the fact that sexual intercourse is sometimes initiated in marriage without prior consent and such initiation is both morally and legally right. It only becomes wrong when there is continuation against the will of a spouse, and that violation of the will of a spouse and whatever force is involved should be punished.

Second, the amendments failed because the national discussion was poorly led by the Ingraham administration. In my view, there was a failure to listen objectively and lead opposing sides in civil discourse and debate. Also, in my view, the individual charged with governmental responsibility for engaging the public on the proposed amendments failed to realize that there was widespread support for criminalizing and punishing forced sexual intercourse in marriage, even though the proposed approach was being opposed by many. Therefore, instead of harnessing that widespread support and working towards acceptable legislation to criminalize forced sexual intercourse in marriage, the national discussion was allowed to take on a life of its own.

Almost on a daily basis, many with opposing views vilified and attacked each other on talk shows and in newspapers. In my view, the vilification and attacks especially came from those who supported the proposed amendments that would have defined as rape any and all sexual intercourse in marriage for which consent was not obtained. I personally experienced vilification and personal attacks simply because I maintained that there is a difference between forced sexual intercourse outside of marriage (rape) and forced sexual intercourse in marriage (spousal sexual abuse) and that there should be separate laws to cover them.

Third, many activists for women's rights (without and within the church) seemed more focused on propagating a feminist ideology than truly working to find common ground to pass an

amendment to the Sexual Offences Act that would have protected wives from forced sexual intercourse in non-estranged marriages. They seemed more concerned with lecturing men on the equality of women and stressing that a husband should explicitly seek his wife's prior consent for every act of sexual intercourse than working constructively to pass a law to criminalize forced sexual intercourse in marriage. Also, it was surprising to me that these activists seemed to be more fixated on ensuring that forced sexual intercourse in marriage is called rape rather than trying to ensure that a law was passed that prohibited forced sexual intercourse in non-estranged marriages.

Sadly, in the current discussion we are already seeing some of the same individuals who engaged in ideas-bullying in the 2009 discussion continue to bully those who differ from them in their views about forced sexual intercourse in marriage. For example, some of them have attacked Minister of Social Services Lanisha Rolle because she expressed her view that forced sexual intercourse in marriage is a private matter. But that's not all that she said. In a December 19, 2017 interview with the Nassau Guardian, when asked her views on marital rape, Minister Rolle said, *"Well certainly we do not support any form of violence against women. That is the stance the country has taken. Certainly, I am one that supports that. In relation to marital rape, I've always said it is an issue that is private. It can become public, but we want to start where marriage is sacred and marriage is private, and so if we are going to legislate any type of law to affect marital couples and relationships between those parties, it is proper to have a conversation with the wider community to get their perspective on how they feel about it."*

Overall, Minister Rolle's statement is measured and balanced, and she said two very important things which her critics ignored as they berated and bullied her and called for her resignation. First, she said she does not support any form of violence against women. On that point, she and her critics share common ground, but they ignored it. Second, Minister Rolle said that she believes that if government is going to pass legislation to affect married couples, it is proper to consult with the wider community to get their views on it. I would hope that Minister Rolle's

critics similarly support a consultative approach so that all interested parties might make their views known on any proposed legislation.

I raise this incident of how Minister Rolle was unjustifiably attacked because it is a classic example of the kind of caustic discourse that typified the failed attempt to pass legislation to criminalize forced sexual intercourse in marriage in 2009. My prayer is that we will not have a repeat of 2009 and that we will collectively engage in civil and reasoned discourse. That's the only way that we will be discuss this complex matter in a constructive manner and, hopefully, arrive at a place of consensus to provide spouses with legal protection from forced sexual intercourse.

Legislative Considerations

Having acknowledged that forced sexual intercourse in the context of a non-estranged marriage is wrong, how do we legislate to punish it? First of all, as already noted, we must be careful to recognize that in marriages that are not affected by some kind of legal order of separation or dissolution, it is the act of force, threat, or fear of bodily harm that is to be punished, and not the act of sexual intercourse (excluding unconventional sexual intercourse), because sexual intercourse is normal and expected in non-estranged marriages.

Therefore, what is needed is a specific amendment to punish forced sexual intercourse in marriage based on evidential proof of force, threat, or fear of bodily harm. A logical Section of the Sexual Offences Act for such an amendment is Section 15, which already deals with non-consensual intercourse in certain estranged marriages.

Bearing in mind the broad definition of sexual intercourse in Section 4, sexual intercourse should only be deemed to be non-consensual in a non-estranged marriage where it is accompanied by force, threat, or fear of bodily harm, or where non-consent is communicated after sexual intercourse has been initiated without prior consent and the offending spouse ignores the communication of non-consent and continues sexual intercourse. However, any

proposed law should not seek to criminalize initiating sexual intercourse in non-estranged marriages for which prior consent was not obtained, except where the nature of the act of sexual intercourse is such that a reasonable spouse would object to it.

To be clear, if a spouse in a non-estranged marriage alleges that sexual intercourse was forced, there would have to be much more than a naked allegation in order for a charge to be brought.

If there are no credible witnesses or corroborating evidence to prove forced sexual intercourse, I believe conviction should be expressly prohibited in language similar to that in Section 9 of the Sexual Offences Act, which refers to two other sexual crimes and reads as follows: “No person shall be convicted of an offence under Section 7 or 8(1) upon the evidence of one witness unless such evidence be corroborated in some material particular by evidence implicating the accused person.” However, where force, threat, or fear of bodily harm is proven in conjunction with non-consensual sexual intercourse, the punishment should fit the force, threat or fear of bodily harm and the nature of the sexual intercourse.

The nature of sexual relations being what they are in non-estranged marriages, it will be virtually impossible to prove forced sexual intercourse where there is evidence that sexual intercourse took place but there are no witnesses and no evidence of force, threat, or fear of bodily harm. It will be indistinguishable from consensual sexual intercourse. Thus, it is accepted that some acts of forced sexual intercourse will not be captured for prosecution. However, it is still important to have a law that criminalizes forced sexual intercourse in marriage because it communicates a societal value that such conduct is unacceptable and will hopefully serve as a deterrent to some degree.

In cases where the act of forced sexual intercourse cannot be supported with the necessary evidence in order to bring a charge, some legal remedy options available to a complainant are: protection under the Domestic Violence (Protection Orders) Act, a legal separation, or a divorce.

In the final analysis, I reiterate that any proposed amendment that is seen to be undermining the institution of marriage or will result in criminalizing normal sexual conduct in non-estranged marriages will be met with the same strong opposition as was the case in 2009. It is important that a high view of marriage is upheld.

Naming the Offence

What should forced sexual intercourse in marriage be called? There are some who insist on calling all acts of forced sexual intercourse "rape," whether they take place inside or outside of marriage. In my view, such an approach is unhelpful and misleading because it departs from the entrenched practice of naming the offence to describe the crime. The name of the offence needs to describe the crime, not confuse the crime.

For example, there are many different names that we give to unlawfully taking the property of others to help us understand the nature of the deprivation of property (e.g., armed robbery, stealing by reason of employment, shoplifting, receiving, fraud, and the list goes on.) Suppose we only had one description for the crime of depriving others of their property, and that word was "stealing"? In such a scenario, a police record that shows a conviction for "stealing" would be meaningless because we would not be able to tell the armed robber from the shoplifter, or the person who stole by receiving from the one who stole by reason of employment.

In a similar vein, I believe that it is right to distinguish between an act of forced sexual intercourse perpetrated on a woman by a man to whom she is not married ("rape") and an act of forced sexual intercourse perpetrated on a wife by her husband with whom she cohabits ("spousal sexual abuse"). Again, in the case of rape, both the sexual intercourse and the lack of consent are to be punished, but in the case of spousal sexual abuse, only the provable lack of consent through force, threat, or fear of bodily harm is to be punished, not the sexual intercourse.

Therefore, if the government moves ahead to criminalize provable forced sexual intercourse within non-estranged marriages, which I believe should be done, I believe the offence should be called something like “spousal sexual abuse” (and “aggravated spousal sexual abuse” that would cover cases where battery and/or sadistic treatment are involved). After all, under Section 15, a person who has non-consensual sexual intercourse with his spouse in marriage that is in some form of legal separation or dissolution is guilty of the offence of sexual assault by spouse.

In considering forced sexual intercourse in marriage, the issue of indecent assault, covered by Section 17 of the Sexual Offences Act arises. It seems to me if the Sexual Offences Act is amended to criminalize forced sexual intercourse in marriage, indecent assault will become a possibility in marriage. In other words, a prosecutor could determine that there is no evidence for rape, but there is evidence for indecent assault. In the process of the current discussion, the Attorney General should speak to this.

Determining the Punishment

In determining what punishment should be meted out for forced sexual intercourse in non-estranged marriages, the generally accepted principle that the punishment should fit the crime should prevail. Therefore, bearing in mind that by their very nature some acts of forced sexual intercourse in marriage are heinous and include battery and sadistic treatment, it is my firm conviction that the range of punishment should extend up to life in prison.

It is also my view that the punishment for the offence of sexual assault by spouse under Section 15 should be increased to up to life in prison.

Concluding Recommendations

In light of the foregoing, here are my recommendations to address forced sexual intercourse in marriage:

1. Pass an amendment within the Sexual Offences Act that explicitly makes forced sexual intercourse in non-estranged marriages a crime which can only be prosecuted in cases of provable force, threat, or fear of bodily harm, or where expressed non-consent is ignored. The offence should be called something like “spousal sexual abuse.” In addition, the proposed amendment should demonstrate an appreciation for normal sexual conduct in non-estranged marriages for which prior consent is not normally sought. Section 3 of the Sexual Offences Act should not be amended.

   The proposed amendment should state that if there are no credible witnesses or corroborating evidence to prove forced sexual intercourse, conviction should be expressly prohibited using language similar to that in Section 9 of the Sexual Offences Act.

   This amendment should require the Attorney General’s consent to charge in cases where the accused person is under 21 years of age.

2. Where a charge of forced sexual intercourse is brought against a spouse, the complainant should be compelled to testify in order to remove any incentive for coercion against the complainant to withdraw the charge. The potential for future and more severe spousal sexual abuse is a real possibility, so the complainant should not be allowed to withdraw the charge. In the public interest of protecting against forced sexual intercourse in marriage, the charge should not be dropped.

   However, if for whatever reason the government deems it inappropriate to compel a spouse to testify in such cases, the law should require the matter to continue if there is standalone credible evidence to support the charge without the cooperation of the complainant.

3. The punishment for forced sexual intercourse in marriage should range from mandatory counseling up to life in prison to cover for some of the heinous acts of forced sexual intercourse that sometimes occur in marriage.

   The punishment for the offence of sexual assault by spouse under Section 15 should be increased to up to life in prison.

4. Where evidence exists that a spouse fabricated an allegation of forced sexual intercourse, he or she should be charged with an offence that carries a punishment that communicates the seriousness of such an act of fabrication.

Conclusion and Special Appeal

The discussion of forced sexual intercourse in marriage is a stark reminder to us that we are fallen people living in a fallen world. This is so evident when we consider that the relationship between a husband and his wife is supposed to be the highest expression of human love and mutual care. Marriage is a picture of the relationship between Christ and the Church, yet it is a context where some spouses (especially wives) have experienced great abuse. Therefore, this national discussion should also serve as a reminder to husbands that they have a divine duty to love and care for their wives. If a wife does not desire sexual intercourse, it is wrong under any and all circumstances to override her will and force upon her that which she does not desire. This discussion, should also serve as a reminder that abuse, be it sexual or otherwise, and whether in or out of marriage, will not be tolerated.

As was the case in the 2009 discussion, people will fall on opposite sides of this important issue. And many good people will differ. Therefore, we should not vilify or condemn others simply because they don't share our view. If this national discussion is going to benefit us and help us to hold a high view of marriage and family life, I believe that charitable and civil discourse is necessary. May the Lord help us toward that end.

Cedric Moss serves as Senior Pastor of Kingdom Life Church. Comments may be sent to him at cmoss@kingdom-life.org. Copies of this paper may be obtained at www.kingdom-life.org.