Fighting Domestic Violence - Denmark

5. Prosecutorial considerations

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# 5.1 Police procedures

# 5.1.1 When do the police get involved in domestic disputes or legal actions?

According to Chapter 2, Section 10 of the *Bekendtgørelse af lov om politiets virksomhed*, the police must take care of a person who is unable to take care of themselves due to helplessness, in general, or a person who is in circumstances that pose a danger to that person or others. This shows that the police must intervene in domestic violence cases.

The police must investigate the matter. This includes questioning suspects, victims and witnesses. If the police suspects that a crime has been committed, charges may be brought against the perpetrator.

Furthermore, according to Section 741b of the Danish Administration of Justice Act (*Bekendtgørelse af lov om rettens pleje*) ("**Act**"), the police must advise the victim of their right to legal aid during the trial.

According to Chapter 2, Section 2, note 3 of the *Bekendtgørelse af lov om politiets virksomhed*, the police have an obligation to end, investigate and prosecute crimes. Their primary task is to ensure public safety. Therefore, they need to act on reported crimes, suspected crimes, tips they receive on crimes, etc.

# 5.1.2 What circumstances effect law firm involvement?

Simply, the victim must decide whether a law firm should be involved. Generally, a subject hires an attorney for the civil process or reaches out to an attorney for guidance or legal aid in the criminal court case. The state will prosecute the perpetrator.

The accused is permitted to be represented by counsel in both the criminal and civil court processes.

# 5.2 Standard of proof

# 5.2.1 Is proof required by any legal means?

Yes, according to Chapter 32, Section 339, paragraph 3 of the Act, the court can invite a party to provide proof when the facts are uncertain.

 Further, Chapter 77, Section 837 states that the prosecutor must — together with the prosecution or as soon as possible — provide the court with the evidence.

# 5.2.2 Are there any requirements regarding evidence and documents?

Parties must share documents on which they base their claim or defense, but this does not include an obligation to submit potentially damaging documents on their own initiative. According to Chapter 32, Section 340 of the Act, the party concerned must notify the other party of the presentation of evidence before the main hearing with one week's notice. Further, Chapter 33, Section 358 states that if a party wishes to adduce evidence that is not stated during the preparation stage of the trial, the party in question must notify the court and the other party of it. The court and the opposing party then have one week to oppose such additions.

Finally, Chapter 32, Section 344 of the Act states that based on what has happened and what has been brought to light during negotiations and the presentation of evidence, the court must decide which facts are to be used as a basis for adjudicating the case.

# 5.2.3 Is proof "beyond a reasonable doubt" required?

The degree of proof is not codified; however, in criminal cases, the principle *in dubio pro reo* or certainty beyond reasonable doubt is settled practice.

# 5.2.4 Is the standard of proof different for ex parte orders?

A preliminary view might be that the standard of proof is the same even for *ex parte* orders. In Chapter 78, Section 855, paragraph 3 of the Act, it is stated that, under certain circumstances, the court can decide the matter even if the accused is not present at the hearing. One of the circumstances mentioned as justifying such a decision is if the court considers that further processing of the case will undoubtedly lead to the defendant's acquittal.

# 5.3 Affirmative defenses

# 5.3.1 Are affirmative defenses available to the accused?

Several mitigating circumstances are stated in Chapter 10, Section 82 of the Danish Criminal Code. Affirmative defenses are available to the accused in the essence that the court will assess whether the accused, when conducting the offense, voluntarily averted or sought to avert the danger connected to the criminal act, or acted in self-defense. The punishment may also be reduced if there are certain circumstances governing the case in question that implies a reduction or if other information about the offense speaks in favor of it — see Chapter 10, Section 83.

# 5.3.2 Is willful intent required?

Chapter 3, Section 19 of the Danish Criminal Code states that negligence is only punishable for the offenses regulated within the Danish Criminal Code when it is specifically provided for. Hence, willful intent is not always required.

# 5.3.3 Are false accusations punishable for the victim?

Chapter 17, Section 165 of the Danish Criminal Code states that if a person reports a punishable action or a complaint for an action that has in fact not occurred, the person may be liable for a fine or imprisonment for up to six months.

Further, Chapter 27, Sections 267-268 of the Danish Criminal Code state that defamation is punishable if the accusation violates someone's honor. This is punished with a fine or imprisonment for up to one year. The imprisonment may be increased to two years if a serious accusation is untrue or if the accusation is made through mass media and intended to significantly harm the defamed person.

# 5.3.4 How is consent discussed in the law?

Denmark has ratified the Convention, which, for example, defines rape as a situation where there is lack of consent since consent has to be voluntary and grounded on free will. However, the Danish Criminal Code is not based on freely given consent, something that both has been and still is a major topic for discussion in Denmark.

There is no criminal offense of rape or sexual assault in the Danish Criminal Code that is based exclusively on a lack of consent, something that forms the central element in the way the Convention frames sexual violence. Instead, the Danish Criminal Code defines "rape" as an act used with force that in itself symbolizes the Danish legislative approach on sexual violence, i.e., to consider all of the elements of the crime and/or characteristics of the victim that preclude the existence of consent and thus make the act punishable. For example, a person under the age of 15 can never consent to sexual intercourse. Similarly, sexual intercourse with a sibling is always punishable since it is the relationship that matters, not the lack of consent in itself.

For the offense of rape, certain elements are stated in Chapter 26, Section 260 that suggest there is no consent. Such elements include the use of violence, threat of violence, duress or a state of mind or situation of the victim that makes them incapable of resisting. Each of these elements may respectively preclude that the victim consented to the actions and makes the sexual intercourse rape. In addition, exploiting a person's "mental illness" or "mental disability" to have sexual intercourse precludes the existence of consent (Chapter 24, Article 218 of the Danish Criminal Code).

In the Report, GREVIO criticized Denmark's approach regarding consent, stating that it does not capture cases in which the circumstances do not fit any of the existing provisions. Instead of introducing the notion that sexual violence is a violation of a woman's body and sexual autonomy, and that consent must be given voluntarily at all times, Denmark only criminalizes those acts in which the circumstances already lead to an imbalance of power and thereby negate consent. Hence, GREVIO has encouraged Denmark to instead base its sexual violence legislation on the notion of freely given consent in accordance with the Convention's requirements.

Since Sweden implemented its sexual violence legislation based on freely given consent, the Danish Ministry of Gender Equality has begun discussions on implementing sexual violence legislation based on freely given consent. However, Danish professors and ministers are still of the opinion that legislation based on consent will lead to more convictions.

# 5.3.5 Is self-defense or insanity a defense?

Self-defense can be used as a defense if it has necessary to avoid or avert an initiated or imminent attack and can be regarded as justified in relation to the attack (see Chapter 3, Section 13 of the Danish Criminal Code).

Chapter 3, Section 16 of the Danish Criminal Code further states that persons who were categorized as "insane" at the time of the crime due to mental illness will not be punished. The same applies to people who were deemed to be legally "mentally retarded" to a greater extent. However, if the perpetrator was temporarily in a state of mental illness or in a state that must be equated with it as a result of consuming alcohol or other drugs, punishment may be imposed when there are special circumstances.

The second paragraph states that persons who at the time of the crime were legally categorized as "mentally retarded" to a lesser degree should not be punished unless special circumstances warrant the imposition of punishment. The same applies to people who were in a state that must be equated with the legal definition of "mental retardation".

# 5.4 Witness status

# 5.4.1 What is a witness's duty to testify honestly and completely?

As a witness, you are obliged to make a truthful and exhaustive testimony of what you know and can remember. The punishment for falsely testifying is usually imprisonment or a fine (Chapter 17 of the Danish Criminal Code).

# 5.4.2 Who may abstain from testifying in certain situations?

Everyone can be called to testify and they have a duty to appear. However, there are some minor exemptions. For example, a government employee cannot be obliged to testify without permission from the authority in question and if a testimony cannot be considered to be in the interest of the public in general (see Chapter 18, Section 169 of the Danish Code of Judicial Procedure (*Lov om rettens pleje*)). Priests can also be exempted from testifying according to Chapter 18, Section 170 of the Danish Code of Judicial Procedure.

Further, a person may abstain from testifying if they are ill or if they have booked a trip abroad before being called to testify. However, the person must always give notice to the court, even if they have a valid reason for not attending. They will most likely have to verify their absence with some sort of documentation. It is always up to the court to decide whether a person is legally prevented from attending as a witness.

# 5.4.3 What potential "excuses" can a witness raise to refuse to testify in a domestic violence action?

As already stated, each person being called to testify is obliged to do so. However, the person in question may use the excuses stated above. Further, the person can request a hearing behind closed doors to be more anonymous, but this is up to the court to decide. Normally, it is not possible to testify anonymously, but the court can decide not to disclose the witness's name or the place of residence of the witness in specific cases if deemed to be decisive for a person's safety.

# 5.4.4 What is the impact of domestic violence on witnesses who are children?

The impact of domestic violence on child witnesses is considered severe and damaging to a child's mental health. Denmark has extensive protection for children who witness domestic violence. For example, Denmark offers professional support and psychological counseling for child victims of sexual abuse at their Children's Houses across the five regions of Denmark. Professionals working with children in Denmark are under the obligation to report to social services any information or suspicion of children witnessing or experiencing domestic violence. In addition to shelters, child witnesses of domestic violence can receive psychological help from specific organizations that design individual counseling programs that last for between six months and one year.

# 5.4.5 Can children be called upon to testify?

Yes, they can. If the child is a relative to the victim, the child can be called upon to testify. However, they are not obliged to do so according to Chapter 18, Section 171 of the Danish Code of Judicial Procedure.

If the child is the victim, the child will be interviewed for the investigation of the case. During the interview, the child is normally recorded on tape and, if this is the case, the child is not obliged to testify during the main hearing in court. However, if the child is called upon to testify, the child is obliged to do so.

# 5.4.6 What is the effect of a child victim on the charges against the offender?

Generally, children are more protected by law. If the offender commits offenses of a sexual nature toward a child, the charges are more severe. For example, rape of child or child sexual abuse under the age of 12 may result in the offender being sentenced to 12 years in prison, instead of eight years, which may be the sentence for the rape of an adult (see Chapter 24, Section 216, p. 2.2 of the Danish Criminal Code). Further, anyone who has sexual intercourse with a child under the age of 15 may be sentenced to eight years in prison if it is not classified as rape in accordance with Chapter 24, Section 216 (see Chapter 24, Section 222). Finally, if the offender has sexual intercourse with a child under the age of 18 who is also the offender's stepchild or foster child, the offender may be sentenced to four years in prison (see Chapter 24, Section 223).

# 5.5 Penalties and sentencing; penalty enhancements

# 5.5.1 What are the penalties and sentencing laws for first-time domestic violence offenses?

Several criminal penalties are applicable for violent offenses under the Danish Criminal Code and some provisions are written particularly with the aim to protect domestic freedom:

All types of violence in family relationships, such as against a spouse and child, are punishable by imprisonment for up to two years (Section 213 of the Danish Criminal Code).

Physical violence against or in any other way in the form of an attack against another's body is punishable by a fine or imprisonment for up to three years (Section 244 of the Danish Criminal Code).

Some penalties relate to being violent repeatedly over a period:

Psychological violence in the form of grossly degrading, insulting or abusive behavior repeated over a period that is used to improperly control a person in the same household or a person that previously had such an affiliation with the household is punishable by a fine or imprisonment for up to three years (Section 243 of the Danish Criminal Code).

For the violence described under item 2 but conducted repeatedly over a period against a person in the same household or closely related to the victim's household, the penalty may increase to imprisonment for up to six years (Section 244 of the Danish Criminal Code).

# 5.5.2 Are there criminal penalties?

Yes, please see the response above.

# 5.5.3 What is the result of a violation of an existing order for protection?

The regulation can be found under Section 21 of the Danish Code regarding this kind of protection (*Lov om tilhold, opholdsforbud og bortvisning*). Intentionally violating an existing order for protection is punishable by a fine or imprisonment for up to two years.

# 5.5.4 What fines and other penalties are imposed besides incarceration and liberty restriction?

Fines, imprisonment and liberty restriction are imposed.

# 5.6 Post-release restrictions

# 5.6.1 Does the law notify the victim of the offender's release from custody?

Yes, a victim is notified upon request if the crime committed is in the category of more serious violations. These violations include physical or psychological violence, threats, crimes of a sexual nature or other dangerous crimes. The regulation can be found under Section 66 (§ 741(g)) of the Danish Code of Judicial Procedure (*Retsplejeloven*).

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