Fighting Domestic Violence - Spain

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?

From the moment the police become aware of any facts that could constitute a criminal offense regarding domestic disputes/gender-based violence, they will get involved. In particular, they will: (i) take actions of investigation to determine the existence and degree of risk to the victim; (ii) establish measures to protect the victim; and (iii) arrest the alleged offender when the situation ofrisk is high (when applicable).

# 5.1.2 What circumstances effect law firm involvement?

The victim can file a complaint without the assistance of a lawyer. Nonetheless, from that moment onward, a lawyer is necessary for the continuance of the procedure. In this sense, the Spanish Law on Legal Aid recognizes the right of the victim to free legal aid regardless of the economic resources of the victim. Free legal aid is available to the victim from the moment the complaint is filed. This right is also recognized to successors in the event of the death of the victim (provided that he/she is not the perpetrator).

# 5.2 Standard of proof

# 5.2.1 Is proof required by any legal means?

Proof is required as per any other procedure. The plaintiff must prove the facts on which the causes of action of the claim are based. In particular, in the absence of proof, the court must acquit the defendant (*in dubio pro reo principle* — where doubts remain).

 According to the principle of the presumption of innocence, the defendant is innocent until proven guilty and, thus, the prosecutor or plaintiff must prove all the elements of the offense.

# 5.2.2 Are there any requirements regarding evidence and documents?

Requirements for the filing of proof, such as documents, are the same as per any other procedure.

It is required for the evidence presented to be admitted in court that the same is relevant and related to the subject of the proceedings. Therefore, only evidence that contributes to the clarification of the facts deemed controversial is admissible in court.

All documents serving as evidence must be provided together with the claim or statement of defense. New documents before the trial hearing will be admitted as long as the parties became aware of their existence after the filing and the response to the claim or the documents are dated subsequent to such filing. Evidence regarding witness or expert testimonies may be introduced before the trial hearing.

Expert testimonies are only permitted in such cases where specific knowledge may be necessary to prove the facts that are relevant to the matter at issue. Experts may be appointed by the parties or by the court (only if the parties request the court to do so). The court cannot appoint an expert *ex officio* (save for cases concerning kinship, paternity or maternity, the capacity of an individual or matrimonial proceedings).

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

Yes.

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

Yes. *Ex parte* orders will be granted in cases where there are well-founded indications (*indicios*) that a crime or misdemeanor has been committed against life, physical or moral integrity, sexual freedom, liberty or security in relation to gender-based domestic violence.

# 5.3 Affirmative defenses

# 5.3.1 Are affirmative defenses available to the accused?

Spanish law recognizes the general criminal affirmative defenses such as self-defense, insanity, entrapment or necessity.

# 5.3.2 Is willful intent required?

According to the most recent doctrine, the Criminal Code does not require the concurrence of any other special or different spirit, it being sufficient to accredit the expressive action of violence, in each case, and the relationship, current or part between the aggressor and victim for the existence of the crime to be estimated.

# 5.3.3 Are false accusations punishable for the victim?

In general, a person who accuses someone with knowledge of the misrepresentation of the facts and absolute disregard for the truth before the judicial or administrative official who has the duty to proceed with the investigation is a crime under Article 452 of the Criminal Code. However, there is no specific punishment for false accusations in gender-based violence cases.

# 5.3.4 How is consent discussed in the law?

The doctrine of the Supreme Court established the need to effectively protect those who are victims of gender-based violence, which is an unavailable collective interest that has led to a whole legal scheme oriented to that end. Therefore, the enforcement of a sentence or precautionary measure imposed by a court as a result of the commission of these crimes cannot be left to the discretion of the convicted person or the victim.

# 5.3.5 Is self-defense or insanity a defense?

As explained in previous sections, the convicted person can use defenses such as self-defense or insanity if the conditions to be considered are met according to the Criminal Code.

# 5.4 Witness status

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

Witnesses are obliged to tell the truth under the Criminal Code and they can be punished if they do not comply with the said obligation with imprisonment from six months to two years and fines from three to six months.

# 5.4.2 Who may abstain from testifying in certain situations?

 The following persons can abstain from testifying: (i) the spouse or partner of the accused; (ii) his/her ascendants or descendants by blood or adoption; and (iii) minors under 14 years old or who are de facto incapable, but they may decide to do so through a legal representative.

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

As stated before, ascendants, descendants, the spouse or partner (the victim can be excluded from testifying) and minors under 14 years old can be excused from testifying.

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

In Spain, any child capable of forming his/her own opinion on the case in question may appear before a court, regardless of his/her age. Therefore, each judge/tribunal must assess the capacity and justify when they decide to reject a child's statement for lack of judgment.

# 5.4.5 Can children be called upon to testify?

Yes, it is at the discretion of the court to call the children to testify. Nonetheless, it has to be taken into account the real need of obtaining information from the child and the possibility that it may be obtained by other evidentiary sources.

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

The child will be heard as any other witness and the judge will decide the importance of his/her witness statement.

# 5.5 Penalties and sentencing; penalty enhancements

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

The person will be punished by imprisonment for six months to three years, by deprivation of the right to keep and bear arms for three to five years and, where appropriate, by a special disqualification from exercising parental authority for a period of one to five years.

# 5.5.2 Are there criminal penalties?

Yes.

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

According to the Criminal Code, the person violating an existing order for protection can be punished with imprisonment from six months to one year.

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

As stated above, the following penalties may apply: (i) deprivation of the right to keep and bear arms; (ii) disqualification from exercising parental authority; and (iii) fines.

# 5.6 Post-release restrictions

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

In the case of victims of crimes of gender-based violence, the decision to release the offender from custody (among others) will be notified to the referred victim without the need for request (except in cases where the victim expresses the wish not to receive such notifications).

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