

CRIMINALIZATION AND PROSECUTION OF RAPE IN DENMARK

SUBMISSION TO THE UN SPECIAL RAPporteur ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES

Amnesty International presents the attached responses to the questionnaire on criminalization and prosecution of rape in Denmark. This submission has been prepared in response to the call for contributions issued by the United Nations (UN) Special Rapporteur on violence against women, its causes and consequences ahead of her upcoming report on rape as a grave and systematic human rights violation and a form of gender-based violence against women.

Definition and scope of criminal law provisions

1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant Sections of the Criminal Code and the Criminal procedure code.

Article 216 of the Danish Criminal Code states (unofficial translation):

“A penalty of imprisonment for a term not exceeding eight years for rape is imposed on any person who

- (i) uses violence or threats of violence to have sexual intercourse;

or

- (ii) engages in sexual intercourse by duress as defined in section 260 or with a person who is in a state or situation in which the person is incapable of resisting the act.”¹

The flaws in Danish law on sexual violence are not confined to the definition of rape and its consequences. Articles 218-220 of the Criminal Code criminalize sexual intercourse in situations where a person exploits another person's mental disability or their dependency, for instance in situations of deprivation of liberty, in institutions such as youth institutions or psychiatric wards.² Article 221 of the Criminal Code criminalizes obtaining sexual intercourse through deception.³ The Criminal Code does not specify explicitly that these offences constitute rape and they carry lesser penalties than those defined as such in it.

Articles 218-221 of the Danish Criminal Code state:

218. Any person who exploits the mental disorder or mental retardation of another person to engage in sexual intercourse with such person is sentenced to imprisonment for a term not exceeding four years.

¹ Danish Criminal Code, Consolidated Act No. 977 (2017), Article 216.

² Danish Criminal Code, Consolidated Act No. 977 (2017), Articles 218-220.

³ Danish Criminal Code, Consolidated Act No. 977 (2017), Article 221.

219. A penalty of imprisonment for a term not exceeding four years is imposed on any person who – (i) is an employee of the Prison and Probation Service and who has sexual intercourse with someone admitted to the institution and subject to his authority; (ii) is an employee of the police and who has sexual intercourse with someone deprived of his liberty and in police custody; or (iii) is an employee or inspector of a child or youth institution, psychiatric ward, residential institution for the severely mentally impaired or a similar institution and who has sexual intercourse with someone admitted to the institution.

220. Any person who grossly exploits another person's dependency of him for employment, financial, treatment or care reasons to engage in sexual intercourse with such person is sentenced to imprisonment for a term not exceeding one year or, if the offence was committed against a person under 18 years of age, by imprisonment for a term not exceeding four years.

221. Imprisonment for a term not exceeding four years is imposed on any person who induces another person to have sexual intercourse with him by relying on such person's mistake as to his identity.

2. Based on the wording of those provisions, is the provided definition of rape:

- a) Gender specific, covering women only NO
- b) Gender neutral, covering all persons YES
- c) Based on the lack of consent of victim NO

Despite being one of the first states to ratify the Istanbul Convention in 2014,⁴ Denmark has not revised its legal definition of rape to bring it in line with the Convention. As GREVIO pointed out in its 2017 assessment of Denmark, criminalization of rape based on the absence of consent, is “a central element in the way the Istanbul Convention frames sexual violence”.⁵ In its recommendations, it strongly encouraged the Danish authorities to amend the legal definition of rape so that it is based on the notion of freely given consent.⁶

- d) Based on the use of force or threat YES
- e) Some combination of the above. NO
- f) Does it cover only vaginal rape? NO

(Article 225: The provisions of sections 216-224 apply, with the necessary modifications, to sexual activity other than sexual intercourse.)⁷

- g) Does it cover all forms of penetration? NO. Please specify.

Oral penetration is not specified anywhere in legislation or guidelines

While Article 225 of the Criminal Code specifies that provisions on sexual offences “apply, with the necessary modifications, to sexual activity other than sexual intercourse”, oral penetration is not specified anywhere in legislation or related guidelines.

- h) Is marital rape in this provision explicitly included? NO

⁴ Chart of signatures and ratifications of Treaty 210, Istanbul Convention, www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures.

⁵ GREVIO report, p. 45.

⁶ GREVIO report, p. 46

⁷ Danish Criminal Code, Consolidated Act No. 977 (2017), Article 225.

- i) Is the law silent on marital rape? YES
- j) Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? YES

The Criminal Code was changed in 2013 to also include marital rape. In the comments to the law changes it is stated: *Regarding § 218, stk. 2*

"...The paragraph regarding having intercourse with a person unable to resist is expanded to including marriage." ... The proposal thus means, for example, that a person who acquires sexual intercourse with his sleeping divorced spouse will henceforth be penalized for violation of Article 216. of the Criminal Code.⁸

- k) Is marital rape excluded in the provisions, or is marital rape not considered as a crime? NO

3. To what extent legislation in your country excludes criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit relevant articles with corresponding translations.

See 7. Aggravating and Mitigating Circumstances

4. What is the legal age for sexual consent?

15 years

Article 222. Any person who has sexual intercourse with a child under 15 years of age is sentenced to imprisonment for a term not exceeding eight years unless the offence falls within section 216(2). (2) If the offender engaged in sexual intercourse by exploiting his physical or mental superiority using coercion or threats, the punishment may increase to imprisonment for a term not exceeding 12 years. (3) When determining a sentence under subsection (1), it must be considered an aggravating circumstance if the offender engaged in sexual intercourse by exploiting his physical or mental superiority⁹.

5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them. NO

No, not directly in the law. However, Amnesty International's research to date has not covered the situation in practice.

6. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?

The amount of reparation stipulated in law in rape cases varies from 5,000 Danish kroner to 125,000 Danish kroner depending on the case.¹⁰

Aggravating and mitigating circumstances

7. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they? YES

Aggravating circumstances

The Criminal Code provides that penalties for rape can be determined on the basis of the presence or absence of broadly defined aggravating circumstances, which include if the offence was committed "in a particularly dangerous

⁸ https://www.folketingstidende.dk/samling/20121/lovforslag/L141/20121_L141_som_fremsat.pdf p. 50.

⁹ Danish Criminal Code, Consolidated Act No. 977 (2017), Article 222

¹⁰ http://www.erstatningsnaevnet.dk/da/Ofte_stillede_spoergsmaal/erstatning_for_hvad/Tort.aspx and Law on reparation nr. 750 of 4 September 2002 with changes of law number 35 of 21. January 2003 and law number 434 of 10 June 2003, <https://www.retsinformation.dk/eli/lt/2005/885#P26>.

manner”,¹¹ caused “particular degradation”,¹² if the victim was trafficked to the country,¹³ or if the perpetrator had a relevant prior conviction.¹⁴

When the victim is under the age of 15, it is an aggravating circumstance if the perpetrator took advantage of their physical or mental superiority.¹⁵ The guidelines for prosecutors investigating sex crimes also refer to “common aggravating factors”, such as if the perpetrator was unknown to the victim or if the rape was committed by more than one person.¹⁶ By posing unknown attackers as an aggravating factor, the law also suggests that if the attacker is known to the victim, it is a lesser crime.

For more on this topic, see Amnesty International’s 2019 in-depth report on women’s access to justice for rape in Denmark “Give us Respect and Justice”, in particular chapter 2.2.¹⁷

- a) Is rape by more than one perpetrator an aggravating circumstance? YES
- b) Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference) NO

NO because it is not defined as rape but as a separate crime, which carries a lesser sentence. It is in fact a mitigating factor. See Question 1 on the definition of rape above, and sections on mitigating factors below.

- c) Is rape by spouse or intimate partner an aggravating circumstance? NO

By posing unknown attackers as an aggravating factor, the law also suggests that if the attacker is known to the victim, it is a lesser crime. Several of the women interviewed by Amnesty International raised this as a concern related to how they were treated by the justice system and indeed how they responded themselves. Such notions reflect a deeply entrenched view of the rapist as an unknown “stranger”. This “stranger myth” affects how rapes committed by partners or other perpetrators known to victims are perceived and treated by the legal system. However, it is a myth with little basis in fact. Research from 2017 shows that 37% of rapes in Denmark were perpetrated by a current or former husband or other intimate partner.¹⁸ Nevertheless, the power of such entrenched myths means that when the attacker is a friend or an acquaintance, victims sometimes do not immediately perceive rape to be rape.¹⁹

In its January 2017 report to GREVIO, Denmark stated that the list of aggravating circumstances is non-exhaustive.²⁰ While GREVIO recognized that this “would allow judges to consider all aggravating circumstances as set out in Article 46 of the Istanbul Convention”, it expressed concern that the aggravating circumstance of the offence being committed against a former or current partner or spouse was not listed anywhere in the legislation. In fact, GREVIO found that when the perpetrator of the sexual offence is or was a partner, this tended to be viewed as a mitigating, rather than aggravating circumstance and led to a lesser penalty. It also noted that the authorities made “no particular effort” to inform judges of the list of aggravating circumstances as provided for by the Istanbul Convention.

²¹ GREVIO recommended that the Danish authorities take measures to ensure application of all the aggravating factors specified under Article 46 of the Istanbul Convention, including improving the awareness of the judiciary. It stressed that judges should be made aware that “lenient sentences in domestic violence cases and other forms of violence against women do not serve the principle of ensuring justice for victims and ending impunity of

¹¹ Danish Criminal Code, Consolidated Act No. 977 (2017), Article 216(3).

¹² Danish Criminal Code, Consolidated Act No. 977 (2017), Article 216(4).

¹³ Danish Criminal Code, Consolidated Act No. 977 (2017), Article 216(5).

¹⁴ Danish Criminal Code, Consolidated Act No. 977 (2017), Article 81(1).

¹⁵ Danish Criminal Code, Consolidated Act No. 977 (2017), Article 222.

¹⁶ Danish Prosecution Guidelines for prosecutors investigating sex crimes, April 2018, Section 5.1.5, www.videosbasen.anklagemyndigheden.dk/h/6dfa19d8-18cc-47d6-b4c4-3bd07bc15ec0/VB/a47861d0-4490-461c-aec7-da2aa4151928

¹⁷ Amnesty International, “Give us respect and justice!” Overcoming barriers for women rape survivors in Denmark (Index: EUR 18/9784/2019), www.amnesty.org/en/documents/eur18/9784/2019/en/.

¹⁸ Marie Bruvik Heinskou, Laura Marie Schierff, Peter Ejbye-Ernst, Camilla Bank Friis, Lasse Suonperä Liebst, “Sexual Violations in Denmark, Scope and Character”, p. 23, October 2017, www.dkr.dk/media/12694/seksuelle_kraenkelser.pdf.

¹⁹ Amnesty International: “Give us respect and justice”, 2019, p. 23

²⁰ Report submitted by Denmark pursuant to Article 68, para. 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report), received by GREVIO on 18 January 2017, GREVIO/Inf(2017)2, p. 45.

²¹ GREVIO report, p. 47.

perpetrators”.²² Amnesty International believes that the Danish Criminal Code should be revised to make sexual violence against a current or former partner an aggravating circumstance. It also believes that, as required by the Istanbul Convention, the offences covered by Articles 218-220 should be considered aggravating circumstances, reflecting the seriousness of the offence, and that punishment should correspond to the gravity of the crime.²³

8. Does the law foresee mitigating circumstances for the purposes of punishment? If yes, please specify. YES

There are general mitigating circumstances for punishment but not specifically for rape. The mitigating circumstances are listed at Article 82 in the Criminal Code.²⁴ They include: that the perpetrator was less than 18 years old or that the crime is committed in an “upset state of mind”.

Further, Articles 218-220 of the Criminal Code criminalize sexual intercourse in situations where a person exploits another person’s mental disability or their dependency, for instance in situations of deprivation of liberty, in institutions such as youth institutions or psychiatric wards.²⁵ Article 221 of the Criminal Code criminalizes obtaining sexual intercourse through deception.²⁶ The Criminal Code does not specify explicitly that these offences constitute rape and they carry lesser penalties than those defined as such in it.

Difference in length of penalties creates hierarchy

In its 2017 assessment of Denmark’s compliance with the Istanbul Convention, GREVIO noted the difference in the length of penalties for the offences of sexual violence which are not explicitly defined as rape in the Criminal Code: “it seems inappropriate to issue a lesser sentence... for sexual intercourse following the exploitation of a ‘mental illness/disability’ compared to sexual intercourse with an intoxicated woman incapable of consenting to the act, which currently carries a maximum prison term of eight years. This creates a hierarchy of victims of sexual violence which would run counter to the prohibition of discrimination on the basis of health.” It strongly encouraged the Danish authorities to bring the penalties for the offences defined in Articles 218-220 of the Criminal Code into line with those for rape (Article 216).²⁷

9. Is reconciliation between the victim and the perpetrator allowed as part of a legal response? YES

If so, at what stage and what are the consequences?

Reconciliation is offered in general in Denmark in criminal law cases only if the perpetrator confesses to the crime. Under such circumstance reconciliation through conflict resolution can be offered to the victim. The victim can also ask for it themselves. It is voluntarily. If the victim accepts this, the police will assess and decide for each individual case whether or not it is appropriate in this specific case.²⁸ Conflict resolution does not replace a court case hence the perpetrator will still be tried.

a) Regardless of the law, is reconciliation permitted in practice? YES²⁹ And what is the practice in this regard?

Amnesty International’s research to date does not cover the implementation of this legal provision in practice.

10. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? If yes, please specify.

²² GREVIO report, p. 47.

²³ Amnesty International: “Give us respect and justice”, 2019, p. 24

²⁴ Danish Criminal Code, Consolidated Act No. 977 (2017), Articles 82.

²⁵ Danish Criminal Code, Consolidated Act No. 977 (2017), Articles 218-220.

²⁶ Danish Criminal Code, Consolidated Act No. 977 (2017), Article 221.

²⁷ GREVIO report, p. 46; Istanbul Convention, Article 4(3).

²⁸ Law nr 467 af 12/06/2009 and <https://anklagemyndigheden.dk/da/deltagelse-i-konflikttraad>.

²⁹ KYVSGAARD, Britta OG RIBE, Malthe Øland, “Effekten af konfliktmægling for ofre” JUSTITSMINISTERIETS FORSKNINGSKONTOR APRIL 2018.

Amnesty International's research to date has not covered this issue.

- a) if the perpetrator marries the victim of rape? NO
- b) if the perpetrator loses his "socially dangerous" character or reconciles with the victim? NO

Amnesty International's research to date has not covered this issue.

Prosecution

11. Is rape reported to the police prosecuted ex officio (public prosecution)? YES³⁰

12. Is rape reported to the police prosecuted ex parte (private prosecution)? NO

13. Are plea bargain or "friendly settlement" of a case allowed in cases of rape of women?

Amnesty International's research to date has not covered this issue.

14. Are plea bargain or "friendly settlement" of a case allowed in cases of rape of children?

Amnesty International's research to date has not covered this issue.

15. Please provide information on the statute of limitations for prosecuting rape.

A 72-hour limit used to be in place for victims' reporting allegations of rape but only in relation to being able to claim compensation. This limit was removed in 2018 amendments to the law.³¹ In terms of prosecuting for rape if the victim was 18 years or older when the rape happened the statute of limitations is 10 years and 15 years if the rape was aggravated. If the victim was below the age of 18 there is no statute of limitations.

16. What are the provisions allowing a child who was the victim of rape to report it after reaching adulthood, if any?

See answer at 15 above.

17. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses?
NO If yes, please specify.

18. To what extent are there rape shield provisions aimed at preventing judges and defence lawyers from exposing a woman's sexual history during trial?

According to the Administration of Justice Act, you can only expose a woman's sexual history if it is directly connected to the current case.³²

19. What procedural criminal law provisions exist aimed to avoid re-victimizations during the prosecution and court hearings? Please specify.

See Amnesty International's report "Give us Respect and Justice" (2019) Chapter 4.7 Survivors' Experiences in Court.

³⁰ Administration of Justice Act, Consolidated Act No.1284 (2018), Article 742 – 749.

³¹ Danish Criminal Code, Consolidated Act No. 977 (2017), Article 94.

³² Administration of Justice Act, Consolidated Act No.1284 (2018), Article 741 a and c.

War and/or conflict

20. Has the Rome Statute of the International Criminal Court (ICC) been ratified? YES

Denmark ratified the Statute in 2001.³³

Remaining questions on War and/or Conflict not answered.

Data

21. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

According to a 2018 study by the University of Southern Denmark, an estimated 24,000 women experienced rape or attempted rape in 2017.³⁴ The Danish Ministry of Justice, on the other hand, estimates that around 5,100 women each year are subjected to rape or attempted rape in the country.³⁵ Yet, only 890 rapes were reported to the police in 2017³⁶ and of these, 535 resulted in prosecutions and only 94 in convictions.³⁷ According to new research from the Ministry of Justice there was an average of 6,700 women annually subjected to rape or attempted raped between 2008 and 2019.³⁸ In 2019, 1,017³⁹ rape cases were reported to the police and 79 of these resulted in convictions.⁴⁰

Other

22. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

Please see Amnesty International's report "Give us respect and justice" (2019), especially sections on:

Focus on evidence of physical violence (p 20)

Focus on physical force, threat and "inability to resist" (p 21)

The "Nordic Paradox"

Loss of Gender Perspective (p 13)

Gaps in data collection (p 15)

Lack of sexuality education on consent and relationships (pp 49 - 51)

See also, Amnesty International's 2019 submission to the UN Committee on Economic, Social and Cultural Rights, including on the topic of sexuality education,⁴¹ as well as the Committee's Concluding Observations, where it

³³ <https://www.retsinformation.dk/eli/ltr/2002/25>

³⁴ Laura Deen, Kathrine Bindesbøl Holm Johansen, Sanne Pagh Møller, Bjarne Laursen, 'Violence and sexual abuse', 2018, p. 52, www.sdu.dk/da/sif/rapporter/2018/vold_og_seksuelle_kraenkelse. The study was based on the Danish National Health survey, as well as qualitative research and data gathered from 12,615 women and girls above the age of 16.

³⁵ Anne-Julie Boesen Pedersen, Britta Kyvsgaard and Flemming Balvig, Ministry of Justice, University of Copenhagen, Crime Prevention Council and Director of Public Prosecutions, 'Victims studies survey 2005-2016', p. 88, www.dkr.dk/media/12899/offerrapport_2016.pdf

³⁶ National Statistics Office, www.dst.dk/en/Statistik/emner/levedilkar/kriminalitet/domme

³⁷ National Statistics Office, www.statbank.dk/STRAF10

³⁸ Ministry of Justice research office, National Police, Copenhagen University and the Crime Prevention Counsel, "Exposure to violence and others forms of crime", Victims studies survey 2005-2019. <https://dkr.dk/media/14967/offerrundersogelsen-2005-2019-hovedtal.pdf>

³⁹ National Statistics Office, <https://www.statbank.dk/STRAF10>.

⁴¹ Amnesty International: Denmark, Submission to the United Nations Committee on Economic, Social and Cultural Rights, 2019 (EUR 18/0965/2019), <https://www.amnesty.org/en/documents/eur18/0965/2019/en/>.

recommended that Denmark provides “age-appropriate, evidence-based, scientifically-accurate comprehensive education for all on sexual and reproductive health and sexuality, including on ‘consent’ in sexual relations.”⁴²

Rape myths and gender stereotypes (p 47)

Barriers to reporting (p 25)

Gaps in training of legal professionals (p 42)

⁴² United Nations Committee on Economic, Social and Cultural Rights, Concluding Observations, Denmark, 2019, E/**Error! Unknown document property name.**, para 61.