Use of Force for Medical Purposes — A Danish Perspective

1 The Legal Framework of Medical Consent

1.1 Introduction
In the Danish legislation the issue of consent to medical treatment is governed by the Danish Health Act. The Health Act deals with both the question of treating children under parental custody and the question of treating adults without the mental capacity to make informed decisions. For these groups it is stated that the right to exercise the patient's rights is placed with the individual/individuals who is/are authorised to do so by law in so far as it is necessary to act on behalf of the patient in the specific situation. While the question of who can act on behalf of adults under personal guardianship and children is answered in the Danish Guardianship Act and the Danish Act on Parental Responsibility, the question of when they can act and to what extent is governed by the Danish Health Act, which for children constitutes a lex specialis-rule for the general competence to act as stated in the Danish Act on Parental Responsibility. As for the rather large group of adults who are not under guardianship, even though they are definitely not able to make informed healthcare decisions, both the question of who can act on their behalf and when they can act are governed by the Danish Health Act.

1 Lovbekendtgørelse no. 913 of 13 July 2010 (the Danish Health Act).
2 Section 14.
3 Lovbekendtgørelse no. 1015 of 20 August 2007.
4 Lovbekendtgørelse no. 1073 of 20 November 2012 (the Danish Act on Parental Responsibility).
1.2  The Main Rule about Consent to Treatment — A Starting Point

The main rule governing the question of consent to treatment is found in Section 15 of the Danish Health Act. This section puts forward that no treatment can be initiated or continued without the patient's informed consent unless it is in accordance with the law. The similarity with Article 5 of the Convention on Human Rights and Biomedicine (the Oviedo Convention) is evident even though Denmark had not yet joined the convention when the Danish rules came into force. The Danish outset is therefore the same as in every other country compliant with the Oviedo Convention.

The focus on self-determination and the protection of the individual's physical integrity is furthermore in coherence with Article 71, subsection 2 of the Danish Constitution and with the right to privacy and to personal freedom pursuant to the European Convention on Human Rights, Articles 8 and 5. This all means that a strong legal basis in law is required in order to treat individuals or hold them in a hospital against their will.

In order for the consent to be informed as defined in both the Oviedo Convention and the Danish Health Act, the patient must know what he is being treated for, what the prognosis is with or without treatment, which different treatment methods might be considered and the pros and cons regarding each offered treatment. The Danish Health Act also states that the patient can refuse to receive information, whilst there is no possibility in the law for the medical staff to withhold information from the patient. At this point the Oviedo Convention renders a possibility to withhold information from the patient if it is in the best interest of the patient, and if it is in coherence with the law, but this possibility has not been used in Danish legislation.

The information necessary for the patient's decision is to be given only to the patient and in Danish law there is no general basis for giving information to the patient's relatives unless the patient has given consent or it is specifically

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5 In Denmark this means that the treatment has to follow the procedures of either the Danish Mental Health Act (lovbekendtgørelse no. 1729 of 2 December 2010: the Danish Mental Health Act), the Danish Epidemic Act (lovbekendtgørelse no. 814 af 27 August 2009: the Danish Epidemic Act or the special rules about use of force on pregnant alcohol abusers in DHA section 141aff.
6 The Danish rules entered into force on 1 October 1998 as part of the former Law on Patients' Rights (lov no. 482 of 1 July 1998).
7 Article 5.
8 Section 16.
9 Section 16. See also Helle Bødker Madsen, Psykiatriret (Copenhagen: Jurist-og Økonom-forbundets Forlag, 2013) p. 32.
10 Article 10.