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Europeanization of evidence proceedings in Polish criminal process

Summary

Europeanization as a term describing phenomena occurring in Europe in various research spheres - politics, culture, law, economics, economy - has gained popularity in recent years. The term began to be used in the 1970s, but it was not until the 1990s that Europeanisation became a subject of scientific research, initially mainly in political science. Gradually, legal sciences also began to analyse the impact of European law, in its broadest sense, on the law of European states. Europeanisation of law can be defined as the process of convergence of legal regulations through the implementation of European law sensu largo into the national legal order or reception of legal solutions binding in another European country ("Europeanisation impulse") to create similar standards in a given field of law.

In comparison with other areas of law, the problem of the Europeanisation of criminal law sensu largo has relatively late become the subject of studies in doctrine. The reason for this seems to be the fact that criminal law is considered to be most closely related to state sovereignty, its traditions and culture. Consequently, states have guarded against external normative solutions being "imposed" on them. Europeanisation also applies to evidence in criminal trials. European organisations (first of all, the Council of Europe and the European Union) are careful to " force" legal regulations concerning evidence in criminal proceedings on European states. The impact on the legal regulation of evidence is indirect. Concentrating on the protection of human rights (within the Council of Europe) or strengthening the principle of mutual recognition of judgments (within the European Union), European organizations, as it were, "incidentally" influence the sphere of evidence. As a result, there is no holistic view of the issue of evidence in a criminal trial. European standards relate primarily to the rights of participants in evidence proceedings (in particular the accused and the victim), leaving national legislators the freedom to implement specific solutions. As a rule, neither EU law, nor regulations adopted at the Council of Europe or Strasburg jurisprudence refer to issues such as the procedure for conducting a search, interrogation or ordering the inspection and recording of conversations. The European perspective is more general. The key issue is whether a participant in the proceedings (accused, victim, witness) was able to exercise a given right in the course of the evidentiary proceedings.

The main thesis of this paper is that the national proceedings are subject to strong external influences provided by the European law. The restraint of the European Court of Human Rights and the EU legislator in "imposing" specific solutions on national legislators is illusory, and national legislators have less and less margin for discretion in creating rights and obligations of the participants of criminal proceedings. This process will continue, especially in connection with the development and strengthening of judicial cooperation in the European Union.

The main purpose of this work is to identify, describe and explain the Europeanisation impulses and to determine whether in legal terms - in relation to the Europeanisation of evidence in Polish criminal proceedings - they bring the expected result, i.e. lead to normative,

jurisprudential or socio-cultural changes motivated by the adaptation of national law and practice to European standards of evidence. An additional aim is to identify possible discrepancies, to determine on what level they occur (statutory, supra-statutory or as a result of faulty jurisprudence) and to assess what are the potential consequences of not removing these differences.

The paper is divided into five chapters.

In the first chapter terminological arrangements are made and sources of Europeanization impulses in criminal procedural law are distinguished. It has been explained how the concept of European law, Europeanization of law and Europeanization of evidence proceedings will be understood in this work. Noting that it is relatively more difficult for evidentiary proceedings in a criminal trial to succumb to external influences, three possible factors that may impede this process have been distinguished. It is then indicated how and to what extent the proceedings of evidence are subject to Europeanisation processes. Analysing the sources of Europeanization impulses, the importance of the Council of Europe and ECHR achievements in the formation of the European dobrie proceedings was characterized, it was indicated what competences in the field of criminal procedural law are vested in the organs and institutions of the European Union and the relation between the "Strasburg law" and the EU law was assessed. It was also considered whether constitutional regulations concerning the taking of evidence are complementary or competitive with European law.

The second chapter is devoted to an analysis of the evidentiary rights of the accused at four levels - Strasbourg, EU, constitutional and statutory. First, however, terminological arrangements were made and how the term "accused" is understood by the ECHR, EU law, the Constitution and the Code of Criminal Procedure was clarified. The evidentiary powers were divided into two categories: evidentiary powers in the largo sense, i.e. those that are relevant throughout the criminal proceedings and are not strictly related to the evidentiary proceedings, but without them, it is considerably more difficult for the accused to conduct his defence. The following were recognised as evidentiary rights in the largo sense: the right to participate in the proceedings, the right of access to the case file and the right of access to a lawyer. The second category of evidentiary rights is the rights of proof sensu stricto, i.e. those that determine how the accused conducts his defence and are closely connected with this sphere of criminal proceedings. The rights of evidence in the strict sense are divided into two groups, i.e. the rights that allow the defendant to adopt a passive attitude during the criminal proceedings (the right not to incriminate oneself and the right to remain silent) and those that enable the defendant to actively participate in the evidentiary proceedings (the right to be heard, the right to participate in the evidentiary proceedings (the right to directly question a witness), the right to take evidence, the right to demand the exclusion (elimination) of evidence obtained in breach of the law.

The third chapter describes the evidential rights of the victim (crime victim). It begins by defining what role and position the victim of a crime has at the Strasburg, EU, constitutional and statutory level. The evidentiary rights of the victim of a crime are divided into two groups - rights that allow the victim to be actively involved in the ongoing evidentiary proceedings (e.g. the right to be heard, the right of access to the case file) and those that guarantee protection from secondary or repeated victimisation. Concerning this participant in the proceedings, the European States have a wide margin of discretion in determining his/her procedural position and status in the year of criminal proceedings. This status determines the scope of evidentiary rights, which causes additional difficulty in establishing a common European standard that should be implemented in European states. European institutions and bodies focus primarily on

providing the victim with protection against undesirable actions on the part of the accused and improper actions of the procedural authorities.

The fourth chapter distinguishes the positive duties of state authorities in relation to the conduct of evidence proceedings. Analysing the ECtHR jurisprudence, it was pointed out that the duties of state authorities include: conducting proceedings with due diligence (due diligence standard) in securing, collecting and assessing evidence, acting in good faith, and taking into account the current level of protection of fundamental rights resulting from ECtHR case law. Assuming that the Strasburg standard is at the same time a standard binding in the European Union, additional duties of the state bodies in connection with the conducted evidentiary proceedings were indicated, i.e. direct application of EU law, the obligation of a pro-EU interpretation of national law, non-application of national provisions which are in conflict with EU law and direct application of EU law. It concludes by assessing whether the Strasbourg and Luxembourg standards are compatible with each other and whether any future distinctions are possible. This was followed by an analysis of the obligations of state authorities under the Constitution, i.e. to guarantee the predictability of proceedings, to act on the basis and within the limits of the law and to interpret national legislation in a pro-European way (Article 91(2) of the Constitution). The last part assesses the compatibility of national provisions regulating the course of evidence proceedings with the European standard and evaluates what the potential negative consequences may be for Poland and for the participants in criminal proceedings, due to the discrepancies that have been noticed between the national law and the European law (standard).

The fifth chapter first defines the concept of horizontal Europeanisation and the concept of cross-border evidence proceedings. Then the model solutions for cross-border gathering of evidence in the European Union and the Council of Europe were characterised. Considering that only the model adopted in the European Union can be considered as a manifestation of horizontal Europeanisation, the conditions which must be fulfilled for the cross-border gathering of evidence to become a Europeanisation process were considered. It also points out the threats connected with this institution and whether its faulty application will not lead to the opposite results than those intended by the EU legislator. It should be made clear that the aim of this chapter is not to describe in detail the principles of functioning of the European Investigation Order and any evaluation of this instrument of judicial cooperation of the European Union. The considerations undertaken in the fifth chapter are an attempt to look from a slightly different perspective at the problem of the cross-border collection of evidence.

The conclusion summarizes all the considerations and contains de lege ferenda conclusions. The perspectives of the Europeanization of evidence in criminal proceedings were also indicated in relation to the future of the "Strasburg standard" and the consequences of the functioning of the European Investigation Order, i.e. whether it can contribute to the creation of the EU evidence procedure.

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