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Some Remarks for the Law as It Should Stand in the Matter of State's Evidence Witness' Testimony

Z problematyki dowodu z zeznań świadka koronnego – kilka uwag de lege ferenda

SUMMARY

The article addresses the slightly anachronistic, in the author's opinion, institution of state's evidence witness, whose current legislative shape may raise objections, in particular from the point of view of the application of the principle of equality before the law. The study presents a few conclusions on the law as it should stand (*de lege ferenda*), which, if implemented, could be used to optimize the legal solutions provided for in the Act on State's Evidence. The article puts forward, among other things, the proposal to include the subsidiarity principle in the discussed institution, kind of like the requirement relating to operational surveillance, which is also debatable in moral and juridical terms, as it leads to restrictions, which is also not indisputable in the moral and juridical sense. The article also refers to the wording of Article 6 of the aforementioned Act, which provides for a rule that eliminates evidence from the suspect who ultimately did not acquire the status of a state's evidence witness. According to the author, the approach under this rule is too broad and imprecise, thus it requires an appropriate correction.

Keywords: a state's evidence witness

The past quarter-century has generated favourable conditions for the establishment and growth of organised crime groups. In the initial period of political transformation in Poland, mafia-type organizations were mainly involved in committing purely criminal offences (e.g. protection racketeering). Over time, their main profile has evolved towards economic crime, which discreetly and under the guise of legitimate activities usually causes serious financial losses, particularly in the national budget, to the detriment of interests of honest citizens (businesses, taxpayers).

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Data: 16/11/2026 19:48:14

The past quarter-century is also a period in which the fight against organised crime has become one of the main challenges and tasks faced by law enforcement agencies. In order to increase the efficiency of the activities being undertaken in this field, a number of solutions are introduced in the institutional sphere (e.g. the establishment of the Central Bureau of Investigation), substantive law (e.g. the penalization of money laundering), pre-trial operations (equipping the police services with new forms of operational work) and trial procedures (e.g. the institution of *incognito* witness). In the face of unrelenting threats from the organised criminal world, the law enforcement agencies have also been given the possibility of using a new, previously unknown to the Polish criminal procedure, type of evidence in the form of state's evidence (in Polish: *świadek koronny*)[1], an institution historically rooted in feudal system (e.g. King's approver), thus in the time when there were no specialized police authorities to professionally prosecute criminals[2].

After 20 years of the controversial Act on State's Evidence Witness, assumed to have an episodic character, one may conclude that the implementation of such solutions was reasonable. Nevertheless, the thesis that the criticism towards the institution of turning approver is the manifestation of a "doctrinaire attitude" ineffective "in view of the results of the large-scale criminological research"[3] needs to be refuted, not just because of the style in which it was expressed. The purpose of a number of legal studies by alleged "doctrinaires" presenting less optimism with regard to witnesses turning state's evidence than the author quoted above was often not so much to totally discredit this anachronistic institution, but to draw attention to issues that may be conducive to taking action to optimise the legal solutions provided for in the law in question, while not depriving the institution of its effectiveness or even making it more effective, despite obvious axiological objections as to the quality of such type of evidence.

The fact is that, from a substantive penal law point of view, the price to be paid for the provision of evidence by the approver is high, because it involves granting the offender the privilege of impunity. Such a scale of "immunity" granted to a witness turning state's evidence is justified in particular by the fact that it contributes to the breakdown of solidarity between organised criminal groups, which are generally governed by the "rule" of extreme loyalty[4]. Regardless of advantages of this institution, manifested for example in the number of crimes revealed by turning state's evidence[5], it is not possible to ignore the fact that it is a breach from

[1] Act of 25 June 1997 on State's Evidence Witness (Journal of Laws 1997, No. 114, item 738).

[2] Cf. *Prawo dowodowe. Zarys wykładu*, red. R. Kmiecik, Kraków 2005, p. 201.

[3] E.W. Pływaczewski, *Świadek koronny jako instrument zwalczania przestępczości zorganizowanej*, „Prokuratura i Prawo" 2010, nr 7–8, p. 115.

[4] See L.K. Paprzycki, *Instytucja świadka koronnego i świadka incognito w świetle Konstytucji RP i Europejskiej Konwencji Praw Człowieka*, „Palestra" 2008, nr 5–6, pp. 26–27.

[5] See E.W. Pływaczewski, *op. cit*., pp. 108–109.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 19:48:14

the principle of equality before the law and the principle of legalism expressing the imperative of prosecuting all offences subject to public prosecution[6]. Thus, the institution of state's evidence witness should not be governed by the rule of *locus minoris resistentiae*, which expresses a directive to follow the path of least resistance, to achieve the most favourable evidence result as soon as possible, by way of a kind of "shortcuts". While appreciating the benefits of the institution of witness turning state's evidence, we should still keep in mind the price thereof in the form of impunity of the offender. The evidence from the approver's testimony as a *malum necessarum* of contemporary criminal procedure should, therefore, be reserved for the situation where, in the assessment of the procedural bodies, it is the only measure available to obtain information and further evidence relevant to current and future criminal proceedings.

It is worth noting that the Act on State's Evidence Witness defines the subjective and objective restrictions on turning state's evidence witness, but does not specify a condition which would point to the fact that state's evidence witness' testimony is of an exceptional character (*ultima ratio*), which could indirectly be demonstrated by the initially episodic character of the Act. In this situation, a question still remains open whether other, less controversial, methods of evidence-taking are used first, even if the suspect is willing to cooperate and turn the state's evidence.

Given the ethical and legal concerns still being raised with regard to this institution, it may be worthwhile, as a proposal for the law as it should stand (*de lege ferenda*), to cover it with the principle of subsidiarity by setting in the Act on State's Evidence Witness a requirement similar to that of Article 19 paragraph 1 of the Act on the Police[7] relating to operational surveillance, i.e. an operation which is also debatable in moral and juridical terms, as it leads to restrictions in civil rights and liberties. However, while the issues related to operational surveillance are subject to fervent debate, which can be seen in successive amendments to Article 19 of the Act on the Police[8], the Act on State's Evidence Witness was revised in a rather limited way in the 20-year period of its functioning, despite the expe-

[6] The different treatment of those perpetrators who have chosen to cooperate with law enforcement authorities is substantiated by their merits for the justice system by contributing to breaking down the solidarity of a given criminal group (see L.K. Paprzycki, *op. cit.*, p. 26). However, in the context of the principle of equality before the law it is difficult to explain why, in similar situations, an adult participant in criminal arrangements is granted impunity by the law for the offences in which they participated and whose he revealed as an approver, while a juvenile perpetrator of punishable deeds who decides to discover the circumstances of the case in principle has to face liability under the provisions of the Act of 26 October 1982 on the procedure in matters of minors (Journal of Laws 1982, No. 35, item 228).

[7] The district court may, by way of a decision, order to carry out the operational surveillance "when other measures have proved to be unsuccessful or are not useful".

[8] Pursuant to one of the latest amendments to police legislation, the scope of the restrictions relating to operational surveillance was broadened by specifying a maximum duration thereof, which

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 19:48:14

rience that accompanied it[9]. Meanwhile, the recent two decades has been a period of considerable development of scientific methods for the use of traces and factual evidence to be applied in forensic examination (genetic testing, microtrace testing and other methods). The statutory limitation of the possibility to allow turning state's evidence only to a situation where other evidence "proved to be ineffective or unsuitable" would be likely to stimulate the seeking and optimum use of other evidence (evidence methods)[10].

It is worth noting that the model of state's evidence currently in use in Poland has no formal requirement for other evidence to be carried out, neither before the suspect is allowed to testify as a witness, nor after the witness turned state's evidence. The Polish criminal procedure does not provide for the institution of corroboration derived from common law, relating to certain categories of witnesses (e.g. accomplices) whose testimony may become the basis for conviction of the accused, provided that it is confirmed by other evidence (corroboration evidence)[11]. Indeed, as A. Lach aptly puts it, assertions by some scholars that state's evidence requires each time to be confirmed by another evidence, are not based on the applicable

is currently 18 months. See Act of 15 January 2016 on the amendment of the Act on the Police and certain other acts (Journal of Laws 2016, item 147).

[9] One of the controversial statutory changes relating to the initially episodic institution of state's evidence witness was giving it the temporally indefinite character. See Act of 22 July 2006 amending the Act on State's Evidence Witness and the Act on the Protection of Classified Information (Journal of Laws 2006, No. 149, item 1078).

[10] It is worth noting that S. Waltoś and P. Hofmański (*Proces karny. Zarys systemu*, Warszawa 2013, pp. 398–399), when discussing the subject of "unconventional" pieces of evidence (those which violate at least one of the main procedural principles), point to the conditions to be met by the "existing and future legal regulations on those kinds of evidence". One of the conditions for the use of such evidence should be adherence to the principle of subsidiarity ("where other measures have been found to be ineffective or unsuitable for prosecution"). Authors classify operational surveillance and state's evidence as unconventional evidence. Waltoś, when commenting in 1993 on the draft law providing for the institution of state's evidence, pointed to the fact that the text of the Act should oblige the prosecutor to make every effort in the first instance to search for other evidence of the offence allowing the disclosure of all the perpetrators. See S. Waltoś, *Świadek koronny – obrzeża odpowiedzialności karnej*, „Państwo i Prawo" 1993, z. 2, p. 20.

[11] In English law, a gradual abandonment of the requirement of corroboration of testimonies given by the accomplices is seen (see more on this topic in A. Lach, *Reguła potwierdzania zeznań współsprawcy w prawie angielskim*, „Palestra" 2003, nr 9–10, pp. 166–170; R. Kmiecik, *Z problematyki „dowodu potwierdzającego" w Polsce i Anglii (w związku z art. 192a § 1 i § 2 k.p.k.)*, [in:] *Współczesne problemy procesu karnego i jego efektywności. Księga pamiątkowa Profesora Andrzeja Bulsiewicza*, red. A. Marek, Toruń 2004, pp. 167–178). Corroboration evidence is used in certain US States. In most of them, however, corroboration evidence is not compulsory (see P.T. Dunn, *Accomplice Testimony: Is Corroboration Necessary?*, "Catholic University Law Review" 1957, Vol. 6(3), pp. 165–168). Despite the criticism of the institution, the requirement of corroboration of the incriminating testimonies given by an accomplice is provided for, for example, in the New York legislation (see M.M. Martin, D.J. Capra, F.F. Rossi, *New York Evidence Handbook: Rules, Theory, and Practice*, Aspen 2005, p. 439).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 19:48:14

law. In light of the principle of free assessment of evidence, nothing precludes the content of state's evidence turned by the witness from being the only aggravating evidence to shape the factual basis of the conviction[12].

The consequence of the above-mentioned view is, however, a risk of reducing the evidence-taking activity of the procedural authorities to the collection of state's evidence assessed by them as reliable, without even attempting to confirm these testimonies by other evidence. No provision of the Polish Code of Criminal Procedure provides for the obligation of the court to take an action *ex officio* in order to confirm the truthfulness of statements of the witness turning state's evidence if *in concreto* he does not see any grounds for challenging them. Moreover, in the light of the wording of Article 170 § 1 item 2 of the Code of Criminal Procedure, the motion for admission of the evidence seeking to confirm the facts presented by the witness turning state's evidence may be dismissed on the grounds that the circumstance "has already been proven in accordance with the applicant's assertion".

It is therefore worth considering, as a proposal for future legislation, whether credibility of the state's evidence testimony should be based, at least in principle, on evidence that, even in part, proves the veracity of the statements of the witness turning state's evidence[13], all the more that the view once presented by J. Bentham – a critic of this institution functioning under English law – that during the hearing of an offender who has been given pardon "the strength of the motives

[12] See decision of the Supreme Court of 4 April 2013, II KK 67/13, LEX No. 1317923; judgement of the Court of Appeal of Warsaw of 16 November 2016, II AKa 148/16, LEX No. 2174843. Another case is where the factual findings which are detrimental to the accused are made on the basis of testimony from only one source of evidence, these must be depositions which have undergone a particularly thorough assessment of their credibility. The view expressed by the Supreme Court presented in the judgement of 3 April 1978 (II KR 56/78, LEX No. 19383) is still valid in stating that "when assessing a witness testimony, in particular where it is the only evidence, it is necessary to consider the witness' personality and the circumstances and conditions under which the witness made his observations". Contrary to what J. Kościerzyński (*Świadek koronny w prawie polskim (postulaty de lege ferenda)*, „Państwo i Prawo" 2006, z. 5, pp. 53–57) argues, it seems that, when assessing the state's evidence, one may refer to the extensive case-law relating to the evidence from slander. The testimony of a witness turning state's evidence, similarly as slander by the co-defendant, is evidence the presentation and assessment of which requires utmost conscientiousness, expressed in e.g. considering personal interests of the person who has decided to give incriminating evidence (see, e.g., judgement of the Supreme Court of 7 October 1999, II KKN 506/97, LEX No. 39428; judgement of the Supreme Court of 6 February 1970, IV KR 249/69, LEX No. 18066).

[13] The requirement of having the "shield" evidence to improve the credibility of the testimony under state's evidence is one of the postulates formulated in German criminal procedure, where the institution shows low efficiency and more than 50% of judges, prosecutors, police officers, and lawyers recognise the danger of false testimonies given as state's evidence. See B. Kurzępa, *Świadek koronny. Geneza instytucji. Komentarz do ustawy*, Toruń 2005, p. 49.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 19:48:14

which induce a witness to lie is at its highest point"[14]. In this respect, it is worth to take advantage of the experience of other countries, especially those where the combat against organised crime has a long tradition. In Italy, the recommendation to seek evidence to confirm the testimony of repentant criminals (*pentito*) results from special investigation instructions which are not binding but certainly affects the functioning of the institution in practice[15]. The formulation of a similar recommendation taking the form of a teleological norm in the methodology for dealing with state's evidence that may be developed in Poland in the future would probably be crucial from the point of view of complying with the international standard of a fair trial. A situation where the state's evidence is the only evidence on the basis of which the accused was convicted may be compliant with the Polish law, but in the light of the case law of the European Court of Human Rights, it does not fit the standard of a fair trial under the Convention[16]. The dangers of organised crime entail, of course, the need for appropriate measures, but "the right to fair justice takes such an important place that it cannot be sacrificed for the effectiveness of prosecution"[17].

As regards proposals for future legislation, reservations may be raised by the content and extent of the inadmissibility of evidence provided for in Article 6 of the Act on State's Evidence. In the event where the prosecutor ultimately refrains from applying for granting pardon to the suspect for turning state's evidence (Article 5a), as well as in the case of a decision to refuse to allow the testimony under state's evidence by the court, the prior explanations of the suspect referred to in Article 3 paragraph 1 item 1 and Article 5 paragraph 3 of the Act may not constitute evidence, therefore the records containing those testimonies must be destroyed.

The provision of Article 5 paragraph 3 provides for the obligation to hear the suspect who may turn state's evidence by the regional court which decides on the request for admission of the state's evidence. If the court, having heard the suspect, does not accept the prosecutor's request arguing that there are no grounds

[14] J. Bentham, *A Treatise on Judicial Evidence*, extracted from the manuscripts by M. Dumont, London 1825, p. 323.

[15] On these instructions, see B Kurzępa, *op. cit.*, pp. 33–34.

[16] See the case *Arnold G. Cornelis* v. *the Netherlands*, application No. 994/03, the substantiation of which points to the conditions for a fair trial involving a witness turning state's evidence, including a requirement that the conviction not be based solely or predominantly on state's evidence. See M. Wąsek-Wiaderek, *Welke i Białek przeciwko Polsce – wyrok Trybunału z dnia 1 marca 2011 r., skarga nr 15924/05 (kluczowe zagadnienia: ochrona informacji niejawnych w procesie karnym przez ograniczenie dostępu do niejawnych akt sprawy a prawo do obrony; wyłączenie jawności rozprawy a rzetelność postępowania; wyłączenie publiczności ogłoszenia ustnych motywów wyroku a prawo do publiczności rozprawy)*, „Przegląd Orzecznictwa Europejskiego dotyczącego Spraw Karnych" 2004, nr 1–4, pp. 17–22.

[17] M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2017, p. 566.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 19:48:14

for accepting it, the disqualification of the suspect's explanation given based on the expectation that his procedural status will change, is fully justified. Such situations can be considered in the context of the principle of freedom of expression, as the failure to adhere it makes the evidence invalid (Article 171 § 7 of the Code of Criminal Procedure). The freedom of expression granted to a suspect extends to various stages of the mental process leading to giving the explanation by the suspect. The first of these stages includes motivation processes affecting the suspect's decision on the future statement of evidence[18]. Undoubtedly, the prospect of impunity for certain offences is often the most important motivator of a suspect to provide testimony. Thus, maintaining the validity of the suspect's explanation as evidence, in a situation where its determinant ceased to be valid, would infringe the principle of freedom of expression, not to mention the principle of *nemo se ipsum accusare tenetur*. The case-law stresses that freedom of expression is maintained when factors affecting the motivation process of the person being heard, but these include only those which "do not deprive them of the possibility to choose the content of the explanations being given"[19]. Certainly, in the event of a candidate for a witness turning state's evidence, the possibility of choosing the content of his explanations is limited by the Act on State's Evidence, which indicates about what circumstances he should be heard (Article 3 paragraphs 1 and 2). Thus, even if the Act on State's Evidence did not disqualify the suspect's explanations received by the court before the decision to refuse to admit the state's evidence, his statement could be declared invalid under Article 171 § 7 of the Code of Criminal Procedure. However, the rule provided for in Article 6 of the Act on State's Evidence which eliminates the evidence with regard to explanations made pursuant to Article 5 paragraph 3 of the Act offers the suspect a guarantee that the mere fact of examining by the court a request to grant the suspect the status of state's evidence witness does not aggravate his procedural situation by circumventing the principle of *nemo se ipsum accusare tenetur*. The main manifestation of this principle is, after all, the right to silence, to which the suspect interested in turning state's evidence is not actually entitled[20].

It is difficult to see the *ratio legis* for such a broad definition in Article 6 of inadmissibility of evidence to the extent to which it relates to disqualification of

[18] The next stage involves deciding whether to provide an explanation or not, and the last is the realization of the decision of will, namely giving the explanation. See S. Waltoś, P. Hofmański, *op. cit.*, pp. 358–359.

[19] Judgement of the Court of Appeal in Lublin of 18 September 2014, II AKa 130/14, LEX No. 1527087.

[20] The destruction of evidence in the form of a record of explanations of a suspect who applied for the status of state's evidence witness "raises objections" of E. Kowalewska-Borys. According to the author, however, this is "the best solution". See E. Kowalewska-Borys, *Świadek koronny w ujęciu dogmatycznym*, Kraków 2004, p. 139.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 19:48:14

the suspect's explanations, the content of which may have "contributed to the disclosure of the circumstances of the offence, the detection of the other offenders, the disclosure of further crimes or their prevention", if the prosecutor just after the explanation provided, issued a ruling on the failure to apply for the admission of state's evidence. The quite imprecise definition of this inadmissibility forms the basis for such an interpretation of the article whereby the failure to file a request for admission of the suspect to testify as a witness results in the deprivation of the probative force of any previously given explanations from the suspect, and therefore even those which the suspect decided to provide even though the prosecutor has not yet formulated any suggestion to take any future action towards granting him the status of a witness turning state evidence[21]. It cannot, however, be ruled out that the prosecutor will begin to consider such an option after the suspect, without fully exercising the right to silence, reveals some of the circumstances of the crimes known to him. A. Baj aptly argues that the regulation set out in Article 6 of the Act "is supposed to protect the would-be state's evidence witness from revenge of the accomplices". Although the author refers to numerous controversies among scholars on the aforementioned provision, but without specifying the details[22]. In particular, the very scope of the above-mentioned inadmissibility of evidence is controversial. It appears that a provision may be proposed for the future legislation that should clearly indicate that any depositions of the suspect, submitted in the preparatory proceedings before he was given a proposal to turn state's evidence, retain the probative value on the general rules and shall not be destroyed.

[21] In the specified context, it may be interesting to analyse the results of a survey conducted by Z. Rau at the dawn of the 21st century. They suggest that the proposal to turn state's evidence comes most often from a member of a criminal group (48%), rarely this kind of offer is made by a prosecutor (30%). Zob. R. Rau, *Przestępczość zorganizowana w Polsce i jej zwalczanie*, Kraków 2002, pp. 217–218.

[22] A. Baj, *Zakazy dowodowe dotyczące świadka koronnego*, „Prokuratura i Prawo" 2007, nr 1, s. 115. The imprecision of the wording of Article 6 of the Act on State's Evidence is also pointed out by M. Kucharczyk. The author states that "the inadmissibility of evidence under Article 6 of the Act covers only those explanations of the suspect who have not turned state's evidence and which were given before the body conducting the preparatory proceedings, the prosecutor and the court which had heard such a suspect before issuing a ruling on the admission of the state's evidence, and which concern the circumstances covered by Article 3 and Article 5 paragraph 3 of the Act". The author is of the opinion that "other suspect's explanations submitted in preparatory proceedings which are not related to Article 3 of the Act are not to be destroyed and constitute evidence which will subsequently be subject to the assessment of the court" (M. Kucharczyk, *Wyjaśnienia podejrzanego nieuznanego za świadka koronnego*, „Państwo i Prawo" 2006, z. 7, p. 70). Is this to be the case where also the suspect's explanations must be destroyed, in which he provided the investigating authority with "information that could have contributed to the disclosure of the circumstances of the offence" (Article 3 paragraph 1 item 1 of the Act), although it took place before the promise was made to give the suspect the status of state's evidence witness?

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 19:48:14

To sum up, another question may be asked: Do even the most "meritorious" state's evidence witnesses really deserve a guarantee of total impunity? Perhaps the prospect (guarantee) of a more lenient criminal liability, including the possibility of providing support under the witness protection scheme, would provide a sufficient incentive to cooperate with judicial bodies.

Of course, the reduction in the benefits from a specific collaboration taken by members in organised groups or criminal associations with judicial representatives would involve the introduction of institutional changes to the Polish model of state's evidence witness. This time, it is worth to follow the solutions applied in other countries. In Germany, the institution of state's evidence witness, in a form providing for the possibility of discontinuation of the prosecution of an offender cooperating with the law enforcement authorities, was abolished in 1999. The German legislation covers, however, a regulation similar to that referred to in Poland as "little state's evidence witness" (Article 60 § 3 of the Penal Code). The situation in Italy looks similar, where the principle of legalism formulated in the Constitutional Act does not allow the full release of the state's evidence witness from criminal liability[23].

To sum up, it is worth mentioning a somewhat controversial view by Judge G. Wasiński, that "there are certain interest groups hidden behind some of scholarly opinions, which would very much like to deprive the law enforcement agencies of the opportunities generated by the institution of state's evidence witness"[24]. Perhaps there are such "groups", but the scepticism about the institution of state's evidence witness can be derived from a quite different point of view. In fact, the interest of the judiciary in the broad sense requires the implementation of substantive criminal law norms by prosecuting and sentencing all perpetrators of crime without guaranteeing impunity for some of them.

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[23] Zob. M. Gabriel-Węglowski, *Ustawa o świadku koronnym. Komentarz. Zarys instytucji w Europie*, Warszawa 2011, p. 266.

[24] G. Wasiński, *Wybrane aspekty specyfiki przewodu sądowego z udziałem świadka koronnego*, [in:] *Przestępczość zorganizowana, świadek koronny, terroryzm – w ujęciu praktycznym*, red. E. Pływaczewski, Kraków 2005, p. 705.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
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STRESZCZENIE

Przedmiotem artykułu jest nieco anachroniczna w ocenie autorki instytucja świadka koronnego, której obecny legislacyjny kształt może budzić zastrzeżenia, w szczególności patrząc z punktu widzenia obowiązywania zasady równości wobec prawa. W opracowaniu zaprezentowano kilka wniosków *de lege ferenda*, których ewentualne uwzględnienie mogłoby posłużyć do optymalizacji rozwiązań prawnych przewidzianych w ustawie o świadku koronnym. Przedstawiono m.in. postulat objęcia omawianej instytucji regułą subsydiarności na wzór wymogu odnoszącego się do kontroli operacyjnej, która także nie jest bezdyskusyjna w płaszczyźnie moralnej i jurydycznej. W artykule nawiązano również do brzmienia art. 6 wymienionej ustawy, przewidującego regułę eliminującą dowód z wyjaśnień podejrzanego, który ostatecznie nie nabył statusu świadka koronnego. Zdaniem autorki ujęcie tej reguły jest zbyt szerokie i mało precyzyjne, dlatego wymaga stosownej korekty.

Słowa kluczowe: świadek koronny

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