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## PROCEDURAL SOLUTIONS, AUTHORITIES AND INFRASTRUCTURE APPLIED IN THE EXECUTION OF PROTECTION FOR A CROWN WITNESS

### Abstract

The essence of the procedural institution of a crown witness is the scope of their protection. Alongside protection in the *sensu stricto* and *sensu largo*, one can point to procedural mechanisms, authorities, and infrastructure operating in the relevant sphere, which the author analyses in this study. These include the mechanism of excluding the public nature of the trial involving a crown witness, the organization of the court building's functioning, as well as the use of appropriate technical means during the performance of procedural activities. In the further part of the article, the sphere of international cooperation during the application of protection is discussed, along with the characteristics of the Crown Witness Protection Office, which is responsible for its implementation. The author cites available literature and statistical data in the text.

**Keywords:** crown witness, protection of a crown witness, crown witness protection program

### Introduction

The problem of protecting crime witnesses has always been an integral part of the criminal justice process. The issue, however, was trivialized for many years, and the reason for such a state of affairs was the exclusive emphasis on punishing the perpetrators of crimes. This rightful assumption, simultaneously one of the goals of the justice system, is challenging to achieve without ensuring effective protection for crime witnesses. The development of crime in the 20th century and the increasingly sophisticated methods of perpetrators have raised the fear of witnesses testifying fully and freely, often leading directly to a conspiracy of silence. Paradoxically, the criminal world itself forced the justice sys-

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tem to reconsider the existing view of witness protection in the criminal process. The implementation of witness protection has dual significance. On one hand, it safeguards their interests, and on the other hand, it paves the way to obtain material truth in the legal process<sup>1</sup>.

Awareness of the gravity of the issue of witness protection in the legal process led to a stream of interesting proposals in this matter at the end of the last century. The demand for the protection of the privacy of crime victims and witnesses was particularly crucial. The names of those involved and details allowing their identification should not be made public. The suspect should also not have access to this information. The possibility of giving testimony without the presence of the suspect should be introduced, for example, using audiovisual equipment. The decision on the method of giving testimony should be made before the interrogation, with experts responsible for determining the type and degree of threat to the witness participating (to ensure the right to the defence of the accused). Another demand was to equip witnesses with devices enabling efficient communication with the local police unit in case of a threat. This device, in the form of an alarm, would guarantee a priority connection and prompt intervention by law enforcement agencies. An interesting solution was the idea of combining, for example, the institution of conditional early release with a prohibition on the perpetrator's contact with the victim or witness. Witnesses and victims should be informed about these special court provisions and what actions to take in case of their violation<sup>2</sup>.

Some of the presented proposals have been adopted by the Polish legislation. An example of this is the institution of an incognito witness, which implements many doctrinal postulates in the field of witness protection. Technical solutions mentioned are likely to be gradually introduced as the budget for law enforcement agencies increases.

The issue of witness protection is actively discussed, especially in the context of the institution of a crown witness. There is a valid conviction that "ordinary" witnesses do not have adequate protection. For witness protection in the Polish criminal process to function satisfactorily, appropriate financial resources and extensive expert work are needed. There is still much to be done in this matter, and the institution of a crown witness, whose protection is far superior to that of an "ordinary"

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<sup>1</sup> See: E. Kowalewska-Borys, *Świadek koronny w ujęciu dogmatycznym*, Kraków 2004, p. 245.

<sup>2</sup> E. Bieńkowska, C. Kulesza, *Jak postępować z ofiarami przestępstw. Poradnik dla praktyków, Dokumenty Rady Europy i Narodów Zjednoczonych*, Białystok 1992; E. Bieńkowska, C. Kulesza, *Europejskie standardy kształtowania sytuacji ofiar przestępstw*, Białystok 1997.

witness in the process, may prove to be a relevant stimulus. Critical opinions and suggestions from experts should not be surprising. Their example can be illustrated by the following words: “(...) effective protection for an ordinary person – a witness (...) is a real social problem and a difficulty for law enforcement agencies and the justice system. This needs to be solved first, rather than starting the work by creating immunity for the criminal. What kind of justice would it be if the state protects the criminal and tells the witness, who is blameless, ‘protect yourself?’”<sup>3</sup>.

The analysis of the problem of protecting crown witnesses should start with Article 14 of the Crown Witness Act<sup>4</sup>. It deals with the scope and conditions of providing protection and assistance to crown witnesses and persons closest to them. It constitutes the framework of the protective umbrella with which the justice system secures a valuable witness. It should be noted from the outset that the protection mentioned may not only apply to the crown witness and persons closest to them. Paragraph 3 of Article 14 expands the possibility of applying protection to a suspect who meets the conditions of Article 3(1) of the Act or a person closest to them until obtaining the status of a crown witness. The phrase “persons closest to them” should be understood in accordance with Article 115, paragraph 11 of the Criminal Code<sup>5</sup>.

The legislator's provision constitutes a facultative norm, as indicated by the use of the term “may”<sup>6</sup>. This means that the protection of a crown witness does not occur automatically each time the witness participates in the legal process. Protection is granted upon request or ex officio and is contingent on the occurrence of circumstances prescribed by law. Ex officio protection depends on the consent of individuals who are to be covered by the protection. The consent must be clear and unambiguous and should be in writing<sup>7</sup>.

The condition for applying protection is a threat to the life or health of the crown witness or the suspect mentioned in paragraph 3 of Article 14 of the Act, as well as persons closest to them. The threat mentioned must be real and manifest itself, for example, in threats or harassment. Often, verifying the threat can be very difficult. In such a situation, when deciding to grant protection, one can rely on clues or operational find-

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<sup>3</sup> J. Wojciechowski, *Na patelni. Po co komu świadek koronny?*, „Polityka”, 1994, No. 3, p. 8.

<sup>4</sup> Journal of Laws from 2016, item 1197, consolidated text.

<sup>5</sup> Journal of Laws from 2022, item 1138, consolidated text.

<sup>6</sup> K.J. Pawelec, *Wyjaśnienia podejrzanego, zeznania świadka i instytucja świadka koronnego. Komentarz*, Warszawa 2003, p. 152.

<sup>7</sup> B. Kurzepa, *Świadek koronny. Geneza instytucji. Komentarz do ustawy*, Toruń 2005, p. 167.

ings. It is important that the threat is not just a subjective feeling of the person to whom protection is to be granted. It should be emphasized that a threat to the freedom of the entitled person or their property on a significant scale does not constitute a condition for granting protection<sup>8</sup>. At this point, it is worth asking whether a crown witness and persons closest to them should not be mandatorily covered by protection. As rightly noted by Ewa Kowalewska-Borys: “a crown witness, due to his role as a traitor, informer, or finally, a criminal who will avoid criminal responsibility for his actions, is in a state of permanent threat to life or health. (...) Persons closest to him, his family, will be subjected to various pressures. (...) In this context, one cannot ignore the possible reaction of society to the crown witness – contempt and aversion, frustration (...)”<sup>9</sup>. Taking the above into consideration, it must be stated that the Crown Witness Act should include a provision for the mandatory protection of a crown witness and those closest to them. A criminal allowed to participate in proceedings as a crown witness loses freedom and security<sup>10</sup>. The time spent obtaining a decision on providing appropriate protection should be used for the witness to go into hiding and adapt themselves and those closest to them to a new reality in which they will have to live.

### Exclusion of the public nature of the trial

The first-level mechanism in the sphere of crown witness protection is the exclusion of the public nature of the trial. Article 13, paragraph 1 of the law addresses this issue, stating: “Upon the request of the crown witness, the court excludes the public nature of the trial during their examination. The witness must be informed of this right. In the event of the exclusion of public nature, the provisions of Article 361, paragraphs 1 and 3 of the Code of Criminal Procedure do not apply”<sup>11</sup>. This is an example of an extralegal limitation of the public nature of the trial<sup>12</sup>. The examination of a crown witness, covered by a protection program and undoubtedly exposed to serious danger from criminal organizations,

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<sup>8</sup> *Ibidem*, pp. 167–169.

<sup>9</sup> E. Kowalewska-Borys, *op. cit.*, p. 257.

<sup>10</sup> See: E. Moczuk, K. Bajda, *Tworzenie bezpieczeństwa lokalnego przez Policję w perspektywie socjologicznej*, [in:] *95 lat służb policyjnych w Polsce*, eds E. Ura, S. Pieprzny, Rzeszów 2015, pp. 387–402.

<sup>11</sup> Journal of Laws from 2016, item 1197, consolidated text.

<sup>12</sup> P.K. Sowiński, *Z problematyki niejawności niektórych czynności dowodowych przeprowadzanych na rozprawie głównej w sprawach karnych*, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza. Prawo”, 2019, vol. 24, pp. 179–191.

should be conducted with the exclusion of public nature. This exclusion applies to the audience, not the procedural parties. The reason for excluding the public nature of the trial is not to hide the identity of the witness or conceal the content of their testimony but to protect their image in the broadest sense. It encompasses all physical characteristics and non-verbal communication methods that could lead to their identification (body build, height, manner of movement, linguistic style, gestures). For the same reasons, it is common practice to have the witness wear a balaclava and undergo a disguise during their presence in other procedural activities<sup>13</sup>. At the same time, the court, based on paragraph 2 of Article 13, “orders the prohibition of bringing into the courtroom devices recording sound, image, or capable of transmitting sound or image, and also subjecting oneself to control for the implementation of this order”<sup>14</sup>. This regulation applies to the crown witness only in proceedings in which they have obtained this status. In other proceedings, where they appear as an “ordinary” witness or accused, they may apply for the exclusion of the public nature of the trial under Article 360, paragraph 1, point 4 of the Code of Criminal Procedure<sup>15</sup>.

### **The organization of the functioning of a courthouse building**

The implementation of crown witness protection also concerns the organization of the infrastructure of courts and prosecutors' offices. Article 54, paragraph 1 of the Act of July 27, 2001, on the System of Common Courts, states, “It is not allowed to bring weapons or ammunition, as well as explosives and other dangerous substances into court buildings. This does not apply to individuals performing official duties in court buildings that require the possession of weapons”<sup>16</sup>. In order to ensure security in court buildings and comply with the specified prohibition, the court president may order the application of appropriate measures. These measures are intended to prevent attempts to bring dangerous items into the buildings. This procedure is crucial for the effective personal protection of the crown witness and the potential threat to their life and health from the criminal world. Firearms and explosives are

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<sup>13</sup> J. Łyżwiński, *Odstępstwa od zasady jawności rozprawy w świetle ustawy o świadku koronnym*, [in:] *Przestępczość zorganizowana. Świadek koronny. Terroryzm. W ujęciu praktycznym*, ed. E.W. Pływaczewski, Kraków 2005, pp. 444-445.

<sup>14</sup> Journal of Laws from 2016, item 1197, consolidated text.

<sup>15</sup> M. Gabriel-Węglowski, *Ustawa o świadku koronnym. Komentarz. Zarys instytucji w Europie*, Warszawa 2011, p. 181.

<sup>16</sup> Journal of Laws from 2023, item 217, consolidated text.

evidently tools used by members of groups and associations with the aim of committing crimes. The same regulation applies to prosecutor's office buildings, allowing for the effective safeguarding of the interests of a potential crown witness during the preparatory proceedings<sup>17</sup>.

### **The use of technical means**

Each appearance of a crown witness in the courthouse poses a real threat to their safety. An effective solution that ensures the secure conduct of procedural activities with their participation while simultaneously preserving the procedural guarantees of the parties is to conduct them, if possible, remotely using technical means with a direct transmission of image and sound. The procedure for questioning in the specified mode is outlined in the aforementioned Article 177, paragraph 1a of the Code of Criminal Procedure, although the conditions for its use are not directly related to the sphere of protection<sup>18</sup>. The Appellate Court in Krakow expressed its opinion on this matter in the judgment of March 13, 2009: "It is advisable to question the crown witness remotely using appropriate technical devices (teleconference mode). This saves significant costs for ensuring the witness's safety, which is an obligation of the State authorities, undertaken in the agreement with the witness when each of their appearances (bringing them in) before the court poses a threat to their safety. Another matter is to guarantee the court's control, especially the procedural rights of the accused concerning the witness's testimony, starting from verifying whether the witness testifies without any influences to allowing the witness to be examined by asking questions, just like in cases of testimonies given directly in court"<sup>19</sup>.

Paragraph 1a is a specific provision in relation to the rule contained in paragraph 1 of Article 177 of the Code of Criminal Procedure. It can only be applied in a situation where, for justified reasons, conducting the questioning in the standard mode is unjustifiable or impossible. If such reasons arise, it is possible to question the witness remotely using technical means, or question them without using them by a designated judge or a court summoned as part of legal assistance. If the procedure is carried out using technical means, a court clerk, judge's assistant, or court

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<sup>17</sup> Article 40, paragraphs 1 and 2, of the Act of January 28, 2016, on the Prosecutor's Office, Journal of Laws 2022, item 1247, consolidated text.

<sup>18</sup> R. Teluk, *Wyłączenie jawności rozprawy wobec osób objętych programem ochrony*, „Palestra” 2014, No. 3-4, p. 80.

<sup>19</sup> Judgment of the Appellate Court in Krakow dated March 13, 2009, Case No. II AKa 155/08, KZS 2009, No. 9, item 42.

official employed in the court where the witness is located participates in the proceedings before the court<sup>20</sup>. If the witness is in a prison or detention facility, a prison service officer may be present instead of the individuals mentioned above. If the witness, being a Polish citizen, is abroad, a consular official is present<sup>21</sup>. The indicated procedure should be applied to conduct the questioning of witnesses subject to special protection, including crown witnesses. Article 177, paragraph 1a of the Code of Criminal Procedure can be used both in preparatory proceedings and in court proceedings. The place of conducting the questioning in this mode can be kept confidential. This is of particular importance in a situation where there is a threat to the health and life of the protected person<sup>22</sup>.

### International cooperation

Article 15 of the Crown Witness Act states that “the conditions and principles of providing protection or assistance referred to in Article 14 abroad may be specified by an international agreement”<sup>23</sup>. Such protection occurs after the conclusion of a bilateral or multilateral international agreement, which establishes the conditions and principles of its provision on the basis of reciprocity. The content of such an agreement is protected analogously to the provisions on the protection of classified information. Given the fact that Poland belongs to countries with average land area and population density, the statutory possibility should be accepted with approval<sup>24</sup>. Expanding the methods and forms of assistance for crown witnesses through cooperation with other countries is justified in every respect. In individual cases, social and cultural conditions may, under certain circumstances, be a factor influencing the effective provision of security for the crown witness and those closest to them<sup>25</sup>. Although the analysed issue is subject to secrecy, it is known that the Polish police cooperate with foreign counterparts within

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<sup>20</sup> Paragraph 1a of Article 177 of the Code of Criminal Procedure, amended by Article 6, point 1 of the Act of August 31, 2011, amending the Act on the Safety of Mass Events and Some Other Acts (Journal of Laws 2011, item 1280), with effect from November 12, 2011.

<sup>21</sup> Article 177 § 1b added by Article 39, point 3 of the Act of June 19, 2020, amending the aforementioned law, with effect from June 24, 2020.

<sup>22</sup> P. Wiliński, *Przesłuchanie świadka na odległość w postępowaniu karnym*, „Przebieg Sądowy” 2005, No. 6, item 16.

<sup>23</sup> Journal of Laws from 2016, item 1197, consolidated text.

<sup>24</sup> *Ustawa o świadku koronnym. Komentarz*, ed. A. Ważny, Warszawa 2013.

<sup>25</sup> M. Gabriel-Węglowski, *op.cit.*, p. 192.

witness protection programs. As part of mutual cooperation, there is regular sending and receiving of protected individuals who are repentant criminals, both domestic and foreign<sup>26</sup>.

### The Management of Crown Witness Protection

The protection of a crown witness is carried out by police officers operating in the organizational unit responsible for the protection of crown witnesses<sup>27</sup>, previously referred to as the Crown Witness Protection Office (ZOŚK<sup>28</sup>), which operates within the structure of the Central Bureau of Investigation of the Police (CBŚP<sup>29</sup>). The actions of the Central Bureau of Investigation of the Police (CBŚP) in the field of protection are classified. Protection officers collaborate with services from several countries and participate in numerous training sessions, including in the USA, Germany, Italy, and France. As part of their work, they organize hideouts, convoys, and travel to courts with repentant gangsters whose protection lasts for many years, sometimes even for the rest of their lives. The recruitment process for working with a crown witness is multi-stage. The most experienced professionally and personally officers are selected to work with protected individuals. The psychologist's opinion plays a crucial role in the recruitment process, assessing how well the personality traits of protectors and the protected individual match. The goal is to avoid symptoms of Stockholm syndrome (solidarity and sympathy between both parties, analogous to the situation of kidnappers and hostages) or, conversely, too much distance and reluctance. Officers in the crown

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<sup>26</sup> Z. Rau, *Przestępcom czasem obiecuje się więcej, niż można im dać*. Wywiad, „Rzeczpospolita”, 2012, No. 117.

<sup>27</sup> The organizational unit for the protection of a crown witness within the Central Bureau of Investigation of the Police (CBŚP) is established based on Directive No. 54 of the Chief Police Commander dated October 7, 2014, regarding the organization, substantive and local scope of activities, and principles of cooperation between the Central Bureau of Investigation of the Police and other organizational units of the Police, Police Headquarters Official Journal 2014, item 121.

<sup>28</sup> See: A. Misiuk, *Od „Maratonu” do Centralnego Biura Śledczego. Rozwój organizacyjny policyjnych służb zajmujących się zwalczaniem zorganizowanej przestępczości*, „Studia Politologiczne”, 2014, No. 34, pp. 66-81.

<sup>29</sup> Centralne Biuro Śledcze Policji (Central Bureau of Investigation of the Police), formerly known as Centralne Biuro Śledcze Komendy Głównej Policji (Central Criminal Investigation Bureau of the Chief Police Command). The change occurred based on the Act of June 26, 2014, Journal of Laws 2014, item 1199, amending the Police Act and some other acts; Por. D. Dzieduszycki, *Akademia Policyjna*, Prawo i Życie 2000, No. 2; G. Maziej, *Polskie FBI, czyli Centralne Biuro Śledcze KG Policji*, „Gazeta Sądowa”, 2000, No. 7-8.



witness protection program must alternately exhibit the qualities of a guardian and a caregiver. They must also behave appropriately in their personal lives. This involves camouflage and discretion. Exceptional stress resistance and resistance to various temptations are also required. Individuals with at least twenty years of experience are preferred. The risk of manipulation by the witness is significantly lower in such cases<sup>30</sup>.

Officers working in the Crown Witness Protection Office (ZOŚK) are usually policemen with operational experience from other units in the police, such as the criminal, anti-narcotics, or economic department of the Central Bureau of Investigation of the Police (CBŚP). Recruitment includes checking the ability to cooperate with personal sources of information. Desired units are those with a security clearance certificate with the classification "top secret," indicating the highest level of trust and adherence to secrecy. Among the necessary skills, in addition to personality predispositions, are the ability to dynamically drive vehicles in protective formations, no fear of flying helicopters, and *quasi*-accounting competencies in handling and documenting funds from the police's operational fund "O" – zero. Protection officers must also demonstrate a high level of initiative in solving the daily problems of the protected individual and their family, both existential and mental problems, as they deal with people whose world has collapsed. They are constantly under pressure related to self-control and counter-observation. They lead a life of double identity, full of concerns for themselves and the protected individuals. Police officers implementing the assistance and protection program must have communication skills and be able to adapt to the level of their "counterparty," which requires intelligence and ideological flexibility. Crown witnesses are ordinary people, representing a cross-section of society. They include both primitive individuals without authority figures and educated people from higher circles, cultured and calculating. The pressure on protection officers lasts for even a dozen or so years. During this time, they bear a multidimensional responsibility for the protected individuals. The failure of the "guardian" would be a situation where the witness returns to a path of crime, their exposure, as well as putting them at risk of losing health and life<sup>31</sup>.

The protected person is presented with the rules of conduct. The guidelines include a set of actions that, for safety reasons, they will have to undertake, as well as those that will be prohibited. A crown witness provides information about their family, social, and criminal contacts,

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<sup>30</sup> *Pod specjalnym nadzorem*, Policja 997, <https://gazeta.policja.pl> (26.11.2020).

<sup>31</sup> A. Ruszczyk, *Ochroniarze „skruszonych”, czyli jak działa zośk-a*. Wywiad ze Zdzisławem Hanejko, byłym „ochroniarzem skruszonych”, t.j. policjantem operacyjnym z Zarządu Ochrony Świadka Koronnego CBŚP, *Gazeta Śledcza*, <http://gazetasledcza.pl> (29.11.2020).

financial status, health, and other relevant circumstances from the perspective of protection<sup>32</sup>.

While a crown witness faces a real danger, their physical protection is continuous. As a rule, such a situation occurs before giving testimony and during the trial. Additionally, protection involves daily personal or phone contacts and the ability for the witness to use a 24-hour emergency phone. Until 2012, protection program officers received information three times about a planned attack on the crown witness. Each time, the attack was successfully thwarted<sup>33</sup>.

## Conclusion

The Polish institution of a crown witness draws inspiration from Western European and Anglo-Saxon countries. Consequently, numerous analogies can be observed in ensuring the safety of repentant criminals<sup>34</sup>. According to police statistics, around 60 percent of those under the protection program do not reoffend. This is a significant result compared to the general population of offenders, where the percentage of return to criminal activity is approximately 20. There is no other institution in Poland that could report similarly high rehabilitation rates<sup>35</sup>. For example, in Italy, a crucial condition for the effective functioning of the crown witness institution is to provide effective legal and factual protection. The status of *collaboratore di giustizia* allows the use of ordinary or extraordinary protective measures. If these are insufficient, a special protection program can be employed. In Italy, similar to Polish legislation, state secrecy regarding the granting of the crown witness status applies to the entire proceedings and all circumstances related to their protection and assistance. This is reflected in a complete prohibition of evidence that pertains to all evidentiary activities aimed at revealing the circumstances of providing assistance or protection to eligible individuals. The scope of individuals who can be covered by the protection and assistance program is limited to the crown witness and those closest to them, which is seen by some scholars as a drawback<sup>36</sup>.

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<sup>32</sup> Świadkowie koronni. Policja chroni 89, teraz będzie odpowiadał za nich CBŚP, Money.pl, <https://prawo.money.pl> (28.11.2020).

<sup>33</sup> Pod specjalnym nadzorem....

<sup>34</sup> M. Krasowski, *Ochrona świadka koronnego*, „Annales Universitatis Marie Curie-Skłodowska”, 2002, vol. XLIX, p. 159.

<sup>35</sup> Pod specjalnym nadzorem....

<sup>36</sup> J. Brylak, *Program ochrony świadka koronnego we włoskiej procedurze karnej*, „Państwo i Prawo”, 2008, No. 12, pp. 73-83.

In the realm of protection, it is worth noting Article 14(4) of the Crown Witness Act, which states that evidentiary actions aimed at revealing the circumstances from paragraphs 1, 1b, and 2 are inadmissible. In a resolution dated November 30, 2011, the Supreme Court declares that this evidentiary prohibition applies to civil proceedings and also encompasses the period after the cessation of assistance and protection applied to the witness under the terms defined in the Act<sup>37</sup>.

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<sup>37</sup> Resolution of the Supreme Court dated November 30, 2011, Case No. III CZP 73/11.

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## **Rozwiązania procesowe, organy i infrastruktura stosowane w realizacji ochrony świadka koronnego**

### **Streszczenie**

Istotą procesowej instytucji świadka koronnego jest sfera jego ochrony. Obok ochrony *sensu stricto* i *sensu largo* wskazać można na procesowe mechanizmy, organy i infrastrukturę działające w przedmiotowej sferze, które autor w niniejszym opracowaniu poddaje analizie. Należy do nich mechanizm wyłączenia jawności rozprawy z udziałem świadka koronnego, organizacja funkcjonowania budynku sądu, a także wykorzystanie odpowiednich środków technicznych podczas wykonywania czynności procesowych. W dalszej części artykułu omówiona zostaje sfera współpracy międzynarodowej podczas stosowania ochrony i charakterystyka Zarządu Ochrony Świadka Koronnego, który odpowiada za jej wykonanie. W tekście autor powołuje się na dostępną literaturę przedmiotu i dane statystyczne.

**Słowa kluczowe:** świadek koronny, ochrona świadka koronnego, program ochrony świadka koronnego