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DICHOTOMY OF NON - CREDIBLE POLICE EVIDENCE IN THE PREVIOUS PROCEEDINGS AND PROSECUTION POWERLESSNESS IN SERBIA

- The Case Study of bribe-taking and money laundering-

ABSTRACT: Deciding to write, for the first time in this country, an article on dichotomy of non-credible police evidence in the previous proceedings and prosecution powerlessness, we had no presentiment how much care it would cause us. During the writing we had the issues regarding the contextualization and terminological determinants. As it turned out, recognizing, separating and using the method of correlation between the lack of evidence in police investigations and prosecution capacity/incapacity was an unexpectedly big challenge and an overly complex theoretical demand for a paper of this scale. However, we are neither the first nor the only ones to face this issue. Every attempt to make a theoretical contribution to understanding this term in both the legal and criminological theory has faced a number of issues difficult to be solved. On the other hand, it does not mean at all that attempts at scientific pondering and exploration of this

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important criminological and legal scientific problem, as well as attempts at defining the scientific causality of those aforementioned attempts, are theoretically meaningless or impossible. The fact that such a feat is difficult, that these institutions are illusive or multidimensional, shows how the theoretical knowledge used to interpret them has certain weaknesses, i.e. that during scientific research we are faced with many limitations and unknowns in our criminalistics and legal theory. By solving theoretical problems associated with the lack of evidence and its impact on prosecution powerlessness, we could open the way for understanding the other, similar or related phenomena and processes in law and criminalistics. Therefore, it is the primary purpose of this paper to explore the ranges of prosecution capacity/incapacity through the lack of evidence in police investigations regarding bribe-taking and money laundering. We do not believe we can offer a significant scientific and theoretical contribution if our research remains isolated, without arousing other scientific discussions on this topic. Our attention is directed towards the search for a different and somewhat innovative approach which could eventually lead to some new insights into our criminal and legal thought on the evidence and its impact on prosecution capacity or incapacity.

Key words: *money laundering, bribe-taking, evidence, police investigation, prosecutor's office.*

1. Methodological framework of the research

Purpose: The subject of this work are research methods for detection and reporting the citizens committed a crime to the police, and issues concerning prosecution capacity/incapacity in Republic of Serbia having police records created without any evidence that these citizens have committed a crime.

Methods: In this research paper there are applied methods of analyzing the content of both the domestic and foreign literature, the comparative method and method of descriptive analysis, the historical method, correlations, legal, as well as the case study method.

Sources of data: The collected data of adult offenders called “criminal charges” are based on the research conducted using a “questionnaire for the adult against whom the procedure was completed based on the criminal charges filed to the prosecutor by the police”. The file is filled in by all competent public prosecutors' offices after the public prosecutor ascertains

that the procedure is finally completed with the decision which: rejects the criminal charge, stops the investigation, dismisses the investigation or files charges- indictment proposal. The collected data referring to the accused and convicted citizens are based on the research conducted using a “questionnaire for the convicted adult against whom the criminal procedure was lawfully completed”. Data collected by using this research concerns the number of the reported, charged and convicted citizens, based on a singular methodology, by applying the uniform procedure and identical statistical instruments in the research on reported adults, as well as in the researches on the charged and convicted adults, the offenders.

Coverage: The study includes all the offenders against whom criminal charges were filed by the police to the competent public prosecutor’s office and against whom the criminal procedure was lawfully conducted and completed. The study includes money laundering offences and criminal acts of bribe-taking according to the articles of the Criminal Code of Republic of Serbia.

Explanations of concepts and features: For the purposes of understanding the methodological aspect of the research problem, here are the meanings of certain terms according to the Code of Criminal Procedure of Republic of Serbia: “the police” is a body of the Ministry of Internal Affairs; “procedure” is a preliminary investigation procedure and criminal procedure; “reasonable suspicion” is a set of facts which indirectly indicate that the crime was committed or that a particular individual has committed a criminal act; “taken into custody” is arresting, detention; “criminal law” is the Criminal Code and other laws of Republic of Serbia containing criminal provisions; “criminal offence” is an act provided by law to be a criminal act, which is unlawful and wrongful; “adult offender” is a criminal offender who was already 18 years old at the time the crime was committed ; “reported individual offender” – is an adult offender against whom a procedure is based on criminal charge and the preceding procedures are completed with the decision which: rejects charges, stops investigation, drops charges, dismisses investigation or files charges; “type of decision”- is a decision made by the public prosecutors according to which the criminal procedure is ended; “the accused person”- is an adult against whom it is filed: a charge, indictment, or private law-suit, against whom a criminal charge is lawfully ended by the court decision according to which: private law-suit is dismissed, the procedure terminated or charges dropped, the offender freed of charges, charges rejected; “the convicted person”- is an adult who is found guilty, against whom criminal sentences are imposed.

Findings: After the social changes during the year of 2000, there weren't any changes in applying police methods in detecting and securing the evidence and reporting citizens (filling criminal charges) who had committed criminal offences. The method of police work from 1945 is still used, brought after the rise of the Communist Party to power in Serbia, when the work of the police had precedence- finding and announcing to the public that the enemy was found was enough. It was not necessary to gather evidence which would show that the citizen had committed an offence for which he/ she was charged with.

Research limitations / implications: Study results are limited to gathering research material for investigation of the existing work methods of the police in Serbia for detecting and securing the evidence for criminal charges against a citizen as a committer of a particular criminal act.

Practical implications: Study results can be used for production and adoption of legal and ethical regulations, rules and methods, as well as education of police officers who would have the knowledge from the following areas: legal and ethical principles, rules, regulations and methods to conduct the law and filling charges against a citizen only when there is a piece of evidence that, without doubt, proves the offender is guilty for committing a particular criminal act. Further, practical implication of this knowledge would influence the quality in gathering and securing evidence and reducing human rights violation in Serbia.

Originality / value: The originality of this paper is evident in researching directed to the work principles of police officers in Republic of Serbia, which enables not only the territory but also the legal and ethical practice to introduce new legislations and methods for discovering and securing the evidence, as well as the ways of the human rights protection in accordance with the regulations of the well-educated nations, democratic societies and states.

2. Model police investigation in Serbia-preliminaries

The practice model of security and police services known as 'clearing up criminal offences' was structured a little less than a century ago, in the model invented by Beria, whose primary goal at the time was to aim the police work at a citizen, not at evidence. It was important and sufficient to reveal the enemy to public, but not the evidence to the court as well.¹ This practice

¹ Lavrenti Pavlovich Beria (Georgian: ლავრენტო პავლეს ძე ბერია, Lavrenti Beria Pavles dze; Russian: Lavrenti Pavlovich Beria, March 29, 1899 - December 23, 1953) was a Soviet politician, intelligence and military leader, best known as the longtime head of the secret police, the NKVD, which is thanks to this position became the second person in the country, behind Stalin himself. Retrieved from: http://sh.wikipedia.org/wiki/Lavrentij_Berija

model for the security and police services was accepted by all socialist countries including the former SFRY- Serbia because the leaders of those countries were educated in accordance with that model. Thus, it was enough for the services to say publicly that a citizen was guilty, that he/she was an enemy, to solve the case before the public, and thus inform the citizens. In order to clear up an offence, they did not need any evidence with which the court would produce to prove the defendant's guilt. The model was designed to derogate and take over the court duties, which, in societies which held to the rule of law, exclusively meant determining what had happened considering all the evidence presented. Building its practice on the clearing-up of criminal offences with no obligation of providing evidence to support the charge in the indictment against the citizen, the police have violated and continue to violate human rights in the most brutal way. This model of practice and organization of security structures had been used in Serbia until the end of 2000.² Whether it is still present in the third millennium, we will draw conclusions from the research findings.

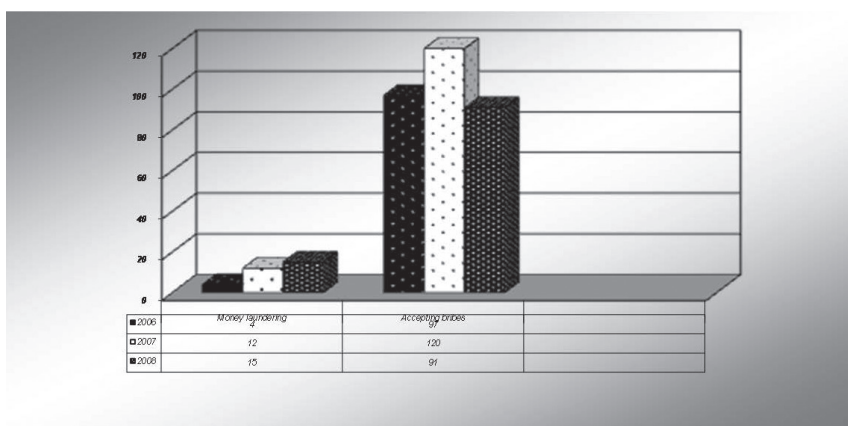
On the other side, the wider public often gets information in the statements given by government officials to the press and in political programmes. It is the court that has or bears the greatest responsibility because, with its decisions, it creates a fertile ground for the development of factors which endanger the security of citizens. It is also stated by government officials that the court 'is not able to convict the accused persons for it chooses inadequate sentences e.g., prison sentences', by which it negatively influences the 'general prevention'. Further, a great blame is put on the court by statements that with such a treatment of the 'solved cases', it creates a negative climate in the country and seriously contributes to discouraging foreign investments since the legal security is demanded in the world of business. In other words, government officials state that there is a negative correlation between the numbers of reported and charged individuals, the evidence and the court's ruling such as imposed sentences. An empirical research has been conducted from the previously mentioned observations and collected data; it examines how this model of clearing up offences influences the quality of evidence, the development of criminal activity, legal and economic insecurity, human rights violation and the credibility of Serbia.

² During 2000, in Republic of Serbia, a new government was elected and it promised changes in the state institutions- the police, prosecution, judicial system as well as law changes and ethical principles of conducting and applying the law and police power towards citizens and protecting the human rights from the previous work of the police. The research findings have shown quite the contrary- the model and principle of the police work from the time of communism in the period from 1945 to 2000 is continued in Serbia.

3. The results of an empirical study analysis and discussion

During the period from 2000 to 2008, charges were brought against 41% of all reported adult citizens in Republic of Serbia, and the court ruled in 75% cases of the charged individuals. Only 35% of the total reported individuals were sentenced by court.³ Using the comparative analysis of research results in several countries which are not members of the European Union,⁴ we have noticed the following: in Republic of Croatia⁵ there is a negative correlation between the number of reported and charged citizens, 40% to 45%, while a negative correlation was found between the number of convicted individuals and the number of all reported cases, which corresponds to the results found in Republic of Serbia.⁶

Chart 1. The number of the reported citizens charged for committing money- laundering offences and criminal act of bribe-taking in Republic of Serbia during the period from 2006 to 2008.⁷



The analysis and interpretation of the results found in Republic of Bosnia and Herzegovina have revealed the positive correlation between the number of the reported and charged individuals and the number of the reported individuals in comparison to Republic of Serbia. In other words, 70% of the

³ Republic Statistical Office of the Republic of Serbia (2010, August 12). Retrieved from: <http://stat.gov.rs/> Bulletin No. 558, since 2012

⁴ Republic Statistical Office of the Republic of Serbia (2013, December 23). Retrieved from: <http://www.stat.gov.rs/>

⁵ Codon Sidheo ISSN 1330/335X; <http://www.dzs.hr/> (available 21/11/2013)

⁶ Retrieved from: Republic Institute for Statistics., ISSN 0354 / 3641st.

⁷ Retrieved from: <http://www.stat.gov.rs/> (available 23:12. 2013)

reported individuals were brought charges against, and 80% of the charged individuals were convicted, while the number of the convicted individuals was positively correlated with the number of the reported individuals with regard to Republic of Serbia (35%), which was almost 60%.⁸ By comparing the results found in the neighbouring countries such as Republic of Croatia,⁹ we have noticed the presence of the model of ‘clearing up criminal offences’, which lacks the evidence to support criminal charges against individuals, and thus leads to enormous human rights violations.

The comparative analysis of the results found in Republic of Bosnia and Herzegovina¹⁰ have demonstrated that the work model of its police services responsible for collecting evidence, has nothing in common with the model of ‘clearing up criminal offences’ used in Serbia; its model is focused on evidence to support charges when bringing an indictment against citizens.

Table 1. The number of the reported, charged and convicted adults for money-laundering offences and bribe-taking in Republic of Serbia during the period of time from 2006 to 2008.

	Reported	Charged		Convicted	
	N	N	Percentage (%)	N	Percentage (%)
2006					
Money laundering	4	0	0	0	0
Accepting bribes	97	43	44	38	89
2007					
Money laundering	12	1	0.8	1	100
Accepting bribes	129	38	29	31	80
2008					
Money laundering	15	4	26	4	100
Accepting bribes	91	33	36	23	70

The object of this theoretical and empirical research study is money laundering and corruption, two criminal offences that have a great influence on the stability, or rather the instability of a country, its institutions, its credibility abroad, and the possible investment of capital in this region by the foreign companies on the one side, and the model of police work and its influence on the violation of human rights and the quality of evidence on the other side.

⁸ The Bulletin of the Institute for Statistics of Serbia, No. 546, p. 4

⁹ Retrieved from <http://www.dzs.hr/> (available 14/11/2013)

¹⁰ Retrieved from <http://www.bhas.ba/> (available 17/11/2013)

The transition reform process has shown so far that just enacting legislation and establishing institutional mechanisms in accordance with the international standards by legislation bodies and the other government bodies without building new foundations and principles of work for the police in Serbia did not give the expected results. Bringing old models back and modernising equipment is not effective. On the contrary, it violates human rights even more.

The correlation and comparative analyses of the research findings presented in the Table 1 indicate the existence of a negative correlation between the numbers of the reported and charged adults on the one side, and a positive correlation between the number of the charged and convicted adults.¹¹ Government bodies not only have the power, but also a legal duty to apply measures and methods in detecting and collecting evidence against perpetrators for committing offences such as money laundering¹² and corruption, which will ensure evidence with which they can effectively combat this form of criminal activity. Instead, their model is focused on the individual. Namely, the research finding unambiguously demonstrates that the number of those being charged ranges from 0.8% to 44% of the total reported adults and, regardless of all taken measures, charges are never laid against 56% to 90% of the reported adults. Several questions arise from this discussion. Firstly, does such efficacy and efficiency contribute to prevention, detection and proving of such criminal acts? Secondly, does such work essentially encroach on human rights? Thirdly, does this inefficacy and inefficiency in detecting and collecting evidence contribute to the development of these criminal activities? Fourthly, how much does this way of working cost taxpayers? Finally, does all this contribute to the economic and legal credibility of the country at both a national and international level? We shall leave it to the reader to find the answers. On the other side, of all reported persons, the court ruled in 58%-100 % of cases.

¹¹ The data being the subject of the research are kept in the database of the Statistical Office of Republic of Serbia, as the authorised body for conducting the collection of the reported, accused and convicted citizens in Republic of Serbia.

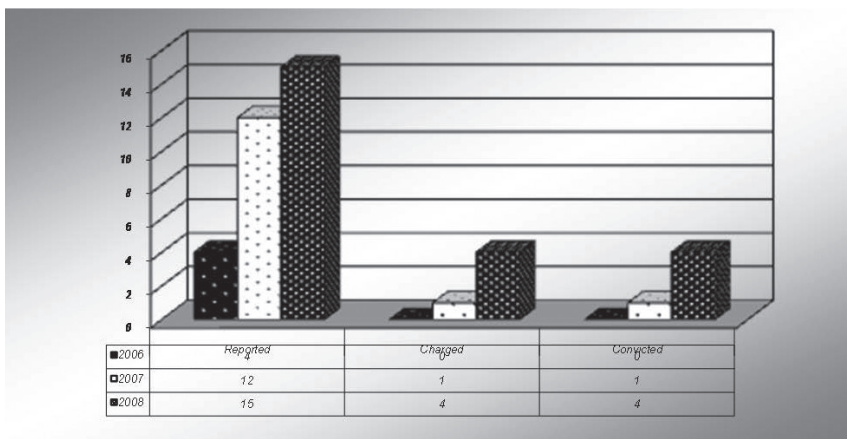
¹² According to the Criminal Code of Republic of Serbia, money laundering offences are specified in Article 231., source: (The Official Gazette), no. 85/2005, 88/2005- update107/2005- update., 72/2009 i 111/2009).

4. Correlation between the number of the reported and charged adults and court decisions

The research findings give a reason for the following analysis. In forty three charges brought against individuals for the criminal act of bribe-taking¹³ during the year of 2006, which was 44% of all reported individuals, the court ruled in 88% of cases. The court imposed a sentence to prison without parole for the criminal offence of bribe-taking in 73% of cases.

In the same year, in respect of four adults reported for bribe-taking, charges were not brought against them. In 2007, it was found that only 28% of citizens reported for the criminal act of bribe-taking had charges brought against them, and the court ruled and imposed a sentence in 80% of the cases. About 80 or 87% of the charged people were sentenced to imprisonment without parole.

Chart 2. The number of the reported, charged and convicted adults for money-laundering offences during the period of time from 2006 to 2008 in Republic of Serbia.



When analysing the relation between the reported, charged, and sentenced individuals, the findings are as follows: the charges were brought against only one adult out of twelve reported ones. In the previously mentioned case, the court imposed a sentence of imprisonment without parole, which was 100% of the convicted individuals out of the number of the charged ones.

¹³ According to the Criminal Code of Republic of Serbia criminal act of bribe-taking specified in Article 367., ... Source: (The Official Gazette), no. 85/2005, 88/2005- update., 107/2005- update., 72/2009 i 111/2009).

During the year of 2008, a charge was laid against thirty three out of ninety one citizens who were reported for committing the criminal act of bribe-taking, which was 36% of all reported citizens. The court rendered a condemnatory judgement in 70% of those cases, and the imprisonment sentences without parole were imposed in 52% of those cases.

Considering the results and correlation between the charged and convicted adults for committing money-laundering offences during the year of 2008, we have noticed a significant negative correlation between the number of the reported adults- charges were laid only in 26% cases. The court sentenced four adults (100%) to imprisonment without parole. The results of the current study also show that during the three-year research period there is a positive correlation between the number of the charged and convicted adults, but a negative correlation between the number of the reported and convicted adults.

5. The model of the police work to gather evidence in Serbia

The model of the police work based on ‘clearing-up’ has been used in Republic of Serbia since the end of the World War II (1945). From the standpoint of criminalistics and law (a criminal process), this model is considered to be very regressive and it significantly contributes to prosecution’s inability to validly support its indictment with evidence, and the research findings confirm that. The model at issue does not belong to the category of traditional models that are partly focused on proving the offence. Its focus is on the criminal offence and the offender. This model is unproductive in the way it causes certain damage to citizens’ rights and spends too much money coming from tax payers in order to achieve insignificant efficacy and efficiency. This work model aims to show and tell the public, in very visible and ‘provable’ ways (always before TV cameras or through releasing statements to the press), how the police succeeded in ‘clearing up the criminal event’ and apprehended the citizen who had committed the criminal offence, disregarding the fact that the offender is a citizen who has been found guilty and convicted by legally binding court sentence, which cannot be challenged by post-conviction relief remedies, regardless of the fact whether it is regular or extraordinary. This means that a citizen can suffer serious legal consequences as well as the other ones imposed by law. The model of the police practice in civilized countries does not aim at ‘clearing-up’, but at collecting evidence to support charges against a citizen.

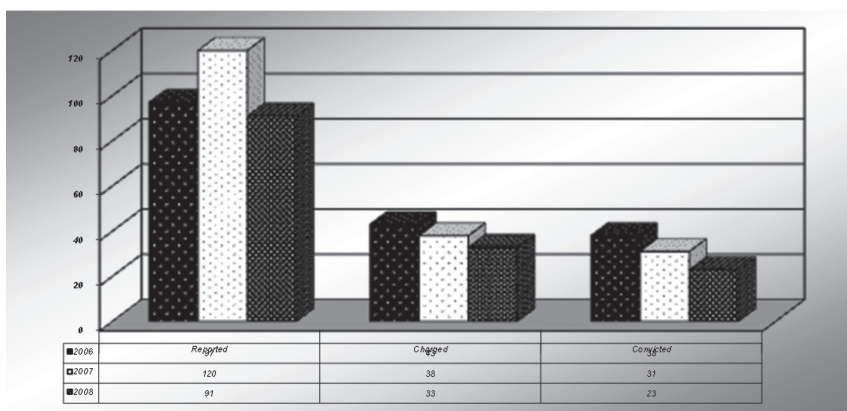
The application of this model of the police work for more than sixty years in Serbia has resulted in a negative correlation between the number of

citizens regarded as ‘offenders’ and the number of the charged and convicted citizens. In more than two thirds of certain criminal cases charges are never laid, which results in reproduction of crime and criminal activities as well as enormous financial expenditures. This model of the police work violates human rights making holding a person and detention in custody an obligation as well as the time for resolving a case. In civilized countries, however, to keep a person in police detention or in custody is an exception, and not a rule.

The Countries of the European Union do not use this model of the police work that aims at ‘clearing up crimes’. Europe is aware of different models of detecting and proving criminal activities. Therefore, two models can be distinguished at opposite ends of a broad spectrum of models, that is, the one regarded as a contemporary model of the police work and the other being traditional. Structurally, in all civilized countries, which have realized what criminal activity is and how it is investigated, there are no examples of criminal investigation units and police units being structured according to the criminological categorization of crimes (except in Serbia).

Chart 3. This chart illustrates the number of the reported, charged and convicted adults for committing the crime of bribe-taking in the period of time from 2006 to 2008¹⁴ in Republic of Serbia.

This is yet another research finding illustrating a negative correlation between the numbers of the reported, charged and convicted adults of all reported adults, and a positive correlation between the number of the charged adults and the number of the convicted adults of all charged adults before the court.



¹⁴ Retrieved from: <http://stat.gov.rs> (available 17/12/2013)

We could possibly say that in order to suppress corruption and money laundering that destroy society and its values (such as economic and legal values), it is necessary to borrow an idea from a famous Chinese philosopher *Confucius* (K'ung Tzu (551–479 BCE)) - “that giving each object and notion a proper name such as son, father, minister, ruler, police officer, prosecutor, judge or president,”¹⁵ implies certain responsibilities and duties. For example, if the parliament, minister, the police or prosecution do not act in accordance with the ideal essence determined by their name, irrespective of their action being wrapped in the form of law which was adopted by such a parliament and enforced by such a minister, the police, prosecution or court, then they are neither the parliament, nor the police, nor the prosecution, although they can be considered as such in accordance with their official positions.

6. Concluding discussion of the research results

The model of ‘clearing-up of criminal offences’ currently applied in Serbia, needs to be not only transformed but also discontinued. It is necessary to build a completely new model of the police work based on longitudinal police operations, which would be independent of any type of crime or persons. This model would aim at detecting and collecting evidence, and not at the public, criminal offences and persons. It would prevent encroachment on human rights and reduce enormous expenses for the achievement of little effectiveness and efficacy.

If we subject the quality of the offered evidence in cases in which the charge is based before the court according to scientific methods of comparison and correlation, and investigate the relation between the number of the convicted adults and the quality of evidence, we will discover that the court treated the cases in the most appropriate manner. However, it is necessary to note that the court is not a party to the proceeding; it does not represent any of the two parties in a dispute. Only perceived this way, the role of the court makes sense in civilized societies and countries.

The results of the current study demonstrate that of all citizens reported for committing the criminal act of bribe-taking, charges were never laid against 67% of them. Charges were laid against 29% of all reported citizens, and 4% of them were freed of all charges. In 80% of 29% cases, the court imposed a sentence of imprisonment with the possibility of parole.

¹⁵ Ssu-ma Ch'ien (1974). *Records of the Historian*. Yang Hsien-yi and Gladys Yang, trans. Hong Kong: Commercial Press.

The analysis of findings regarding criminal offences of money laundering illustrates that a charge was never laid against 87% of all reported adults, while a charge was laid in only 13% of cases. Of all charged adults, the court rendered condemnatory sentence in 100% of cases and imposed a sentence of imprisonment without parole.

To change the structure and model of the police work which would aim at collecting evidence, it is necessary to have competent leading police professionals, a new basis of education with new training programmes and philosophy of decentralization and depersonalization of powers.

Yet, another crucial question arises regarding the protector of citizens' rights- the relation between the reported and charged citizens demands his or her reaction. We also need to look at how this has affected the citizens who have been charged with these offences, and what their reactions are. On the other side, all the citizens who were reported but not charged with a criminal offence, and then found guilty and convicted, are suffering the consequences as well as their present and future descendants.

7. Suggestions based on the findings in this paper

It is strongly suggested that Republic of Serbia, as soon as possible, rejects this model of the police work based on 'clearing-up of criminal offences'. It is important for building legal security, respecting citizens' human rights, and for the credibility of the country at both a national and international level.

It is also suggested that Republic of Serbia adopts the new model of the police work, which is based on longitudinal operations that are conducted independently of the existence of the criminal offence, and whose practice aims at detecting and collecting evidence, rather than being aimed at the individual, and the criminal offence.

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***Dihotomija nekredibilnih policijskih dokaza u
prethodnom postupku i tužilačke nemoći u Srbiji
-Studija slučaja primanje mita i pranje novca-***

REZIME: Odlučujući da napišemo po prvi put u nas, jedan tekst o dihotomiji nekredibilnih policijskih dokaza u prethodnom postupku i tužilačkoj nemoći, nismo ni slutili koliko će nam to briga zadati. Tokom pisanja susreli smo se sa teškoćama u pogledu kontekstualizacije i pojmovnih određenja. Ispostavilo se da je prepoznavanje, izdvajanje i metodom korelacije dovođenje u odnos nedostatka dokaza u radu policije i tužilačke moći/nemoći, bio neočekivano veliki izazov i previše složen teorijski zahtev za ovakav obim rada. Međutim, nismo ni prvi ni jedini s tom vrstom problema. Svaki pokušaj teorijskog doprinosa razumevanju pojma u pravnoj i kriminalističkoj misli suočen je sa mnoštvom teško rešivih pitanja. To, međutim, nikako ne znači da su pokušaji naučnog promišljanja i istraživanja ovog važnog kriminalističkog i pravnog naučnog problema i pokušaji definisanja njihovog naučnog kauzaliteta teorijski besmisleni ili nemogući. Činjenica da je takav poduhvat težak, da su ovi instituti teško uhvatljivi i višedimenzionalni, pokazuje nam da teorijska znanja koja se koriste za njihovo tumačenje imaju izvesnih slabosti, odnosno da se prilikom naučnih istraživanja susrećemo sa mnogim ograničenjima i nepoznanicama u našoj pravnoj i kriminalističkoj teoriji. Rešavanjem teorijskih problema u vezi s nedostatkom dokaza i njegovom uticaju na tužilačku nemoć, mogli bismo zato otvoriti mogućnost i za razumevanje drugih, sličnih ili s njima povezanih pojava i procesa u pravu i kriminalistici. Ovaj rad zato ima za primarni cilj da istraži domete tužilačke moći/nemoći usled nedostatka dokaza u policijskim istragama u vezi sa primanjem mita i pranjem nov-

ca. Pri tome, ne mislimo da možemo da pružimo bitan teorijski i naučni doprinos, ako naše istraživanje ostane usamljeno i ne pobudi druga naučna promišljanja na ovu temu. Naša pažnja okrenuta je traganju za drugačijim ili donekle inovativnim pristupom koji bi, eventualno, mogao dovesti do određenih novih pogleda u našoj kriminalističkoj i pravnoj misli o dokazu i njegovom uticaju na moć ili nemoć tužilaštva.

Ključne reči: pranje novca, primanje mita, dokaz, policijska istraga, tužilaštvo.

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