UDC 343.2/.7

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SOCIALLY ADEQUATE CONDUCT AS PETTY CRIME

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Abstract.

Purpose: *the main objective of this contribution is to show that the notion petty crime is a complex concept which can, at least in part, be understood in the light of the doctrine of social adequacy.* ***Methods:*** *dogmatic method (methods of classification, description and compilation) as well as axiological method were used in the study of the notion petty offence and the doctrine of social adequacy.* ***Results:*** *factual and normative criteria extracted from the doctrine of social adequacy can have a profound impact on the understanding of the notion of petty crime.* ***Discussion:*** *because it impacts the concept of petty crime, understanding of Welzel's substantive criteria for social adequacy of conduct is crucial for lawgivers, criminologists and judges alike.*

Key words*: Welzel, social adequacy, petty crime, petty offence, minor offence, minor crime, trivial offence, trivial crime.*

1. Introduction

The recent development in Slovenian criminal procedural law seems to be largely driven by the idea that a criminal trial has to be more *effective*. A criminal legal system can be made more effective in many ways. One of them is certainly the introduction of mechanisms and instruments which allow for a swifter trial in cases which concern *petty crime*. With this in mind, the Slovenian lawgiver decided to introduce a number of procedural mechanisms to achieve his goal. Mechanisms such as the option of a settlement between the offender and the injured party as well as the option for the public prosecutor to suspend prosecution were introduced. It can even be argued that the function of the recently introduced instrument of plea agreement is *inter alia* to reduce the number of trials concerning petty crime.

Our contribution is, however, not dedicated to the research of recent developments of Slovenian criminal procedural law. Instead, we focus on the *rationale* for the above mentioned changes. We found that despite numerous criminological research projects focused on the rate of *petty crime* in a society, not many concern themselves with the substantive criteria upon which a conduct can be labelled as *trivial* in the light of criminal law.

2. Problem and its actuality

We believe that such a lack of research concerning the meaning of the notion *petty crime* is unfortunate. If the depths of the notion *petty crime* are not properly explored and therefore poorly understood, it offers a very unconvincing fundament for the existing and future changes of criminal procedure. Research on various substantive criteria for determining the *triviality* of criminal conduct is furthermore topical because it is connected to the interpretation of statutory provisions and the process of judicial decision-making.

3. Analysis of recent research and publications.

Literature on substantive criteria for determining the triviality of criminal conduct in a strict sense is scarce. We therefore turn our attention to *Welzel* and his doctrine of social adequacy to show which criteria can be considered. Despite the fact that the most important paper concerning this topic was published in 1939 [1] we also take into account *Welzel*'s later work [2] as well as more recent publications of *Roxin*, [3] *Eser* [4] and other German

authors [5] [6] [7]. Slovenian literature mainly touches upon the topic of interest when analysing the instrument of the act of minor significance. Among those authors works of *Bavcon*, [8] *Korošec* [9] and *Ambrož* [10] seem particularly informative.

4. Setting objectives

The purpose of this paper is to show that the notion of *petty crime* is a multi-faceted concept which should be used and analysed with caution – by criminologists, lawgivers and judges alike. Furthermore, the purpose of this contribution is to show that *Welzel*'s doctrine of social adequacy can provide possible substantive criteria to be considered when distinguishing between petty crime and regular criminal conduct.

5. Presenting main materials

Despite its common appearance in criminological and theoretical analyses, the notion *petty offence (*Slo. "*bagatelni delikti";* Ger. "*Bagatelldelikte*") or *petty crime* (Slo. "*bagatelna kriminaliteta*"; Ger. "*Bagatellkriminalität*") is not regulated in Slovenian Criminal Code, nor any other corresponding Slovenian legal act (an exception is the procedural mechanism of an act of minor significance, which covers only a small part of minor offences). However, it can be said that legal scholars filled this term with not only one, but several meanings. The linguistic analysis of the term *petty* reveals that such an offence can be described as *trivial* and *of little importance*. A petty offence can therefore be understood as an offence which is *not very serious*; a *minor offence* [11]. *Bavcon*, an influential figure in Slovenian criminal law, is writing about "a flood of genuine and ostensible bits and pieces (e. g. small, unimportant matters) [8, p. 21]."

It might therefore seem that the term *petty offence* can be understood by merely following our legal intuition, our *hunch* [12]. Such an approach certainly seems appealing, and it can be viewed upon as a useful tool during the process of judicial decision-making. "Everyone can see," writes another influential Slovenian expert on criminal law, "that taking a blade of dried grass from a pile of hay is not theft, that appropriation of a single coin found on the street is not concealment and that kind assurances of a customer to the cashier about giving her loose change next time he visits the store is not fraud [13, p. 137] [10, p. 2]."

The need to provide a more thorough definition of the term does, however, become apparent when we try to analyse certain marginal cases, when the *triviality* of the offence becomes less obvious. In German criminal legal thought one can find theoreticians who consider a theft as a petty offence if the worth of the stolen good does not exceed 15 EUR [5, p. 977]. When reflecting upon such a statement, various questions are bound to start forming in the head of a critical lawyer. Would the margin of 15 EUR also be appropriate in other member states of the EU? Does this mean that the subjective reasoning of the perpetrator does not play any role when considering if a criminal conduct is to be labelled as a petty offence? Does the opinion of the victim as the bearer a legally protected interest (Ger. "Rechtsgut") bear any meaning? And how is this notion connected to the views and actions of the society at large? The answers to those questions are dependent on the understanding of the phenomenon of petty offences.

Bavcon distinguishes between substantive and formal criteria for considering a criminal conduct as a petty offence. Not confronting the material criteria, he instead focuses on the formal ones. Criminology, a scientific study of crime as a social phenomenon, principally approaches the term of a petty offence by applying formal criteria. If a research is designed to determine the scope of petty crime in a certain society, it has to operate with an objective criterion. It is furthermore expected that the researcher will be able to apply the criterion to a large sample of legal cases and thereby efficiently distinguish petty criminal conduct from other offences. Criminologists therefore typically use formal criteria which merely tries to stay (approximately) true to material criteria for determining the *triviality* of criminal conduct [9, p. 22-33]. Example of such formal criteria is either the term of imprisonment as it is provided in a legal act for the relevant type of the criminal offence or severity of the imposed sentence [14, p. 293-94]. The latter criterion was already used in the past to determine the scope of *petty crime* in Slovenia. In accordance with this research, *petty crime* is a criminal conduct for which

the court issued merely a judicial admonition or which was sanctioned with a fine or imprisonment for up to 6 months. Even the researchers themselves, however, admit that they have no ambition to provide an *ex ante* criterion for determining the *triviality* of a criminal conduct. [9, p. 24-25] Such formal criterion can namely only be applied *ex post*. By accepting a formal standard as the main standard to distinguish petty criminal conduct from the rest, one indivertibly recognises that criminal conduct can only be viewed upon as *trivial* after a judge passes his sentence. We therefore believe that a formal criterion must be grounded in a material criterion which allows us to determine if a criminal conduct can be viewed as petty or not *before* the judgement is passed.

A short analysis of material standards reveals a broad spectrum of different approaches. Some of them were developed by the legal doctrine and some were, at some point in time, even adopted in national legislation - for example the above mentioned act of minor consequence or threat to society which was a separate element of the concept of an offence in substantive criminal law of Yugoslavia. In a broad sense, there seem to be three major doctrinal approaches which influence the substantive understanding of the notion *petty crime*: the first is connected to the conduct not being a *threat to the society*; the second stems from insignificant endangerment of the *legally protected interests*; the third is connected to the doctrine of *social adequacy*. The latter had a profound impact on the development of German criminal legal thought and, subsequently, on many other continental legal systems. This is the reason why, in the second part of this contribution, we turn our attention to socially acceptable, adequate conduct and argue that criteria for social adequacy can simultaneously be viewed upon as substantive criteria for determining if a criminal conduct can be considered merely a petty offence.

There seems to be a consensus that the notion of socially adequate conduct was first mentioned and developed by *Welzel* in his contribution from 1939, titled "*Studien zum System des Strafrechts"* (Eng. "Studies on the Sysm of Criminal Law"). In his article, *Welzel* develops the doctrine of social adequacy as a response to developments in German criminal law which he disagrees with. He takes a stance that the *causal nexus*, as a category of criminal law, connecting the act or an omission and its consequence, cannot be explained solely by applying the method of natural science. A doctrine which views causality in criminal law as a pure, objective category furthermore puts too much emphasis on the harm or endangerment of the legally protected interests. Legal theory should instead focus on how the perpetrator's conduct (action or omission) itself affects the weight of injustice (Ger. "*Unrecht*") of criminal conduct. The problematic doctrinal focus on the harm or endangerment of the legally protected interests is furthermore disputed by *Welzel* because it roots in the *doctrine of legally protected interests*. This doctrine sees legal interests as if they would exist in a vacuum. *Welzel* describes this vacuum as an inanimate, abstract, afunctional world [1, p. 529]. Such an approach is, he argues, fundamentally flawed. Legally protected interests cannot be compared to museum exhibits, carefully sealed away to prevent any potential harm. Harming a legally protected interest is not like breaking the glass of the display window and disturbing the harmonic initial state of a protected object. Interests are rather protected only insofar as they fulfil a certain function – not in an abstract world, but within a social reality. Life, freedom or health cannot be understood as something which *exists* outside of social life. Their existence is rather dependent on their ability to influence and be influenced by social reality [1, p. 491; 514-515].

Welzel derives to such a conclusion by examining the nature of (criminal) law itself. For law, he argues, only *cognitive concepts of the is* (Ger. *"kognitive Seinsvorstellungen"*) are relevant because law itself is a socio-ethical phenomenon. This means that law cannot be understood either as a mere set of rules or as a pure natural phenomenon, for example by applying methods of empirical science. The latter namely focuses merely on a small part of our *social* existence. A socio-ethical world namely also consists of subjective elements and a set of historically contingent social rules [1., p. 493; 515-516].

Numerous implications for criminal law arousing from such a view upon the nature of law (for

example the *finality* of conduct) are too complex to be introduced here. It is however important for the understanding of the theory of social adequacy to note that the above mentioned reasoning affected *Welzel*'s understanding of *conduct* in the sense of criminal law. If (criminal) law is a socio-ethical phenomenon, it can only be understood with a view to historically contingent social rules. And this is where the doctrine of *social adequacy* becomes relevant. If a certain action or omission is, in the light of the so called social integrity (Ger. "das soziale Ganze"), deemed to be acceptable by the society, the injustice of the conduct is not significant enough for it to even be considered a *conduct* as a term of criminal legal doctrine [1, p. 516; 530-531].

The scope of this conclusion becomes clear if we once again focus on *Welzel*'s criticism of the *doctrine of legally protected interests*. One cannot imagine a world without a constant harm and endangerment of legally protected interests. A coexistence of human beings is only possible if we accept that our actions limit interests of other people. It would be, for example, impossible to count how many times a person harms legally protected interests of others during a perfectly ordinary day. Social reality furthermore demands that people engage in risky behaviour, and as a consequence of our human nature we tend to quickly get accustomed to such risks. A typical example is participation in public traffic [1, p. 515-516].

With this in mind, *Welzel* concludes that not *any* conduct which endangers or harms a legally protected interest is regulated by criminal law. The purpose of law is to differentiate between functions of legally protected interests which are in line with social customs and those which are not. Only conduct which constitutes an *unbearable* threat for a legally protected interest reflecting the actual state of the social life is prohibited. From this line of thought, the characteristics of the doctrine of *social adequacy* become apparent. If a threat to a legally protected interest is deemed acceptable, if it is in line with a set of historically contingent social rules, it cannot be treated as a conduct relevant to criminal law. Such conduct is namely accepted by the community, e. g. socially adequate [1, p. 513-517].

Because a socially adequate conduct cannot be considered as a conduct subject to the rules of criminal law, social adequacy impacts the element of "*Tatbestandsmäßigkeit"* and the degree of injustice of the conduct, not merely the element of unlawfulness (Ger. "*Rechtswidrigkeit*"). This is important because it shows why *Welzel* deems the doctrine of social adequacy an important principle of criminal law which is bound to influence the interpretation of statutory provisions. [2, p. 58]. Purpose and meaning of provisions of criminal law becomes clear only after they are understood in the context of the historical social order. The methodological purpose of social adequacy, he argues, is in connecting the notion of *conduct* to the *social wholeness*, e. g. the world of social existence [1, p. 530-531].

Welzel's doctrine was quite influential and was therefore commented upon by a number of his scholars and followers [6., p. 846-852] as well as rigorous critics [3, p. 933-936.] As a result, the doctrine of social adequacy was subject to many alterations, some even suggested by *Welzel* himself in his later work [7, p. 369-374]. It would not be possible to describe the numerous variations of *Welzel*'s doctrine here due to limited space and time. Let us instead focus on *Eser*'s contribution titled *"Sozialadäquanz": eine überflüssige oder unverzichtbare Rechtsfigur?* "Sozial adequacy": a redundant or a vital legal concept?) from 2001 in which he thoughtfully and carefully examines the essence of the doctrine of social adequacy. *Eser* argues that *Welzel*'s theory implies that a multi-layered approach is needed to determine if a conduct is socially acceptable. First, it needs to be clear that the conduct is *customary* (Ger. "*Üblichkeit*") for the whole society, not merely for a single person, a limited group or a minority of people in a community. This is the *factual basis* which needs to be assessed prior to labelling a conduct as socially acceptable. [4, p. 211] It should be noted that although the idea to limit the scope of criminal law to conduct which is not contrary to factual behaviour of people can be considered novel in terms of criminal substantive law, similar approaches regarding the validity of law or certain legal provisions can be traced back to legal theory and philosophy of law. Even positivists

such as *Kelsen* admitted that law cannot be valid if it is not *effective* as a whole [15, p. 64-65]. His scholar *Pitamic*, in his early work, even argued that a single legal norm can be deemed invalid if it is not effective [16, p. 122-124]. Such a conclusion is very similar to *Welzel*'s first premise for determining if a conduct is socially adequate.

Eser however argues that a further premise which is connected to the *normative* roots of law needs to be considered. The conduct needs to be perceived as socially acceptable, e. g. appropriate (Ger. "*die Angemessenheit*"). The existence of socio-ethical norms should thereby be examined separately, not simply assumed on the basis of actual behaviour of people in a community [4, p. 211]. We can therefore see that the principle of social adequacy demands a complex deliberation which takes into accounts factual, empirically measurable circumstances, as well as the existence of a historically contingent social order, e. g. morality. *Ergo,* to label a certain conduct socially adequate, people in a community need to actually behave in a certain way and furthermore perceive such behaviour as morally acceptable.

6. Conclusions

Why is *Welzel*'s approach important for the understanding of *petty crime?* The main contribution is the revelation that petty crime seems to be a multi-faceted term. A conduct can be seen as *trivial* according to diverse criteria. In some cases, a conduct will be recognised as petty crime according to all of them. In other cases, a conduct will seem trivial according to some criteria, but not according to all. It is imperative that anyone who undertakes the task of research or normative regulation of petty crime, as well as the interpretation of statutory provisions related to criminal law, is aware of these differences. When conducting a research of petty crime in a community, a criminologist has to be aware of substantive criteria according to which he builds the formal criteria to determine the rate of trivial criminal conduct. When a lawgiver decides to limit the ever-growing number of criminal trials related to petty crime which supposedly overburden the legal system, he needs to be aware which *kind* of petty crime he is actually battling. If the multi-faceted nature of *pettiness* is not understood, one cannot hope to develop effective instruments of criminal legal procedure to tackle the problem. Last, but not least, *Welzel* also showed that one should not forget about diverse subjective and objective, factual and normative criteria for determining the triviality of a conduct when interpreting statutory provisions of criminal law.

The determination that diverse criteria should be used furthermore begs the question of *how* to implement them in the process of judicial decision-making, theory of argumentation in law, criminal legal procedure and theory of substantive criminal law. Such questions exceed the scope of this article and therefore cannot be answered here. Further extensive research would have to be undertaken to provide adequate answers. We nevertheless managed to show that *Welzel*'s theory of social adequacy can have a profound impact on the understanding of the notion of *petty crime*.

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СОЦІАЛЬНО АДЕКВАТНА ПОВЕДІНКА ЯК НЕЗНАЧНИЙ ЗЛОЧИН

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Мета: *головна мета цього наукового дослідження полягає в тому, щоб показати, що поняття дрібної злочинності являє собою складну концепцію, яка, принаймні частково, може бути зрозуміла в світлі вчення про соціальну адекватність.* ***Методи:*** *догматичний метод (метод класифікації, опису та компіляції), а також аксіологічний метод були використані при вивченні поняття дрібного правопорушення і доктрини соціальної адекватності.* ***Результати:*** *фактичні і нормативні критерії, що випливають із доктрини соціальної адекватності, можуть справити глибокий вплив на розуміння поняття дрібної злочинності.* ***Обговорення:*** *у зв'язку з впливом на концепцію дрібної злочинності, розуміння істотних критеріїв Вельцеля про соціальну адекватність поведінки має вирішальне значення для законодавців, криміналістів і суддів.*

Ключові слова: *Вельцель, соціальна адекватність, дрібний злочин, незначний злочин, просте правопорушення, простий злочин.*

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СОЦИАЛЬНО АДЕКВАТНОЕ ПОВЕДЕНИЕ КАК НЕЗНАЧИТЕЛЬНОЕ ПРЕСТУПЛЕНИЕ

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Цель: *главная цель этого научного исследования заключается в том, чтобы показать, что понятие мелкой преступности представляет собой сложную концепцию, которая, по крайней мере частично, может быть понята в свете учения о социальной адекватности.* ***Методы:*** *догматический метод (метод классификации, описания и компиляции), а также аксиологический метод были использованы при изучении понятия мелкого правонарушения и доктрины социальной адекватности.* ***Результаты:*** *фактические и нормативные критерии, извлеченные из доктрины социальной адекватности, могут оказать глубокое влияние на понимание понятия мелкой преступности.* ***Обсуждение:*** *в связи с влиянием на концепцию мелкой преступности, понимание существенных критериев Вельцеля о социальной адекватности поведения имеет решающее значение для законодателей, криминалистов и судей.*

Ключевые слова: *Вельцель, социальная адекватность, мелкое преступление, незначительное преступление, простое правонарушение, простое преступление.*