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Issues of foundations and criteria of law: criticism of the theory of social rules and conventional rule of recognition in “early” R. Dworkin’s doctrine

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Abstract. The article investigates the doctrine of an American jurist, Ronald Dworkin, presented in the essay “Social Rules and Legal Theory” (1972) and considered as a stage in his large-scale polemics with legal positivism. In this doctrine the author criticizes the theory of “social rules” and the conventional “rule of recognition”, which is basic for his opponents. The theory requires an agreed unity of practice and defends the controversial character and moral engagement of normative grounds and criteria of law, their priority and autonomy against community practices. The relevance of the topic is due both to the fundamental nature of the Dworkin — positivists dispute, and peculiarities of the 1972 doctrine, which formed a number of its “cross-cutting” elements. The article is aimed at systematization and assessment of the 1972 doctrine, relies on the texts by its author, his opponents and researchers, and uses various tools, primarily the ideological and historical method, focused on explication of views and issues developing in the history of thought. The study results are generalization of original components of R. Dworkin’s 1972 doctrine, its localization within the dispute between the author and positivists and discerning its ideological and historical implications. Summing up the article emphasizes a stimulating role of the 1972 doctrine for evolution of the rival approaches, as well as its potential for the philosophy of law, associated with R. Dworkin’s problematization of a link between normativity and facticity in law, linguistic-analytical idea of a rule as a practice, and conventionalist account of foundations of law which decenters normative disagreements.

Key words: R. Dworkin, legal positivism, foundations of law, legal validity, rule of recognition, conventionality of law, controversies in law, law and morality

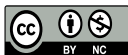
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**Проблема оснований и критериев права:
критика теории социальных правил и конвенционального
«правила распознавания» в доктрине «раннего» Р. Дворкина**

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Аннотация. Предмет — доктрина американского правоведа Рональда Дворкина, представленная в очерке «Социальные правила и правовая теория» (1972) и рассматриваемая как этап в его масштабной полемике с юридическим позитивизмом. В рамках данной доктрины автор критикует базовую для оппонентов теорию «социальных правил» и конвенционального «правила распознавания», требующую согласованного единства практики, отстаивая спорность и моральную ангажированность нормативных оснований права, их приоритет и автономию относительно практик сообщества. Актуальность темы обусловлена как фундаментальностью спора Р. Дворкина и позитивистов, так особенностями (мало обсуждаемой) доктрины 1972 года, сформировавшей ряд «сквозных» для него элементов. Статья имеет целью систематизацию и оценку доктрины 1972 года, опирается на тексты автора, его оппонентов и исследователей, использует различные инструменты, прежде всего идейно-исторический метод, сосредоточенный на разъяснении взглядов и проблем, развивающихся в истории мысли. Результатами исследования выступают обобщение оригинальных компонентов доктрины Р. Дворкина 1972 года, ее локализация в контексте спора автора и позитивистов, выявление ее идейно-исторических следствий. В качестве выводов в статье подчеркивается стимулирующая роль доктрины 1972 года для эволюции соперничающих подходов, а также ее потенциал для философии права, ассоциируемый с проблематизацией Р. Дворкином связи нормативности и фактичности в праве, лингво-аналитической идеи правила как обыкновения и конвенционалистской трактовки оснований права, децентрирующей нормативные разногласия.

Ключевые слова: Р. Дворкин, юридический позитивизм, основания права, юридическая действительность, правило распознавания, конвенциональность права, разногласия в праве, право и мораль

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Introduction

The focus of this article is the polemics between an American legal scholar Ronald Dworkin and proponents of the influential doctrine of legal positivism — a large-scale discussion concerning proper explanation of law and organization of legal theory, which is systemic for the language and agenda of the modern Anglo-American legal philosophy. Covering a wide range of conceptual, value and practical topics (the concept and composition of law, legal validity and determinacy, judicial decision and discretion, legal interpretation and argumentation, methodology of jurisprudence, etc.) these polemics are relevant both in terms of its separate historical and systematic study, and from the point of view of comparative reflection on models of legal theorizing beyond the common-law systems.

R. Dworkin’s 1972 essay “Social Rules and Legal Theory”

The article is built around R. Dworkin’s 1972 essay “Social Rules and Legal Theory” (Dworkin, 1972: 855—890)¹. In this work the author refers to the dominant view in (Anglo-American) positivism. According to this view, law is rooted in the fact of society’s adoption of some rule of recognition, which fixes institutional criteria for validity of norms of a given system and determines possibility of separating law from morality and its value-neutral conceptualization. At the same time, the rule of recognition itself is conceived as a social conventional rule that interprets a uniform practice of judges and officials in identifying and applying law as a binding standard. R. Dworkin rejects the consistency of such view, which, in his opinion, derives *the ought from an is* and localizes foundations of law in a convention that requires agreement in assessing uniform behavior. In contrast, the author emphasizes the normativity of foundations of legal rules and obligations, their large-scale controversy, moral and political bias, and autonomy from social practices, linking “validity” of standards with competing normative theories of jurists’ and judges’ purporting to be “the soundest” explanation and legitimization of the relevant law.

In this capacity, the 1972 doctrine seems valuable for analysis, especially against the background of its limited discussion in foreign literature and a lack of such discussion in Russian academic environment. Demonstrating the fundamental nature of R. Dworkin’s speculations, the doctrine not only complements his well-known challenge to positivists — the “jurisprudence of principles” (Dworkin, 1967:14—46). In fact, it sets out a number of key lines in their further polemics, anticipating the ideas of “rights thesis”, “theoretical disagreements”, “semantic sting”, “law as interpretation”, “law as integrity”, etc., which

¹ Further citation of this essay by R. Dworkin will be based on the 1978 edition (Dworkin, 1978:46—80).

are the most debated today and significant for the relevant perception of the author's works (Dworkin, 1978: 81—130; Dworkin, 1985: 119—204; Dworkin, 1986: 1—275; etc.).

In the light of the foregoing, the purpose of this article is to generalize and analyze the main (original) elements of R. Dworkin's 1972 doctrine, and to assess its ideological and historical implications in the context of the author's dispute with positivism. Accordingly, in its structure, the article includes 1) a statement of the initial positions of the disputing parties, including an outline of H. Hart's 1961 views, their 1967 criticism by R. Dworkin and answers from positivists, 2) an identification and explanation of key provisions of R. Dworkin in 1972 doctrine, touching upon the issues of foundations and criteria of law, as well as 3) an assessment of its place and significance in the development of the author's polemics with positivism, including determination of its potential unaccounted for by the opponents.

R. Dworkin versus positivists (1967): an issue of interpreting legal principles

1. The starting point: a positivist conception of H. Hart

The study of Ronald Dworkin's 1972 doctrine should begin with clarifying the ideological and historical context that preceded it. As noted above, this doctrine composes one of the stages in the dispute between the author and positivists, therefore a statement of the basic points of this polemic is necessary both for understanding R. Dworkin's claims in question and for their adequate evaluation.

As known, the starting point for the modern Anglo-American positivism and, accordingly, for the debate under discussion was the doctrine of a British philosopher and jurist, Herbert Hart. Proceeding in the light of basics of philosophical and linguistic analysis, H. Hart seeks to revive the project of analytical jurisprudence, coming from the British positivist utilitarians (Jeremy Bentham, John Austin, etc.), as a philosophical explanation of fundamental legal concepts (Hart, 1958:600). He declares a general, descriptive and morally neutral conceptualization of law as a system of rules based on conceptual-linguistic structures and institutional practices of a community (Hart, 1961:1—17; Hart, 1994:239—240). At the same time, the author rejects the classical "command" interpretation of law through orders of a sovereign as *distorting the facts*. In his opinion, such interpretation, among other things, does not adequately explain the normative nature of law (reducing it to simple empirical facts), and conceals its institutional complexity (Hart, 1961:18—78; Postema, 2011:267). H. Hart's own approach centers the idea of a social rule as opposed to the idea of a habit. The latter is used by J. Austin in explaining the mass compliance with orders of the superiors in a political community, which is fundamental to a legal system. According to H. Hart, both a rule and a habit presuppose the presence of a general (uniform, intersecting) regular behavior of the majority of members of a social group in certain circumstances. However, a rule differs from a habit in three important ways. First, deviating from rule-governed behavior is usually viewed as a lapse or a fault, which is open to criticism and faces social pressure. Secondly, this deviation is considered a proper ground for such criticism and demands to follow the rule, which are thus justified in relation to all members of the group. Thirdly, the relevant behavior is supposed to be a general standard, binding on the group as a whole. In other words, according to H. Hart, in addition to the "external aspect" intrinsic to a habit

(a regular uniform behavior accessible to observation), the existence of a social rule also requires an “internal aspect” — a critical sensible attitude to certain patterns of behavior as general standards, expressed in the mentioned criticism and demands for conformity in accepting their legitimacy (Hart, 1961:55—57; Raz, 1990:51—53).

From these positions, H. Hart explains law as a “unity” of primary and secondary rules that differ from each other in their logical form, social functions, and levels in the system (Hart, 1961: 18—49, 79—123). Thus, along with “primary” rules — binding standards aimed primarily at regulating behavior of citizens, the British jurist points out the existence of “secondary” rules in a legal system that empower officials and individuals (Hart, 1961:26—49). Among the latter he distinguishes three types of meta-rules: rules of recognition², or identification, which determine what is considered to be legal rules in a given system; rules of change, more precisely, of law-making, concerning creation, adjustment and cancelation of existing legal rules; rules of adjudication, or rather, of law-enforcement, empowering to resolve disputes, ascertain offenses, and bring violators to justice. H. Hart interprets establishment of such meta-rules as a fundamental mechanism for eliminating the problems of uncertainty, static nature and inefficiency of pre-legal normative regulation, and as a watershed in developing a legal order as such (Hart, 1961:94). He also treats the idea of the unity of primary and secondary rules as a conceptual model, capable of explaining the complexity of institutional organization of legal systems (Hart, 1961:81, 98—99; Schauer, 2006:869).

H. Hart calls the rule of recognition *the sole* of the meta-rules. In his conception, it plays the role of the ultimate foundation of a legal system, the conditions for its autonomy and unity, acting as the author’s alternative to the figure of a sovereign in John Austin’s command theory and the “basic norm” in Hans Kelsen’s pure theory of law. Unlike other legal standards, the rule of recognition does not obtain legal validity, but is a social fact, arising out of a convention and agreed practice of judges and officials in establishing and reproducing what is law in the community. Functionally, the rule of recognition (appealing primarily to official sources of law) defines the “authoritative criteria for identifying” legal rules as a set of features of a proposed standard that is accepted by the community as a conclusive affirmative indication of its legal status and due support by social pressure (Hart, 1961: 79—123)³. Hence, the existence, authority and binding nature of a legal rule is determined not by its (moral) merits, but by its compliance with the institutional criteria adopted in a legal order, the loss of legal validity by a rule does not automatically follow

² Russian translation of H. Hart’s expression “rule of recognition” as “*правило признания*”, despite its prevalence, seems to be less successful (compared to its translation as “*правило распознавания*”). It does not seem to convey an important function of this rule — identification (discernment, cognizance) of legal rules, which is associated with institutionalization of criteria for validity of legal rules and, thereby, with their delimitation from other social standards. On the other hand, it coincides / intersects with the Russian translation of another term, important for H. Hart, — “acceptance” (“*признание*”, “*принятие*”, etc.), which has a different meaning and is designed to reflect *adoption, acknowledgement, approval*, etc. of legal rules by participants in legal communication from the “internal point of view” (cf.: Hart, 1961:56).

³ It seems essential to highlight the ambiguity in H. Hart’s presentation of the idea of the “rule of recognition”. Thus, among other things, he uses this term both in the singular and in the plural and treating it as a kind of “secondary” rules (giving powers / authority), he at the same time thinks of it as the supreme rule binding on judges and officials in a system (cf.: Hart, 1961:94—110, etc.). Within this article, H. Hart’s rule of recognition is discussed as the ultimate basis of a legal system, constituting criteria for legal validity of its standards.

from its contradiction to moral standards, as well as the legal force of that rule does not necessarily follow from its moral desirability (Hart, 1958:594; Hart, 1961:185—186).

Conceiving law as a system of rules, H. Hart, at the same time, notes limitations of legal regulation. In his opinion, due to impossibility of comprehensively predetermining the meaning of language terms, the legal rules built on them have the “open texture”, providing guidance in most clear / typical cases, but turning out to be vague in borderline / controversial situations, necessarily requiring judges (law-enforcers) to choose between given alternatives, i.e., to use their discretion (Hart, 1961:124—129).

*2. R. Dworkin's challenge:
“model of rules” and “jurisprudence of principles”*

Herbert Hart's conception, taken as the most advanced and influential version of legal positivism, has been targeted by the American legal scholar Ronald Dworkin starting with his famous 1967 essay “The Model of Rules” (Dworkin, 1967:14—46)⁴. Upon that, if H. Hart initially associates the positivist nature of his doctrine solely with the thesis concerning the absence of a necessary conceptual connection between law and morality (expressed preeminently in the distinction between validity of a legal rule and its moral value) (Hart, 1961: 185—186; Hart, 1958: 594, etc.; Schauer, 2006:876—877), R. Dworkin uses his own interpretation of positivism, presenting it by means of three components, referred to in literature as the theses of pedigree, discretion and obligation (Shapiro, 2007:7—10; Patterson, 2021: 678).

So, according to R. Dworkin, firstly, positivism conceives law as a set of rules (all-or-nothing standards) that establish behavior subject to coercion or punishment by public authorities. These rules are identified — through criteria in the system's master rule — by their origin / “pedigree”, i.e., the way they are (authoritatively and officially) developed and adopted, but not by their content, or moral value (Dworkin, 1978:17, 21).

Secondly, positivism recognizes situations of exhaustion / gaps in the law, when a decision in a particular court case is not provided for by a clear or appropriate legal rule, and when “application of the law” is impossible: in these cases, judges “exercise their discretion”, (arbitrarily) applying extra-legal standards and creating, on their base, new legal rules or supplementing the old ones (Dworkin, 1978:17, 33).

Thirdly, positivism associates a person's legal obligation solely with the existence of a legal rule — hence the judge's use of discretion in disputed cases cannot be considered as providing the legal right corresponding to obligation (in such cases neither of the parties has a predetermined right to win) (Dworkin, 1978:17).

As follows from the above positions, R. Dworkin reformulates positivism from the point of view of judicial practice and substantiation of rights and obligations that belong to legal subjects — parties in the process. The doctrine of a complex system of primary and secondary rules, ascending to the rule of recognition, a key doctrine for H. Hart, is “compressed” here into one thesis of pedigree, supplemented by the theses of discretion and obligation, which are rather secondary for the British jurist (Schauer, 2006:869—881, etc.). The “separability thesis”, the main one in positivism, is only implied in the

⁴ The collection of the author's works “Taking rights seriously” published this essay under the title “The Model of Rules I” (Dworkin, 1978:14—45). Further citation of this essay will be based on the 1978 edition.

deciphering of the pedigree thesis (cf.: Dworkin, 1978:44, 46), while being constantly present in R. Dworkin's critical reasoning, and, in fact, acting as the opposition to his basic tenet concerning law's rootedness in community morality (Priel, 2020:23—32), and as the main target of his criticism (Shapiro, 2007:5, etc.; Pattaro, 2005:179).

In the stated form, the positivist doctrine is rejected by R. Dworkin as inconsistent with legal (judicial) practice. According to the critic, positivism is a model of and for a system of rules, and its central concept of a single fundamental criterion of law does not allow to recognize the important role of legal standards other than rules, most notably, legal principles (Dworkin, 1978:22).

Formulating his own approach, R. Dworkin defends specificity of principles, missed by positivism, primarily their “logical” difference from rules, missed by positivism. The author asserts that the principles do not work in an “all-or-nothing” manner, providing only general grounds or guidelines for a judicial decision. They are measured not by their validity, but by their “weight”, and, consequently, are not amenable to exhaustive fixation. Hence, they can also compete with each other in application to particular cases without losing their legal character (Dworkin, 1978:24—28).

R. Dworkin claims that once we identify principles as legal standards distinct from rules, we become aware of their all-penetrating presence. Being typical for legal practice and judicial reasoning, they are perceived (by judges and litigants) as binding standards constituting “law as it is” rather than “law as it ought to be” — a guidance in exercising discretion (Dworkin, 1978:28; Postema, 2011:406—407; cf.: Hart, 1958:605—615). Moreover, the principles play a decisive role here, forming an argumentative ground both for applying the existing legal rules and for making court decisions in cases of indeterminacy, inconsistency or absence of such rules, or even contrarily to the latter (if they are unreasonable, unfair, etc.) (Dworkin, 1978:28—39, etc.). As a consequence, the principles exclude the possibility of judicial law-making and ensure the legitimacy of statements about rights and obligations of participants in the process, even in hard cases (Dworkin, 1978:44).

Meanwhile, according to R. Dworkin, contrary to the “model of rules”, the principles are included in a legal system not through the pedigree criteria, but because of their authority — the “sense of appropriateness”, which is developed over time in a professional corporation and in society as a whole. In other words, with regard to principles, a strict separation between their justification and their legal status is irrelevant: the binding force of a principle is a consequence of its value significance and is rooted in community morality (Dworkin, 1978:40—41). Moreover, the content and weight of a principle, as well as the system of principles belonging to a particular jurisdiction, is not limited to concrete examples of their formalization, but is defined within the context of the “fusion” between practice, history of the system, and many changing and interacting legal and other ideas and standards (Dworkin, 1978:32). This, in turn, makes it impossible to identify legal principles through any clear, comprehensive, and permanent criterion (set of criteria) implied in the idea of a rule of recognition (Dworkin, 1978:43—44).

The American jurist recapitulates that from such positions the positivist model of a system of rules, singled out and combined along with their “pedigree”, is incapable to take into account specificity of principles as distinctive legal standards. It cannot adequately explain the deep moral engagement of legal principles, reflected in the nature of their

inclusion in a legal system and their functioning in legal practice even by expanding an elemental composition of law. Neither it can offer a working value-neutral test (remaining within the construction of the “rule of recognition”) that would explain the content, applicability and weight of variety of principles adopted in a legal system, and, thereby, clearly delimit law from morality. As a result, positivist jurisprudence must be abandoned (Dworkin, 1978:43—45, etc.).

3. Answers to R. Dworkin: exclusive and inclusive positivism

The challenge by R. Dworkin, outlined in his 1967 essay, had a great resonance in Anglo-American jurisprudence, having received various assessments and counter-rationales. Representatives of positivism largely accepted the critic’s arguments concerning the breadth of use and special role of legal principles in legal reasoning, as well as close connection between the binding status of legal principles and their morally conditioned rationality, or appropriateness. However, they disagreed as to the theoretical significance of this fact — its proper explanation and compatibility with positivism. The debates touched not only the place of morality in legal argumentation, but also understanding of the very basic postulates of positivist theory, giving rise to the significant division of its supporters into two camps: “exclusive” / “hard” and “inclusive” / “soft” legal positivism (Leiter, 2003:11—15; Shapiro, 2007:18—26; Postema, 2011:407; Patterson, 2021:680—682).

The first type of response to R. Dworkin is given by Joseph Raz. In his opinion, R. Dworkin, on the whole correctly describes the basics of positivism: the criteria of legal validity in the rule of recognition should always distinguish the rule of law from non-law solely on the ground of social sources, without resorting to moral judgments (“the sources thesis”) (Raz, 1979: 46). He is also correct in noting the prevalence of principles in legal reasoning, their frequent lack of “pedigree” and the professional duty of judges to consider principles in their decisions. However, J. Raz emphasizes that R. Dworkin does not distinguish between the general obligatory nature of a principle and its obligatory nature as a valid legal standard. The prevalence of principles in legal practice does not make them legal without a proper “pedigree” (even if judges are legally obligated to apply them in controversial cases), and therefore does not threaten a positivist interpretation of the nature of law. J. Raz treats the divergent perception of principles by judges and participants in the trial as doubtful or insufficient (Raz, 1983; Postema, 2011:408).

Another response to R. Dworkin is offered by Jules Coleman, who admits not only the importance of morally determined principles for judicial reasoning in a number of legal systems, but also the correctness of their consideration (and perception) as legal principles binding for court proceedings. Following H. Hart, the jurist elevates the criteria of legal validity to the basic convention of law — the rule of recognition, manifested in the practice of law-enforcement agencies. In other words, these criteria are entirely determined by this convention / practice, being contingent (“the conventionality thesis”), and potentially may include substantive reasonableness, justice and other dimensions of morality (“incorporation thesis”). At the same time, J. Coleman argues that such assumption does not undermine a doctrine of positivism, which, contrary to R. Dworkin’s interpretation, is not committed to the pedigree thesis. Positivism assumes that law is based on a social fact — a rule of recognition accepted in a certain community, constituted by law-enforcement practice and formalizing the conventional criteria of the legal standard/norm.

Hence, like formally established rules, principles that are morally reasonable or true can be valid legal standards in a particular system. For this end the judicial practice must acknowledge such principles based on their moral reasonableness or validity, or that, at least occasionally, such practice consists in resolving disputes about acting law through appeal to moral reasoning (Coleman, 2002:12; Postema, 2011:408—409; cf.: Hart, 1994:250, 263—268).

As a result, no matter what line of counter argumentation the positivists would choose when responding to R. Dworkin's challenge, the latter has not shaken their faith in *soundness* of the positivist doctrine, and its ability to present an adequate explanation of law, including the specificity of legal principles (Shapiro, 2007:26, etc.; Postema, 2011:407; Patterson, 2021:682; etc.).

In turn, the American scholar has also remained committed to his own views, perhaps being unsatisfied with the arguments by the opponents (Shapiro, 2007:26). It is noteworthy that the answer by J. Coleman and other positivists in one way or another has been constructed on R. Dworkin thesis, according to which the legal nature of a principle is determined by the “sense of appropriateness” formed in society, and the weight of such principle is determined by the amount of “institutional support” embodied in examples of its use in legislation and judicial reasoning (Dworkin, 1978:40). For positivists, such thesis was equivalent to identifying legal principles through their recognition by a judicial custom / practice, i.e., given by a social fact (Sartorius 1971:156; Raz 1983:79—81). At the same time, this interpretation did not consider R. Dworkin's important objections (Postema, 2011:409—411). In the critic's view, elaboration of a formula that determines the amount and type of institutional support, necessary to give a principle a legal character and, even more so, to establish its weight, is impossible; any principle is justified in a collision of many evolving and interacting standards (principles as to institutional responsibility, interpretation of law, force of precedents, their connection with morality, etc.), which cannot be reduced to a single, however complex, “rule”. Moreover, the huge number of existing legal principles, the controversy and variability of their content exclude the possibility of their simple enumeration, which also means a “capitulation” of the doctrine of the rule of recognition and its conventional criteria in explanation of law (Dworkin, 1978:40, 43—44).

In 1972 the American jurist focuses on the criticism of conventionality considered below.

R. Dworkin's new challenge (1972): social rules, conventions, and normative foundations of law

1. The theory of social rules and the rationale for legal obligations

In 1972 Ronald Dworkin publishes the essay “Social Rules and Legal Theory” (Dworkin, 1972:855—890), later included in the “Taking Rights Seriously” collection under the title “The Model of Rules II” (Dworkin, 1978:46—80). Committed to the 1967 ideas of the “jurisprudence of principles”, he proposes a new line of argumentation: he focuses on criticism of the doctrine declared by H. Hart and supported by many positivists as the rule of recognition, i.e., a social fact and a social, conventional and binding rule fundamental to a legal system.

As before, in his 1972 criticism R. Dworkin proceeds from an analysis of grounds of (truth of) statements about a legal obligation, including obligation of judges to follow the rule of recognition in identifying and applying certain standards as law. In his interpretation, for H. Hart, such an obligation exists when there is an appropriate binding social rule, which, in turn, takes place when the behavior of some group coincides and is perceived as a standard of one's own and others' behavior: here the fact of behavioral uniformity constitutes a social rule and its derivatives (Dworkin, 1978:49). Thus, in H. Hart's example, a rule prohibiting men to wear a hat in church exists if members of a group of churchgoers a) follow the practice of taking off their hats when entering church, b) explain their behavior by referring to this rule, and c) criticize or punish those who forget to do so (Dworkin 1978:49—50; cf.: Hart 1961:55). Hence, the duty of judges to follow the law will also be a derivative of the corresponding social rule. The latter takes place if judges regularly apply the rules established by law in their decisions, justify this practice by appealing to "the rule" that binds them, and condemn officials who violate it (Dworkin, 1978:50).

According to R. Dworkin, such a view does not allow for the differences between the two types of statements with the concept of a rule. When a sociologist speaks of "having" or "following" a rule in a community, he just describes behavior, i.e., points at the conviction of members of the community in their relevant duty but he does not express his agreement to this effect. When a churchgoer appeals to the rule, censuring on its basis his own or someone else's behavior, he also gives an assessment of the latter: he means not only that other community members are convinced that they have a certain duty, but that they do have it. In other words, if a sociologist is talking about a social rule, the churchgoer is talking about a normative rule; if the truth of the first statement implies a certain factual state of affairs, the second statement implies a normative one (Dworkin, 1978:50—51). In the critic's view, the judge within a legal process is not in the position of a sociologist, but of a churchgoer: asserting the judicial duty, he refers not to the commitment of other judges, but to its actual existence. And this means that a social rule *per se* cannot be a source of judicial duty (Dworkin, 1978:51).

Developing the above, R. Dworkin consistently indicates three limitations in applicability of the doctrine of social rules, demonstrating the impossibility of exhausting the normative grounds of (statements about) an obligation by references to behavioral practices.

Firstly, the assertion of a duty does not always imply the existence of a relevant social practice and its acceptance as a behavioral standard. For instance, a vegetarian speaking about the prohibition of killing animals for their consumption, refers not to a social rule absent in a society, but to a moral principle according to which deprivation of life is evil (Dworkin, 1978:52—53).

Secondly, the same is true of a community recognized duty. The fact of a general agreement on a normative rule is considered an (essential) part of the grounds for following such rule only in the case of "conventional", but not "concurrent" social morality. Thus, churchgoers may believe that there would be no obligation to take off the hat in church without a relevant social practice, but they will believe that an obligation not to lie remains, even if most people lie. The same may apply to judges who follow the law by virtue of political principles that for them is of independent value (Dworkin, 1978:53—54).

Thirdly, and this is what constitutes the author's "argument from controversy" (Coleman, 2002:16—18; Bayles, 1991:355—356; Postema, 2011:412): even when a uniform social practice is shared as a necessary ground for assertions of obligation, it is often unable to guarantee the unity of the normative rule and the obligation claimed on its basis. So, founded on the social rule concerning the prohibition for men to wear hats in church, people can still disagree on who this obligation applies to. Does it apply to male babies? If only half of the churchgoers support this demand, what social rule will constitute such behavior? This rule will not be indeterminate, because all behavioral facts are well known. Hence, since a conventional rule is constituted by, and limited to a relevant convergent practice, the only rule here is to consider the scope of the given prohibition to grown males (Dworkin, 1978:54—55). However, R. Dworkin argues that the latter means fatal consequences for the theory of social rules. Typically, humanly asserted normative rules vary in scope and detail, or at least they would vary from person to person, to be exact. Against the background of such discrepancies, two people cannot appeal to the same social rule (and one of them may not appeal to a social rule at all), even if they agree with each other in most cases of using the rules they adopt. Thus, H. Hart's theory is appropriate only in cases when it is believed that a disputable obligation is not an obligation. But then, in R. Dworkin's opinion, it is not applicable to judicial duties (Dworkin, 1978:55).

From these positions, the American jurist finds the explanation of the connection between social practices and normative judgments implied in the theory of social rules, unsatisfactory. It is the normative grounds — but not the facts of conventional behavior — that are central in asserting obligations as such grounds take effect without relevant social practice, along with such practice, and even in spite of it.

According to R. Dworkin, normative judgments can consider social practice as an essential element of justification (as in case of conventional morality). However, contrary to H. Hart, this practice does not form a normative rule adopted here but helps to justify it as in the practice of churchgoers, creating ways to commit violations and giving rise to relevant expectations, which are good grounds for assertion of the normative rule and obligation to take off a hat in church. The theory of social rules fails in insisting that practice must somehow have the same content as the rule asserted in its name by individuals, while the latter may be wider and narrower in scope than such practice. Moreover, the author continues, if one finds a social practice meaningless, offensive, or stupid, he, contrary to others, may in principle not consider it a justification for any duties or normative rules. Finally, if there is practice in some community, such as removing hats in church, its members will often declare different normative rules supposedly justified by this practice, disagreeing about the requirements of the relevant rule and the duties it imposes. In doing so, however, they will refer not to the social rule formed by the uniform behavior, but to the normative rule justified by it; it is the content of the normative rule that constitutes the dispute. Similarly, when judges cite a rule, for example, on the duty to follow the law, they may refer to a normative rule justified by a relevant practice and argue about its exact content, without being limited to disagreeing about the facts of other judges' behavior. Hence, R. Dworkin summarizes that positivists may rightly consider judicial duty as a case of conventional morality, but they should not rely on its simplified explanation by the theory of social rules (Dworkin, 1978:57—58).

Therefore, in the 1972 essay, this theory becomes an object of “multi-level” criticism. Even allowing for the ambiguity of the specific target of the “argument from controversy” introduced by R. Dworkin (Postema, 2011:414—415), one could argue that the author challenges both the general understanding of social practices in terms of conventions proposed by H. Hart and the positivists, and their understanding of conventions themselves, according to which conventional agreement sets the boundaries for the extension of their normative force (cf.: Postema, 2011:414). For R. Dworkin, normative foundations of standards and duties of community members have autonomy and priority in relation to established social practice and, therefore, cannot be reduced to a conventional recognition of convergent social behavior. Hence, even where behavioral uniformity is part of such normative foundations, the relevant standards and obligations may have a different — not limited by an agreed convention — scope, often being the subject of disagreements (which, judging by the author’s texts, are derived from a mismatch of more fundamental moral and political attitudes of community members).

*2. Basic criteria of law:
rule of recognition and “the soundest legal theory”*

The stated positions form the basis for a new interpretation and criticism of the rule of recognition by American jurist, supplementing the 1967 arguments and outlining an alternative to the positivist conception of legal validity.

Rejecting the opponents’ attempts to re-describe his approach by incorporating principles into the positivist “model of rules”, R. Dworkin formulates three “theses” regarding the “fundamental test of law” in a system. These can be conditionally called the conceptions of 1) social criterion, 2) normative criterion and 3) majoritarian normative criterion. According to the first one, the social rule (a set of them) acts as a standard to be used by judges in identifying rules and principles of a certain legal system. The second one sets up a normative rule or principle (a set of them) whereas the third one states that these normative rules and principles are available to the majority of judges of the system.

In other words, in the first case a judge’s duty to apply statutes, precedents and customs is based on a conventional recognition of such duty by judges as an integral social group (implying the agreed official practice). In the second case it is based on normative rules and principles shared by individual judges or lawyers, regardless of the uniformity of their understanding and application. In the third case it rests on the same normative rules or theories (not necessarily identical to each other) obtained by the majority of judges in the community (Dworkin, 1978:59—60, 66—67).

In such perspective, R. Dworkin asserts that there is a fundamental divergence between him and H. Hart concerning the first — the social — thesis. In his opinion, it is defective due to the inconsistency of the theory of social rules, which is not able to substantiate a criterion of strict delimitation of legal standards from moral and political ones. Normative theses do not allow this either. Thus, as the author argues, if he accepts some normative theory of law not shared by the rest, it will include controversial provisions, e.g., concerning an obligation of judges to give priority to recent precedents, which will require argumentation, e.g., a theory about the meaning of the institute of precedent, which, in turn, depends on controversial principles of political morality (concerning the place of the court in democracy, etc.). This type of dependence is denied

in positivism (Dworkin, 1978:60—61). Hence, R. Dworkin concludes that if his conception implies the division of principles that are subject to and not subject to application by judges as law, this means that he is committed not to the first — positivist — thesis concerning judges' recognition of a social rule with a basic criterion of law, but to the second thesis that allows to justify a normative theory on how judges should decide hard cases (Dworkin, 1978:61).

R. Dworkin treats the arguments in favor of the social thesis as unsatisfactory. Firstly, we are talking about H. Hart's view, according to which the rule of recognition allows ambiguity only in a small number of cases (e.g., in establishing whether an act of parliament that limits the powers of its future composition is valid), clearly regulating most situations, which is sufficient for the first thesis under study. In R. Dworkin's opinion, such an argument contradicts the idea of a social rule, which presupposes the consistency of practice constituting a standard of behavior and acting as a necessary and sufficient condition for fixing what judges should consider a law; in fact, the positivist rule of recognition is definite, though not covering controversial powers of parliament. Meanwhile, such a restriction does not exclude new counter examples: contrary to H. Hart, disputes about criteria of validity are not limited to rare, extraordinary instances, constantly arising when courts consider hard cases, which is fatal for the doctrine of the rule of recognition (Dworkin, 1978:61—62).

Then, the author argues that a social rule of recognition exists if judges take as guidance its specific verbal formulation, which can be vague in controversial cases. However, such an argument places too much weight on linguistic and historical contingencies: the dispute is (and is usually perceived by the participants as a dispute) about the essence of the social rule, not about its various formulations (Dworkin, 1978:62—63).

Further on, Dworkin states that the rule of recognition identifies only the threshold duties of judges suitable for clear cases, just giving recommendation for disputable situations to be resolved by discretion. However, such an argument fails to give a holistic explanation of judicial duty, is based on a dubious moral doctrine, according to which duties cannot be controversial; it also contradicts the accepted moral customs and the use of a concept of duty in moral reasoning (where disputes concern understanding of duties, but not their very existence) (Dworkin, 1978:63—64).

Finally, R. Dworkin considers the possible revision of the positivist doctrine of the rule of recognition in the spirit of “institutional support” (proposed by him earlier to illustrate justification of the legal nature of principles and their weight and associated with judges' appeal to adopted laws and precedents as deficient (Dworkin, 1978:40)).

The author presents the doctrine of institutional support as follows. First, it is possible to collect all the apparently valid legal rules in some US state, as well as all the explicit rules of institutional competence, which form the basis for considering the first set of rules as valid. Second, one may ask which set of principles would suffice to justify the collected totality of material and institutional rules. Any judge or lawyer in this state can elaborate a “theory of law” that describes this totality of principles and assign to each of them a relevant weight, and then argue that it is his set of principles that should be considered the principles of this legal system. In this context, R. Dworkin summarizes that a principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification

for the explicit substantive and institutional rules of the jurisdiction in question (Dworkin, 1978:66).

At the same time, the jurist emphasizes that due to their diversity the theories of individual judges and lawyers do not form the social rule of recognition advocated by positivists. The institutional support, tied to the issues of “pedigree”, is not enough for this role either. According to R. Dworkin, the (factual) criterion of institutional support does not provide an automatic, historical or morally neutral basis for asserting any theory of law as the soundest one, not even allowing to distinguish legal principles from moral and political ones. Meanwhile, to provide a basis for a judicial duty, the evolving legal theory and its principles must reveal not the reasons or motives for adoption of the relevant legal rules, but the political and moral interests along with the community traditions that justify them. Development of such theory and / or seeking for the best one, depends not only on official materials, but also on a wide range of normative considerations, going far beyond the positivist arguments significant for identification of law: it is difficult to think of any principle of social or political morality of a community (constitutionally accepted) not included into the extended scheme of justifying the existing rules of a legal system. A positivist can accept the criterion of institutional support as the ultimate foundation of law only at the cost of abandoning all other considerations used here (Dworkin, 1978:67—68).

As a result, from R. Dworkin’s point of view, the impossibility of creating a closed list of standards for proper justification of legal rights and obligations undermines definition of law, which is built on identification of such standards and traditional for (analytical / positivist) jurisprudence; delimitation of legal rights and obligations should proceed in a different way (Dworkin, 1978:68).

Thus, following from the criticism of the theory of social rules, in the 1972 essay R. Dworkin comes to denial of the positivist theory of conventional grounds and criteria of law — the doctrine of a single master rule of recognition. In his opinion, this doctrine ignores the moral and political content and perception of judicial argumentation, as well as the controversial standards used by judges; it is incapable of separating law from morality. As an alternative, the author proposes a model of “the soundest” normative theory (a set of such competing theories), which claims to be the best justification of the law established in a community and determination of the legal nature and weight of principles in resolving specific court cases.

At the same time, Dworkin does not clearly determine the status of the proposed normative theory. It is often seen by positivists as an alternative conception of legal validity (or “institutional support” (Sartorius, 1971:156, etc.)), which holds morality a necessary condition of legality, and which, in such capacity, is regarded as limited, unsubstantiated, and in need of positivist criteria of established law (Coleman, 2002:4; Shapiro, 2007:5, 13, etc.; Hart, 1994:264—273). However, it is important to bear in mind that R. Dworkin himself does not use such a designation, leaving the “validity” parameter for legal rules determined by “pedigree” (Dworkin, 1978:17, 26). Moreover, the perspective of speculation by the American jurist is also very specific. On the one hand, he follows in line with (normative) political and moral philosophy (Dworkin, 1978: vii—xv), considering law as an institution that legitimizes the use of public coercion (Dworkin, 1978: 17; Dworkin,

1986:93, 98), and legal rights as the most justified moral and political claims (Dworkin, 1978:xi ff., 82 ff., etc.).

On the other hand, he builds a doctrine of legal proceedings, where the key is not so much the formal identification of standards as their applicability and weight in adjudication (Dworkin, 1978:44—45, 105, etc.; cf.: Dworkin, 1986:vii ff.). Hence, given the admissibility of interpretations of R. Dworkin's doctrine in the spirit of the classical theory of legal validity (focused on its intersection with the topics of positivist jurisprudence), it seems quite appropriate to assess it as a theory of legal argumentation, or moral and political legitimacy of law (Perry, 1997:794—801; Priel, 2020:16—20; cf.: Alexy, 2010).

The 1972 doctrine in the debate between R. Dworkin and positivists: ideological and historical implications

1. The 1972 ideas in the development of R. Dworkin's views

Moving from a statement of Ronald Dworkin's 1972 updated positions to an assessment of their ideological and historical significance, it's necessary to place them again in a more general perspective, starting primarily with the trajectory of the development of his views.

Firstly, as noted above, R. Dworkin introduces the 1972 doctrine as an explanation, reformulation and additional substantiation of his original 1967 ideas: his "jurisprudence of principles" and the ensuing challenge to the positivist model of rules and judicial decisions built on it. In this regard, it is quite appropriate to say that the author's focus is still on the problematic nature of the theses of discretion and obligation, according to which, when legal rules are exhausted, all possible significant statements about judicial duty are exhausted as well (Postema, 2011:415). At the same time, R. Dworkin's challenge seems to have a more ambitious objective. His polemics with positivists here and further (taking into account, *inter alia*, a recognition of persuasiveness of their counter arguments) is not limited by debates about whether law is a system of rules, or whether judges have discretion. In essence, this is a dispute of legal ontologies that differ primarily in the relationship between morality (legitimacy) and legality, where the main target of the American scholar is the separation thesis of positivism (Pattaro, 2005:181; Shapiro, 2007:3—5, etc.; Priel, 2020:44). Without declaring identical requirements of law and morality, R. Dworkin, more clearly than in 1967, seeks to show the inferiority of the positivist criterion for their differentiation: in his opinion, any such criterion should basically include moral reasoning and evaluation (Dworkin, 1978:59—61; Postema, 2011:407).

Secondly, following the critical and positive program of the "jurisprudence of principles", R. Dworkin's 1972 doctrine offers a significant expansion of the author's views. In fact, the latter is associated with a shift in the focus of the discussion, now turning to the positivist thesis of conventionality as another aspect in restricting the rule of recognition authority (Coleman, 2002:14) or in explaining law through social facts (Postema, 2011:415).

Thus, the idea of a rule of recognition as the ultimate basis for the validity of legal rules and for the existence of legal obligations is contested from a new perspective.

Previously, the defect of the master rule was seen by R. Dworkin in reducing criteria of law to questions of pedigree, which does not allow considering legal principles recognized by virtue of their content, or value. Now he disputes the very idea of a social binding rule of recognition that links the criteria for determining legal standards and obligations in the system solely with the fact of their acceptance and use by the courts (law-enforcers), i.e., with the presence of the relevant convention in a society. According to the author, the convention as a complex social fact cannot explain legal judgments and behavior of participants in legal practice. On the one hand, it, *per se*, does not provide normative grounds for legal obligation (the *ought* does not follow from the *is*). On the other hand, it cannot form a reliable and autonomous ground for legal regulation, since it presupposes agreement on the content and scope of social rules established by practice, which contradicts the scale of (real and potential) disagreements between community members. By analogy with the 1967 essay, R. Dworkin contrasts the positivist “model of rules” with the idea of a multitude of heterogeneous normative standards and considerations used in judicial argumentation, which are irreducible to the “institutional support” of the legal system and have no necessary connection with the established social practice, going back to moral and political doctrines and patterns. At the same time, in the 1972 interpretation, the “legality” of standards — principles — is determined by their correspondence to “the soundest” normative theory, which provides the best justification for a clearly established positive law, and legal practice is characterized through a competition of such theories, reflecting the differences in normative views of jurists and judges.

Thirdly, in the 1972 essay, R. Dworkin formulates a number of “cross-cutting” ideas that remain consistent within the final system of his views, including the doctrine of “legal interpretation”, canonical for the author’s modern perception.

Thus, the idea of the controversial character of normative grounds resonates as the doctrine of “theoretical disagreement” (1986), emphasizing the breadth of debates among judges on the very criteria of validity in a legal system, ignored and / or distorted within positivism as a “theory of plain fact” (Dworkin, 1986:3—6, etc.). Another realization of this idea are R. Dworkin’s theses on the disputability of ethical, aesthetic, etc. theories that give rise to the controversy of the ensuing interpretations, including legal judgments (Dworkin, 1985:146—166). The author’s idea of “the soundest legal theory” unfolds further in the 1975 conception of resolving hard court cases and in the 1980’s conceptions of “law as interpretation” and “law as integrity”. Here, as before, when making a decision and protecting legally recognized rights of the parties in a trial, a judge formulates the best theory of the case at hand, which simultaneously is the most consistent with the history of a given system (previous political decisions) and provides it with the best moral justification (Dworkin, 1978:81—130; Dworkin, 1985:146—166; Dworkin, 1986:225—275). Finally, R. Dworkin’s emphasis on the priority of deontology in justification of law is embodied in his criticism of a descriptive and semantic project of positivism (Dworkin, 1986:33—46, etc.), as well as in elaboration of his own legal theory as an interpretive, descriptive-evaluative jurisprudence, reasoning from the point of view of participants in legal practice and designed to ensure the legitimacy of judicial decisions (Dworkin, 1986:vii—ix, etc.).

2. *The 1972 ideas: a positivist perspective*

R. Dworkin's 1972 doctrine, being important for development of the author's views, have produced a significant impact on the theory of (Anglo-American) positivism, causing various responses among its supporters.

Firstly, the appropriateness of a number of Dworkin's ideas addressed to Herbert Hart, as the author of the conception of law, basic for positivists, has become the focus of the discussion. Earlier, in response to the 1967 challenge, positivists have already demonstrated its defective interpretation solely as a theory of rules operating in "all-or-nothing" manner, linking legal criteria only to the questions of "pedigree", treating the judicial discretion as arbitrary law-making, etc. (Leiter, 2003:5; Shapiro, 2007:3, 15—18; Patterson, 2021:678, 680). Now the question addressed to H. Hart concerns the theses that a) conventional binding rules of a community, primarily the rule of recognition, are "constituted" by uniform behavior of its members, and that b) the content of the conventional agreement establishes the scope of normative action of the convention (Postema, 2011:413—415).

Given the continuing uncertainty as to H. Hart's positions, R. Dworkin's second thesis is considered quite plausible (cf.: Coleman, 2002:22; Shapiro, 2007:24), whereas the first raises questions. For H. Hart, the existence of a social rule presupposes convergence of corresponding actions and attitudes in the community (Hart, 1961:55—57). At the same time, if the foundations of validity and authority of primary rules are raised to the rule of recognition, then validity of the latter is substantiated through a reference to the demonstrated fact of its existence as a social rule, i.e., through the description of the fact of convergent judicial behavior (Hart, 1961:103, etc.), which can be treated as problematic. The question of the grounds for primary rules is normative and requires arguments with a normative premise — a rule of recognition can act as such only if it is a normative proposition (Raz, 1990:56; Postema, 2011:413). However, contrary to R. Dworkin's interpretation, H. Hart does not build normative jurisprudence, but a theoretical description of law's normativity, no matter what foundations it rests on (Hart, 1994:242—244; Leiter, 2003:8—9). Hence, without showing the "genuine" normative grounds for propositions concerning validity of rules and their binding nature, the rule of recognition as a descriptive proposition still makes sense, anchoring the relevant normative propositions to the community in question (Zipursky, 2001:238; Postema, 2011:413—414).

Secondly, R. Dworkin's 1972 arguments lead to reinterpreting and adjustment of a number of initial positivist approaches.

Thus, on the one hand, there is an acceptance as to the limitations of H. Hart's "practice theory of rules", which covers only cases of conventional morality. The latter implies not just the "consensus of independent conviction", but the "consensus of convention" when general observance of a certain rule by a group is part of the grounds for recognizing its obligatory nature. This, in turn, means the extension of this theory to custom rules and its inapplicability to legislative norms that are valid (in accordance with the institutional criteria of the system) from the moment they are enacted and until their practical implementation (Coleman, 2002:14—15; Raz, 1990:54; Hart, 1994:255—256).

On the other hand, within the framework of ("hard") positivism, there is an alternative conception of legal rules as a special kind of practical reasons for action — institutionally recognized, mandatory behavioral "second-order reasons". According to J. Raz, they refer

to the “first-order reasons” used by subjects before and without taking into account social norms and institutions (reasons of rationality, morality, etc.), and claim to be their “preemption” and, thereby, most legitimate and successful implementation in behavioral practice (Raz, 1990:15). Within this construction, rules act as “protected reasons” and “authoritative directives” introduced through official sources of law, whereas principles are more likely to be “first-order reasons” (Postema, 2011: 406), being the object of institutional “preemption” and transformation.

Thirdly, despite the proposed adjustments, positivists remain committed to explaining law as a system of standards which go back to social sources (Raz, 1979:46; Leiter, 2003:12), including, to the fact of a conventional acceptance of the rule of recognition as a form of judicial custom used by judges and officials in their practice (Coleman, 2002: 20; Hart, 1994:256). R. Dworkin’s criticism here is opposed by serious counter argumentation.

A. The “controversy argument” declared by the critic — according to which the multiplicity of disputes on criteria of legal validity excludes the existence of a unified social practice and, thus, the binding rule of recognition — is parried by an argument dating back to Hart’s “All that succeeds is success” (Hart, 1961:149). For J. Coleman, H. Hart and others, the rule of recognition may turn out to be indefinite, however, contrary to R. Dworkin, such cases are not numerous; they mainly concern not the content of legal criteria, but their application, and are compensated by discretion. Hence, the rule of recognition is still able to perform the function of providing certainty in a system (Coleman, 2002:20; Hart, 1994:251—252; Bayles, 1991:355—357).

B. R. Dworkin’s remark concerning insufficiency of “institutional support” and the necessity of moral grounds for fixing the legal status of standards and obligations (e.g., when choosing between lines of precedents) also faces a row of counterarguments. On the one hand, it is contended that there is no legal basis for choosing decisions in a controversial case, and that judges are entitled to turn to additional, extra-legal considerations. On the other hand, the rule of recognition is said to impose a duty on judges to use moral arguments in disputable cases, thus forming a second-order method of legal decision (Coleman, 2002:22—23; Sartorius, 1971:153; Hart, 1994:247; Bayles, 1991:355).

C. The positivists also renounce R. Dworkin’s objection, according to which the delimitation of legal standards can be accomplished only with a normative rule stemming from moral and political doctrines, but not from a social rule formed by a convergent behavior. On the one hand, it is argued that a rule of recognition does not need to rely on normative considerations not rooted in social rules (Coleman, 2002: 23; Bayles, 1991:357). On the other hand, R. Dworkin’s confusion of the rule and social practice that reveals it, or the grounds for people’s acceptance of such rule and the corresponding fact, is emphasized. As noted above, according to positivists, for whatever motives the rule is adopted — and those are not reduced to moral arguments only (Hart, 1994: 257) — a statement of this fact is descriptive, not normative (Bayles, 1991:357—358; Leiter, 2003:7—9).

3. R. Dworkin’s challenges: unaccounted potential

Despite the weight of the cited counter arguments, positivists seem to have neutralized only partially the American jurist’s rationales, which retained their explanatory and critical potential within the framework of the polemics. The ideological perspective developed by R. Dworkin in the 1972 essay is not limited to the topics of legal principles, judicial

decisions or parameters of the supreme norm of a system, often discussed by his opponents, but contains fundamental challenges related to ontological questions of law (Priel, 2020:44; Patterson, 2021:677), manifested in subsequent, more complex constructions of the author.

Firstly, R. Dworkin discusses the key problems for legal philosophy concerning the correlation between normativity and factuality in law. In contrast to positivism, which links the basis of a legal system with conventional practice as a complex social fact, the author defends the necessity, autonomy and priority of the normative foundations of law: the rule of recognition as a binding rule should give a proper explanation not only for what standards are binding, but also for why they are so (Postema, 2011:411). Even if R. Dworkin's doctrine is defective, and the provisions he imputed to positivism are incorrect, its ability to present a full-fledged theory of how "facts give rise to law", going beyond a simple statement about the use of certain criteria of legal recognition in a community, is still important for asserting its tenability and value.

Secondly, rejecting the theory of social rules introduced by H. Hart as a positivist, R. Dworkin, in fact, challenges the general understanding of a rule as such, perceived from the analytical linguistic philosophy. The model comprises the rules of ordinary language as a institutional practice — rules that we learn and follow "blindly" (cf.: Wittgenstein, 1958: § 219). Yet, R. Dworkin emphasizes the reflexive and argumentative nature of rules and of a rule-compliance action. His 1967 doctrine already implies that following a legal rule requires coordination of diverse and multi-level standards and includes orientation towards their most justified — and not just "typical" — interpretation, application, and possibility of deviating from established behavioral patterns. Later, in the 1972 essay, the very capability of practice to constitute patterns of proper behavior is problematized: the emphasis shifts to the moral foundations of normativity (*inter alia*, in the absence of social practices and in opposition to them), involving identification and justification of "the soundest theory" rationally created by social actors in a controversial practical context. Development of this line is focused on centralization of interpretation as a key feature of many human activities, including legal practice (Dworkin, 1985:146), and elaboration of the interpretive theory of law, contrasted to a narrow positivism as a purely "semantic" theory (Dworkin, 1986:31—35), which is focused on describing (the concept of) law and criteria for its delimitation without offering an independent theory of legal interpretation (Patterson, 2021:689).

Thirdly, R. Dworkin rejects the positivist idea of convention as a foundation of law, necessarily implying unity, agreement and determinacy. In his opinion, it contradicts numerous disputes among judges regarding the very criteria of legal validity in the system, which cannot be described as misconceptions concerning the law in force or as discussions concerning its improvement (Dworkin, 1986: 4). In contrast to this, R. Dworkin emphasizes the idea of the fundamental contestability of value-normative knowledge that underlies social practices and institutions. As follows from the author's texts, such an idea is quite compatible with the existence of the soundest theory of law, moral or aesthetic theory, truth in interpretation, as well as completeness of legal regulation and presence of a single right answer even in hard court cases (Dworkin, 1985:119—189; Dworkin, 1986:76—85, 225—275; Dworkin, 1978:279—290). In this regard, R. Dworkin's legal theory, which seeks to account for the phenomenon of controversy, *caeteris paribus*, looks more significant or ambitious compared to the positivist theory. The latter, remaining within the

rigid model of convention, is unable to adequately explain not only “theoretical disagreements”, but the law in general. Appealing to conventional practice, positivism tries to defend the existence of objective, self-sufficient facts that legitimize the value-neutral description of law and its separation from morality. Hence, R. Dworkin’s recognition of controversial normative basics of legal reasoning not only links them with debatable provisions of morality, undermining the separation thesis of positivism, but also outlines the prospect of a conscious construction of legal theory in the methodological context of relativism (Dworkin, 1985:146—189; Dworkin, 1986:76—85).

Conclusion

R. Dworkin’s 1972 doctrine looked at in the article (despite the modest attention in foreign literature) has formulated a number of philosophically significant provisions containing both criticism of the theory of social rules and the rule of recognition, basic for modern (Anglo-American) positivism, and an alternative model of grounds and criteria of law, irreducible to conventional practice. In ideological and historical terms, these provisions have become an important step in intensifying the author’s polemics with positivists, expanding its subject and arguments, and ensuring the progress of both approaches to understanding law. Meanwhile, R. Dworkin’s 1972 doctrine has broader implications. The outlined vision of normative, controversial, and reflexive-argumentative basics of law constitutes a serious challenge to the classical positivist program in jurisprudence and introduces its own set of postulates and problems changing the space of modern legal philosophy and deserving discussion beyond Anglo-American law and legal theorizing tradition.

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