Comments on: Gidon GOTTLIEB. *The Logic of choice. An Investigation of the Concepts of Rule and Rationality*. George Allen & Unwin LTD, London 1968, p. 188.

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The problem of legal reasoning appears as one of the focal points in the formalists and antiformalists controversy (1). There are, however, difficulties in summing up the outcome of this discussion now; besides, the opposing positions are, as a rule, not clearly determined. This situation gives a opportunity to search for some positions of a compromise. The reviewed volume is an expression of such an intermediate position.

The author approves neither of the rapprochement of legal reasonings to rhetorics in the way of the Belgian School of prof. Perelman (pp. 11, 73, 118) nor of the views assertings the irrationality of judicial decisions (pp. 23 and ff). He rejects also any comparisons of legal reasonings to deduction or induction, he does not support the rapprochement between jurisprudence and the sciences or sociology either (p. 15-22). The author's exploration of existing controversies is meant "... to lead ... to a logic of rule-guided choices and decisions" (p. 13) (2).

Rules are specified by their function and not by the forms of their formulation, although they have certain characteristic structural peculiarities (pp. 35, 39). Rules are inherently purposive (p. 106). The author asserts, however, against the com-

(1) Cf. Ch. PERELMAN, *Justice et Raison*, Bruxelles 1963, chpt. XIV; J. HOROVITZ, La logique et le droit, in *Études de logique juridique*, Bruxelles 1967, vol. 2, p. 43 and ff. G. KALINOWSKI, Logique formelle et Droit, *Annales de la Faculté de droit et des sciences économiques de Toulouse*, vol. XV, fasc. 1, 1967, p. 197 and ff.
Cf. also the reviewed Chapt. II.

(2) In my review I am passing over several problems which are not relevant to the essential topic. Hence I do not discuss the problems of precedents (Chapt. VI), the relation of law and morality (Chapt. IX) and I only slightly mention the problems of the purpose in law (Chapt. VIII).

monly held opinions, that "... rules are understood to be tools for guiding inferences leading to action rather than directly governing action or conduct" (p. 157, cf. p. 114). If any linguistic expression has such a function then it is a rule. It is a question of fact. The problem of the legal rule is different, since it is "... a rule ... pursuant to the application of a rule of recognition" and, hence, the question "is this a legal rule" cannot be answered in factual terms (p. 130).

Omitting here the problem of defining the legal rule one ought to stress the peculiar way of defining a rule. Whereas one usually refers to the "rules of behaviour" the author wants to talk about the "rules of inferences". This is *prima facie* somewhat startling, but seems to be more clear when used for an analysis of the "reasoning with rules" in the context of legal decision-making.

The legal decision is a standard example of reasoning with rules. There are, in the legal decision, six "aspects" (p. 66), "elements" or "categories" (p. 169) or "ingredients" (p. 77): facts statements; law statements — guidance devices; processes of reasoning (choice of facts; inference form facts; subsumption); statement of the decision reached; statement of the foreseeable future application of the law statements. These heterogeneous elements (p. 170 and ff) can be treated as a determination of various parts of the psychological process of legal decision-making. Each of these elements, with the exception of the last one, can be ascribed to definite "stages" of the theoretical model of an application of law ([3]). The author rightly singles out situations of the immediate understanding of a legal rule and situations requiring interpretation; he stresses the difference between the rule of guidance and the rule of justification (pp. 71, 153, 159), analyses the problems related to the choice of relevant facts, with their demonstration and inferences about their existence (chapt. IV), discusses the possibility of formulating the justification of a decision in a syllogistic form (p. 70 and ff.).

([3]) Cf. J. WRÓBLEWSKI, Il modello theorico dell' applicazione della legge, *Rivista intern. di filosofia del diritto* 1, 1967, pp. 13-21.

It seems, hence, that in spite of his specific concept of a rule the author uses it in a way not inconsistent with the other concepts of decision-making; it is one of the possible complementary concepts of a rule. The same rule R can be viewed as a rule directing a behaviour B and can serve as a motivation of reasoning of the subject deciding the consequences of a behaviour consistent (or inconsistent) with R. The author looks at the rule from the point of view of the subject which applies this rule. But it is neither the unique nor the priviledged point of view.

G. Gottlieb determines several ways of using the term "interpretation" (pp. 95-98). He rightly points out to the difference between the situations when the legal text is doubtful and those, when there are no doubts (pp. 101, 108, 113, 114). He accepts the theory of legal interpretation formulated by Curtiss ([4]). In his opinion the essential problem of interpretation is «... whether the inference drawn in accordance with the rule is authorized or required by such a rule. Not what the meaning of words in the rule is, but whether the words authorized the inference made in reliance on them". This is the problem of "... finding guidance for the application of rules" (p. 101). One can treat these assertions as referring to the functions of interpretative decisions of an "operative interpretation", that is an interpretation made by the state organ when deciding a case ([5]). For such an interpretation the determination of the meaning of applied norms serves as a guidance for its application. The sharp opposition between the goals of determination of the meaning and guidance for decision, asserted by the author, seems not justified at least for an operative interpretation.

Canons for construction of statutes are, in the authors' opi-

([4]) C. P. Curtis, A Better Theory of Legal Interpretation, *Vanderbildt Law Review* 3, 1950.

([5]) Cf. L. Ferrajoli, Interpretazione dottrinale e interpretazione operativa, *Rivista inter. di filosofia del diritto* 1, 1966; J. Wróblewski, Semantic Basis of the Theory of Legal Interpretation, *Logique et Analyse* 21/24, 1963, p. 405 and ff.; the same author, *Zagadnienia teorii wykładni prawa ludowego*, Warszawa 1959, Chapt. III.

nion, tools for the performance of the judicial tasks. They play, however, only a role of justification of decision, never the role of guidance for reaching it. The argument for this opinion is the obvious competition of these canons (p. 102 and ff.). In my opinion the conclusions drawn by the author are not sufficiently demonstrated. There is no doubt that canons of statutory construction do play a role of the rules of justification. But the question of whether they play a role of guidance for judicial decision-making can be answered only by empirical data ([6]). The existence of contradictory canons does not exclude their motivational force, provided a choice of conflicting rules is made.

G. Gottlieb has his own normative theory of legal interpretation, called the "integral theory" (p. 128). It could be summed up as overriding the alternatives of Legal Posivitivism and Natural Law (p. 124). This theory demands "... that the interpretation of laws be consistent with the policies of legal rules", it "... necessarily resists the introduction into a legal system of legislation designed to subvert and override the basic policies of the system" (p. 128). The author uses "purpose" and "policy" as synonyms, and he rightly stresses the elusiveness and proliferation of purpose (pp. 107, 109 and ff). His "Integral theory" cannot be simply considered as a set of postulates for the uniform understanding of "purposes" in the application of law ([7]), but it is to be thought of as a way for the evaluation of law. Such evaluation has to be based on certain criteria which could not be indifferent to the axiological basis of Legal Positivism and Natural Law controversy [8].

"Reasoning with rules" is strictly related to evaluative choices. The author analyses the problem of how to make these choices, since neither the known kinds of logic nor the irra-

([6]) Cf. J. WRÓBLEWSKI, Właściwości, rola i zadania dyrektyw interpretacyjnych, *Ruch Prawniczy*, Ekonomiczny i Socjologiczny 4, 1961, p. 105 and ff.

([7]) Cf. J. WRÓBLEWSKI, Zagadnienia teorii wykładni... *op. cit.* p. 380 and ff.

([8]) Cf. K. OPALEK, J. WRÓBLEWSKI, Axiology: Dilemma between Legal Positivism and Natural Law, *Österr. Zit. für öff. Recht* 18, 1968, p. 554 and ff.

tionalism of decision rejected by him give any directives. He discusses two doctrines formulated in the American jurisprudence, namely the "balancing doctrine" and the doctrine of "principled choice" (p. 135 and ff.). The author supports the latter because a decision between rival purposes and interests is always necessary. The use of principles does not remove a discretion of choice but it can remove the complete discretion. The main techniques for a principled choice are: rules and principles; standards; purposes, policies; examples, decided cases; preexisting and binding commitments (p. 162). The necessity of choice does not mean that the decision is based on arbitrary personal preferences (p. 141), and, hence G. Gottlieb formulates the demand "... that decisions and choices be as unarbitrary as possible (which) can be equated with the demand that they be consistent and principled whenever possible" (p. 172).

Rationality of choice serves this purpose. The author analyses the problem of constructing a model of rationality adapted to his conception of reasoning with rules (pp. 29-32). It seems that the model in question is given implicitely in the analysis of particular elements of legal decision-making. G. Gottlieb asserts that his analysis gives "the basis for the articulation of a standard model of rationality". He asserts that "... rational arguments in this field are those that lead to decisions and choices in reliance on inferce-guidance devices with proper regard for the necessary presuppositions, implications, consequences and other features unavoidable in the use of such devices". Rationality demands that the process be consistent, that means be appropriate for the ends; that decisions and choices be as unarbitrary as possible; that a sequence of mental operations be reflecting the guidance features of rules, principles, purposes and policies (pp. 171, 172).

These postulates defining rationality of reasoning with rules are very general, although they seem to grasp some of the intuitions related to the concept of "rationality of decision-making". The criticism is easy, but led us remember that there is no commonly accepted model of such a rationality coverning

the area discussed by the author (9). If we seek for rational decisions we have to know what conditions must be satisfied for rational decision-making. The reviewed book is a search for the model of such rationality.

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(9) Cf. e.g. the concept of rationality elaborated for all humanities in J. KMITA, L. NOWAK, *Studia nad teoretycznymi podstawami humanistyki*, Poznań 1968, Chapt. II, § 3 esp. p. 110 and ff.