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Raimo Siltala, *Law, Truth, and Reason. A Treatise on Legal Argumentation*. New York: Springer, 2011, XV +290 pp., 9 illus., ISBN 978-94-007-1871-5, 106,95 € (Hardcover).

Carlo Marmo
Studio legale associato Giovanni Pellegrino, Roma, Italy.
carlo.marmo@gmail.com

In his relatively short book, Raimo Siltala, professor in jurisprudence at the University of Turku, Finland, tackles the perennial theme of assessing the mutual relations among law, truth and language.

Several different philosophical theories of truth are sketched out as a roadmap for the exploration of ten schemes to be used for the analysis of contemporary theories of argumentation in law. Wroblewski's three ideologies (bound/free/legal and rational) and Makkonen's three situations (isomorphic/semantically vague/normative gap) of judicial decision making are then used as a general background to apply these schemes. In this respect, Siltala's sophisticated and intelligent narrative makes rather complex ideas manageable and accessible. It results in a well-argued survey of the contemporary philosophical scene regarding truth and rationality in the law from the point of view of analytical jurisprudence.

It is worth noticing that the issues discussed in this book count among the hot topics on the contemporary philosophy of law agenda. One of the reasons for this is related to the ongoing globalization process (mentioned in the concluding chapter, p. 268). Many find it increasingly problematic to conceive the binding force of law as resting solely upon the authority of a central recognized entity, be it that of national parliaments or courts enforcing judicial decisions. While the aforementioned entities are involved in the highly debated crisis regarding the concept of sovereignty, phenomena like negotiable law, self-regulation law and soft law do challenge our received view of the territorial state judge who addresses cases by reference

to a coherent system of institutional sources of law. Frequently, ordinary courts are ruled out by *ad hoc* decisions, arbitration or "alternative dispute resolution" procedures, so that non-institutional sources of law come to shape the ultimate decision of the case at hand. In this context, globalization contributes to the emergence of the quest for cogency in (legal) argumentation. It sheds light on the delicate and crucial role of individual discretion that is at work in the intellectual act of assigning specific legal consequences to certain states of affairs.

These general remarks should serve to set the stage for this review. My goal is to offer an overview of Siltala's main lines of argument by touching upon most of the key chapters. I will not cover exhaustively each of the ten legal frames proposed by Siltala. Rather, my focus is on his central claim: that "the truth of a legal assertion is conditional on a set of truth-constituting premises defined by the ideologies of bound, legal and rational, and free judicial decision-making and the frames of legal analysis discerned under them" (p. 256).

The starting point of his inquiry is Makkonen's isomorphic theory of law, read in the light of the correspondence theory of truth as defended by Wittgenstein and Tarski**.** Roughly stated, from this point of view the truth-value of a linguistic sentence is in the structural similarity between a linguistic expression and some state of affairs "out there." According to the correspondence theory, truth is the existing correlation between expressions and extra-linguistic entities (isomorphism). The core criticism of the legal version of this theory is that an isomorphic approach would make the interpretation of law redundant. After all, what an "isomorphic judge" is after when deciding a case would consist simply in attaching mechanically to a certain fact the legal consequences a specific norm prescribes for that fact. As Siltala notes, this conception "leaves the judge rather empty-handed" (p. 50). Legal professionals could easily concede that the theory fails to fit the facts. Along with "routine cases," where the emergence of a structural correspondence between facts and norms is clear, there are many "hard cases" where clear legal rules that are applicable to clear uninterpretable facts remain absent. More incisively, as Siltala points out, the structural correspondence (between states of affairs and linguistic expressions) is itself the product of interpretation: "the choice of a key of isomorphism vis-à-vis a pair of legal fact-situations is not possible without first

having constructed the two states of affairs with the help of some conceivable key of interpretation" (p. 44). Consequently, any distinction between "routine cases" and "hard cases" would be far more difficult to trace, leaving it debatable whether isomorphism in law can preserve a minimal notion of proper judicial competence.

In altering the (chrono)logical order chosen by Siltala, legal positivism (chapter 6) could be mentioned here as ideologically sympathetic with isomorphism. Legal positivism has various forms (analytical, institutional, exclusive and inclusive) all of which share as a central conviction that law is a social fact which arises from an act of will of the sovereign legislator or some other institutional lawgiver. Positivist jurists are concerned with preserving their discipline as a scientific subject by clearly separating law from morality or other value-laden preoccupations. They affirm that judicial-decision making consists in describing the valid legal system in a value-free manner. As a consequence, Siltala notes, issues of legal interpretation are ruled out by legal positivism. At this point the convergence between positivism and isomorphism becomes somewhat arguable because both conceptions seem to assume the infamous view according to which the judge merely serves as the 'bouche de la loi', the mouth pronouncing the words of the law.

The weakness of the correspondence theory of truth opens the way, in Siltala's inquiry, to an interesting exploration of the "coherence theory of truth" concerning law (chapter 3). On this view, the truth-value of any proposition consists in its coherence with some specified set of propositions. More precisely, truth "is a quality internal to a system of beliefs that is collectively sustained by the members of the community at a certain moment of time, and not an isomorphic relation between a linguistic expression and the states of affairs in the world" (p. 54). Ronald Dworkin's view about "law as integrity" is key here. Judicial decision-making, as Dworkin sees it, is a matter of reporting the individual case within the legal tradition as defined by the prevailing conception of the institutional and societal sources of law. Here, Siltala evokes Dworkin's well-known metaphor of the judge as the 'chain novel author':

> "[T]he judge, like the co-author of a chain novel, cannot resolve a hard case of adjudication in a haphazard, whimsical, or capricious manner, in

> disregard of the evolving legal and political narrative on how the allocation of legal rights and duties among citizens, the institution and division of decision-making authority, and the allocation of scarce material resources in society have previously been accomplished" (p. 65).

Siltala's accurate reading of Dworkin displays a critical attitude towards the exact meaning of "coherence": how could coherence work practically as a normative standard of rationality in law? It seems that current explications of the concept of coherence fall short of providing a compelling normative criterion for argument evaluation. Amongst others, Siltala points to there being always more than one way of (re)constructing the internal coherence of law. Unless more effort is put into arguing for one reconstruction over another, one may conclude that choosing among them is a mere act of faith. If so, then the trouble with coherence is its subjective nature.

Avoiding such objections may lead to agreement with those who rest satisfied with a *pragmatic* approach to the problem of truth. For instance, many judge the truth of an assertion by its empirically observable effects in the world. Among them is Chaim Perelman, the well-known pioneer of the *New Rhetoric* discussed in chapter 4. He maintains (implicitly) a pragmatic idea of truth, judging the truth-value of an assertion according to the extent of its approval or disapproval gained with a target audience. The extreme degree of consent, i.e. unanimity, occurs when the "universal audience," the widest and most rational audience the speaker can imagine, is convinced by the discourse.

While there are many objections to the preceding line of thought, the target of Siltala's criticism is —in my opinion correctly so — the notion of the universal audience as a regulative standard of reasonableness in argumentation. This notion always leaves behind the impression that the standards are set so high that they cannot be fulfilled in this world. Dworkin's notion of coherence evokes similar impressions, and Siltala's criticism is quite the same here. As a subjective thought-construct of the speaker, he argues, the universal audience can hardly function as a universal standard for building and assessing the strength of arguments. The notion of a universal audience seems to be epistemologically challenging: "if the universal audience is no more than a thought construct of the speaker, how can we ever be certain that the outcome of legal construction and interpretation really matches with the prevailing idea of legal justice?" (p. 95).

Philosophical pragmatism is the inspiring line of thought for other theories of law like the economic analysis of law summarized in chapter 5. Siltala cites Richard Posner's arguments for the priority of economics over law. According to the economic analysis of law, "key concepts of analysis are given in terms of economic efficiency and the optimality of the allocation of scarce resources in society, both in legislation and in jurisdiction" (p. 107). The economic effects of regulation should therefore have priority over other kinds of considerations when it comes to the definition and the enforcement of law. Perhaps surprisingly, from this point of view, Chaim Perelman and Richard Posner indeed share a technical and instrumentalist notion of law and argumentation. Law is a tool for programming desirable effects such as community consent or economic efficiency. Arguments are tools to produce those effects, receiving their validity from their efficacy. Two further theories which Siltala treats within distinct philosophical contexts, namely "legal conventionalism" (chapter 8) and "legal realism" (chapter 7), seem to a significant extent to be committed to the basic tenets of pragmatism.

Drawing mainly from David Lewis' influential book *Convention* as well as John Searle's work, Siltala offers a notion of legal conventionalism as the "common acceptance or recognition of certain social phenomena as having legal significance or as a set of mutual expectations and cooperative dispositions among the members of the community" (p. 185). Conventionalism is ideologically sympathetic to the pragmatic theory of truth. Both accept that social conventions go into the constitution of a constraining normative standard for argumentation in law.

Similar remarks seem at least partially valid for the fundamental premises of the legal realism view (chapter 7) under which maximum credit is given to extremely social-sensitive standards of rationality in argumentation. This derives from the realist premise about the nature of law, which is seen as "law in action." In other words, law is the sum total of rules and principles, duties and rights, *effectively enforced* by the courts of justice. This is, approximately, what Ross means by "*normative ideology collectively internalized by the judiciary*," a concept Siltala presents in very precise terms (p. 154) as a major work in analytical legal realism. Again, we can note that ultimate reference to the *status quo* comes about by socially shared conventions as enforced by courts. On this basis, some may find it

plausible to argue that the kind of legal knowledge that is possible under the premises of the realists is of a statistical type. The absurd consequence would be that the business of judicial decision making then merely consisted in recording proven successful models of argumentation that prevailed in past legal decisions and fitting current models accordingly, so that future legal decisions become predictable.

For this reason, the theories under discussion may serve as an elegant exercise in pragmatism à la Perelman: empirically observable effects of arguments are ultimately what these theories value the most (if not exclusively). Though from slightly different premises, they all reach the conclusion that the merits and demerits of a legal decision are to be judged primarily by the empirically observable consequences of any sort (social, economic, etc.) thereby brought into effect. Validity (rationality) is a matter of efficacy (consent). Approval or persuasion being the ultimate goal for both practical uses and theoretical reasoning of arguments, contrary to Siltala, one might align Perelman, Posner, Ross in more explicit terms. I will now attempt to make this idea more precise.

Pragmatism, including its conventionalist and realist forms, implies the priority of non-institutional sources of law over the institutional constraints put in place by the traditional sources of law, this priority being necessary to bring about the chosen social consequences. The point is easily illustrated by recalling the legal positivism discussed above. Positivists (and, arguably, isomorphists) claim that law is an auto-referential system to be studied and applied regardless of the social consequences brought into effect by the law. In contrast, legal pragmatism is anti-positivist, and affirms that legal argumentation "can never take place in a social or ideological void, detached from the constitutive value premises operative in the various legal instruments" (p. 105). This conclusion appears to be valid for the new rhetoric, and also for economic and realist conceptions of law.

Interestingly, Siltala treats what he calls the *decisionist approach* to law as a (non-)theory. It does not assume the form of a theory, nor do its proponents want it to. Not acknowledging to hold any meta-theory of law is characteristic of such an approach. Instead, judicial adjudication is seen as a free and creative act. Consequently, individual discretion plays the main role in the process of adjudication, and the importance of law is largely downplayed. Siltala reports decisionism as having noble and historical

pedigree in the works of Bodin and Schmitt. But he discusses it (in chapter 11) with reference to the contemporary postmodernist book *From Apology to Utopia* by Martti Koskeniemmi, whose effort in unveiling the inherent "political" nature of what is commonly labeled as "international legal argumentation" well illustrates the sense of "incredulity toward meta-narratives" (Lyotard) which the decisionist approach embodies within itself.

As mentioned in the introduction, once Siltala has accurately exposed his several frames of legal analysis, he proceeds (in chapter 12) to group them together, using Wroblewski's three ideologies and Makkonen's three situations of legal decision-making to illustrate "a comprehensive catalogue of the philosophically defensible approaches to legal interpretation" (p. 243).

At one extreme we have the ideology of bound judicial decision-making (Wroblewski) or an isomorphic situation of legal decision-making (Makkonen). Isomorphic theory of law along with the legal formalism described above well represents the bound ideology, wherein no or very little room is left to a judiciary interpretation of law. At the other extreme, we have the ideology of free judicial decision-making (Wroblewski) or an unregulated situation of legal decision-making (Makkonen). The decisionist approach to law is a projection of the just mentioned ideology: justice is a contextual-oriented business and any access to meta-theories of law must be disregarded.

Between the "no-law land" (decisionism) and the "nothing-but-law land" (legalism), as we might call them, we have a wide area corresponding to the ideology of "legal & rational judicial decision-making" (Wroblewski) or to the "semantically ambiguous situation of legal decision-making" (Makkonen). This is where recourse to the methods of legal interpretation is as urgent as the problem regarding the rationality of those methods.

Siltala's book is addressed to multiple audiences. To a contemporary non-specialist reader, this book is a valuable tool for mapping out a representative portion of the subject under scrutiny. In this respect, the reader should benefit from Siltala's talent for clarifying complex material without oversimplifying it. At the same time, this book should provide the more sophisticated reader with valuable insights into argumentation in law. The reader should further benefit from Siltala's clever command over an impressive variety of contexts and perspectives. The concluding paragraphs

of each chapter, in which the author uncovers default assumptions at the basis of fundamental theories about truth in law, should be of special interest. Perhaps this book is deliberately intended for those whose passion for legal knowledge is usually "more concrete," such as practitioners and legal professionals. The book is helpful in understanding the intriguing web of beliefs, theories and ideologies surrounding the question "what exactly am I doing when I give and ask for reasons."

I was left feeling ambivalent with respect to the well-calibrated classifications and schemes of analysis Siltala puts in place. At times, Siltala's use of such classifications, although effective for didactic purposes, remains ultimately unconvincing. For instance, using Ockham's razor, one might replace the trichotomy 'bound-rational-free' with the traditional dichotomy 'foundationalism-deflationism'. Although the author presents several different models of truth, I suggest that the arguments about truth exposed throughout the book tend to go in one of two distinct directions. On one hand, we have theories such as the correspondence (and perhaps coherence) theory of truth that propose a *substantive* idea of truth, satisfactory or not. On the other hand, we have theories such as pragmatism, conventionalism, and realism that endorse local conventions or community consent. They progressively "debunk" the problem of truth, and eventually give up (*qua* decisionism) in the quest for conclusive grounds of legal rationality.

This remark, however, is subject to many limiting conditions. One is related to the above-discussed view about instrumental rationality as a key concept embraced by an entire family of theories. My sense is that several theories that Siltala treats separately arise from the common belief that the significance of a theory lies in its empirical application. Consequently, they share a common view about law and argumentation as technical tools directed towards pre-given ends, so that distinctions among them might become questionable from this point of view. Another, rather subjective, limiting condition is related to the reader's personal expectations towards the text. Disrupting the reader's stable context with a problem the author will solve with his main thesis is a *topos* in academic writing that I myself am very vulnerable to. So, in reading the book, I expected a moment at which all of the very neat classifications would be put to the challenge, dissolved and rebuilt, and when the author's personal commitment would

take the stage. To my dismay, I could not determine whether the author is committed to a particular conception of truth and argumentation in law.

Notwithstanding the aforementioned remarks, I highly recommend the reading of Siltala's account of law, truth and reason. It provides a comprehensive and accessible overview of the subject, locates its central ideas, and raises a number of thought-provoking questions.