

## BOOK REVIEWS / BOEKRESENSIES

***The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law*** by S Woolman. Juta & Co Cape Town 2013. xv & 632 pp. ISBN 9781485100072. Price R395.00 (soft cover)

Stu Woolman's new book is an ambitious work, which expounds a theory of constitutionalism which breaks with traditional understandings of the self, the social and constitutional law, and seeks to reconceive them in a number of ways. This it does by drawing on a wide variety of scientific fields, theoretical endeavours, analogies and metaphors. To mention but a few examples: global neuronal workspace theory and experimental philosophy are enlisted to problematise and point beyond metaphysical conceptions of selfhood and individual freedom; the notions of feedback mechanisms, choice architecture and social capital are employed to rethink the social and the possibility of social change; and concepts such as shared constitutional interpretation and participatory bubbles are developed as a way out of the stale oppositions that tend to characterise constitutional thought. Throughout, the author takes great pains to relate these diverse concepts and theories to each other, and to weave the different strands into a coherent and defensible theory of constitutional adjudication.

The first part of the argument centres on a critique of the assumption that the individual self is unitary and coherent and shapes her own destiny in a conscious, rational manner. According to the author, this conception of the self is firmly entrenched in folk psychology and has roots in outmoded metaphysical understandings of volition and freedom. To this he juxtaposes the more constrained and fragmented understanding of the self that emerges from contemporary studies in disciplines ranging from neurological studies to social theory. These studies suggest that the individual possesses far less freedom than is commonly supposed, and that traditional notions of the self radically underestimate the extent to which the self is conditioned by cultural givens and social practices. However, these outmoded understandings are far from dead, and the author argues that their tenacious hold is visible in a number of judgments. For example, *S v Jordan* 2002 6 SA 642 (CC) is critiqued for its commitment to metaphysical notions of autonomy which preclude an understanding of the extent to which sex workers' alternatives are dramatically restricted by a social context of poverty and exploitation. *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) is similarly criticised for its overemphasis on the choice made by Rastafarians, and its disregard for the "arational, constitutive attachments that form the better part of our identity" (118).

Following from this critique, the author proposes a conception of human flourishing which, he argues, is central to the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Unlike metaphysical notions of freedom, this vision of flourishing attaches great importance to the

constitutive role of social attachments, roles and practices. It recognises that the institutions, routines and ties which allow humans to endow their world with meaning, can be uprooted only at great cost to individual and group flourishing. However, in addition to this conservative side, his theory of flourishing also has a more radical (or, in his words, a revolutionary) strand, which emphasises that a great number of South Africans find themselves excluded from the material and immaterial resources that are required to flourish, and requires that “issues of access, of coercion, of choice, of voice, of exit must be constantly negotiated – by the state and other actors – in order to ensure that all members of our society have a meaningful opportunity to flourish” (424).

This brings us to the second part of the argument, which concerns the social. If individuals are indeed more constrained than commonly supposed and if there is a “radical givenness” (a phrase he borrows from Walzer) to their social world, how is it that social change is possible? How can individuals and groups alter the ends that they pursue, and be responsive to challenges to the rules underpinning social practices? The author proposes a number of answers to these questions. For example, he argues that, just as individuals can change without having a fully conscious and rational self at the helm, social change is also not contingent on the existence of a central authority that deliberately adjusts a society’s ends and the means by which they are pursued. Similar to the way consciousness serves as a feedback mechanism that allows individuals to adapt their ends through trial and error, the “stores of collective wisdom about what works and what doesn’t work” (166) that underpin our social practices are subject to ongoing processes of verification and falsification. A commitment to social experimentation can enable societies to confront deeply held assumptions and cognitive biases, and the state and other social actors can nudge individuals and groups towards more optimal decision making by rearranging the contexts in which choices are made. A second explanation is that it is social heterogeneity that lies at the heart of the possibility of change. Again, there is a close affinity between the author’s take on the individual and social contexts. The heterogeneity of the roles each one of us performs often challenges us to reappraise our ends and adjust the means by which we pursue them. Similarly, the radical heterogeneity of the society we live in confronts us with the realisation that “there are other, perhaps better, ways of doing things” (175).

The theory of constitutionalism developed in this book is closely aligned to the author’s views on individual and collective selfhood. Not surprisingly, the notions of flourishing and experimentation again take centre stage. On the author’s reading, the Constitution is committed to the flourishing of everyone living in South Africa. In addition to rights of access to basic material resources, flourishing requires respect for those classical rights and freedoms which enable individuals to sustain the social practices and institutions which give their lives meaning. Importantly, it also requires the destabilisation of the very same practices and institutions, to the extent that they are grounded in rules of entrance, voice and exit which prevent the poor and marginalised from flourishing.

The book advances an understanding of experimental constitutionalism which, it argues, is best equipped to promote individual and group flourishing, and to come to terms with the tension between the conservative and revolutionary strains of the Constitution. Experimental constitutionalism recognises that there is no single individual, body or functionary that can pronounce, once and forever, on the meaning of constitutional commitments and the best way of securing them. This follows, on the one hand, from the experimental epistemology that is at work here, which holds that it is only through multiple processes of trial and error that we are able to discover the best methods of attaining our ends (and also to revise those very ends). On the other hand, it follows from the fact of and commitment to heterogeneity. In a heterogeneous society, multiple constitutional visions exist alongside each other, which allow for different possible reconciliations of conflicting constitutional commitments. To close the door, once and for all, on contending constitutional visions is to undermine ways of life which are a source of individual and group flourishing, and to clamp down on processes of contestation and participation that are vital to the Constitution's legitimacy.

Closely tied to this vision of experimental constitutionalism is the principle of shared constitutional interpretation, which recognises that constitutional interpretation is not the exclusive preserve of the judiciary, but is best seen as a joint venture involving all branches of government. The author argues that, even though courts have a fundamentally important role in expounding the meaning of the Constitution and setting general norms that should guide the actions of the coordinate branches, they need not have a theory of everything or give judgments that exhaust all possible constitutional readings. Constitutional learning is optimised where spaces exist for a variety of social actors to experiment with different ways of giving effect to constitutional norms, and where they can pool information and benefit from each other's feedback. However, it is not only state institutions that can contribute to these ongoing processes of constitutional learning. The author coins the phrase "participatory bubbles" to capture the ways in which decision making can benefit from the participation of individuals and communities affected by laws or state policies. This idea is not grounded in idealised notions of democratic deliberation, or in the idea that extensive processes of deliberation and participation are needed to legitimate all exercises of state authority. Instead, the metaphor of bubbles highlights that processes of participation and interaction are spatially and temporally circumscribed: they normally deal with specific disputes and disperse (the bubble bursts) once the issue has been resolved. And yet, they can have a lasting impact, by leaving behind a residue of experience that feeds into our collective knowledge of best practices.

How does the theory of constitutionalism offer envisage the division of work between judicial pronouncements on constitutional meaning and these broader processes of inter-institutional dialogue, information sharing and participation? The author's views on this can be gleaned, *inter alia*, from his critique of judicial avoidance (in ch 1B), his discussion of rights analysis, limitations analysis and remedies (ch 5), his evaluation of constitutional experimentation in the contexts of housing and education rights (ch 6), and his

analysis and critique of twenty Constitutional Court judgments (ch 8). From these passages, it appears that his vision of experimental constitutionalism aims to provide an alternative both to judicial minimalism and Dworkinian maximalism. While favouring a rigorous form of rights analysis which articulates binding legal norms that can guide lower courts, state institutions and other social actors and facilitate rational decision making, he is nevertheless clear that these norms should be general enough to leave sufficient scope for a range of possible solutions to concrete cases. Accordingly, courts engaging in limitation analysis or deciding on remedies must adopt a flexible, reflexive approach. Mechanisms must be put in place to “gather relevant information, generate proposed reforms and relay feedback quickly” (264), and room must exist for the reconsideration of solutions previously arrived at in view of new empirical evidence.

This is an attractive vision, which anchors institutional matters of competence, cooperation and comity in the same values that, on his reading, inform substantive constitutional rights and principles. But while the experimentalism advocated here avoids the excesses of both a Herculean and an overly deferential approach, it is not free of tension, and I sometimes wished that the author would elaborate a bit more on the nature of these tensions and the best ways of negotiating them. For example, how exactly does the model of shared constitutional interpretation differ from a judicial philosophy of avoidance, given that it also requires judges to “consciously limit the reach of their holdings regarding the meaning of a given provision”, and “frees the court of the burden of having to provide a theory of everything” (425)? The author is clearly of the view that these two approaches rest on very different premises, and it would have added value if these differences were spelt out more.

A second and related set of questions concerns the relation between the general norms elucidated by the Constitutional Court and the various constitutional experiments occurring within that normative framework. The author welcomes the Court’s use of meaningful engagement orders in eviction cases as an example of an experimental approach which creates participatory bubbles through which information is shared and active citizenship is promoted. He nevertheless recognises that these orders could potentially detract from substantive judicial engagement with the right of access to housing (see for example 329-330). This, he insists, need not be the case – in his view, experimental constitutionalism is undermined, not bolstered, by a failure on the part of the courts to give normative content to rights. Judges must get the balance right: they must neither give too little normative guidance to the other actors engaged in processes of shared constitutional interpretation and participation, nor give judgments that leave them too little scope for experimentation. But this is a fine line which will be drawn differently in different contexts, and which raises difficult questions over the depth and breadth of judicial reasoning and the relationship between rights analysis, limitations analysis and decisions on remedies. For instance, why is it that experimentalism in the housing context would have been better served by stronger judicial pronouncements on the core content of the right (330),

while experimentalism in education has benefited from the Constitutional Court's "quiescence on issues educational" (353)? Do some contexts lend themselves better than others to a non-interventionist stance on the part of the courts, or a tendency simply to decide the matter at hand, without formulating norms which extend significantly beyond the facts of the case? Could the political or cultural sensitivity of the issue to be decided or the singularity of the facts justify such a narrow approach? (Cf the discussion at 457 of *Shilubana v Nwamitwa* 2009 2 SA 66 (CC), a judgment which is lauded for the space it creates for communities to develop customary law in accordance with constitutional values, even though the author notes that the Court gives little normative guidance for the future resolution of conflicts between gender equality and cultural norms that reflect a patriarchal bias.) And to what extent is our understanding of the normative framework within which experimental constitutionalism occurs, itself subject to ongoing revision in view of new information and insights?

The book does not – and could not be expected to – answer these questions conclusively, but it provides an innovative conceptual and theoretical framework which could help free us from the stranglehold of unhelpful concepts and dichotomies, and which is sure to stimulate further reflection and debate. It is compulsory reading for anyone working in the fields of constitutional law and constitutional theory. Readers who are not comfortable with the underlying pragmatist philosophy, who are not convinced by the critique of traditional understandings of selfhood, or who do not share the author's optimism about the possibility of law-grounded processes of experimental learning and progress, will nevertheless find much on these pages that is helpful and insightful.

The argument advanced in *The Selfless Constitution* is a complex one, and there were times that I wished that the author had introduced fewer theoretical perspectives, metaphors and examples. In the end, though, my irritation gave way to awe at the way in which he managed to pull the different strands of the argument – and the narrative – together. The book is written in an easy, engaging style, which helps to keep the reader interested.

*The Selfless Constitution* is a theoretically rich and imaginative work, which is set to become a standard reference. Although it deals, first and foremost, with South Africa's Constitution, the significance of its theoretical reflections extends far beyond our national borders. It deserves to be read widely, and to become part of a transnational debate on the possibilities and limits of a form of constitutionalism that is committed to ongoing processes of experimental learning and renewal.

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