Double Blind, Peer Review

Patrick Lenta *STU WOOLMAN'S THE SELFLESS CONSTITUTION: EXPERIMENTALISM AND FLOURISHING AS FOUNDATIONS OF SOUTH AFRICA'S BASIC LAW*(2014) 130 *South African Law Journal* 208 – 210.

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Stu Woolman*The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law*. Juta& Co Ltd, Cape Town. 2013. xv and pp 651. Price: R395.00 (soft cover).)

Despite more than once describing his endeavour in *The Selfless Constitution* as modest, Stu Woolman sets himself the ambitious task of elucidating the foundations and purposes of the South African Constitution and critiquing the jurisprudence it has engendered. He offers a pragmatist vision of constitutionalism that is significantly influenced by 'experimental constitutionalism', a theoretical approach developed by a group of constitutional lawyers at — in one case, formerly at — the Columbia Law School, including Michael Dorf, Charles Sabel and William Simon. Woolman draws on work in the fields of experimental philosophy, cognitive psychology, neuroscience, development theory and political philosophy to contest assumptions that underpin constitutional doctrines and to offer fresh, productive perspectives and possibilities with which to comprehend and develop constitutionalism in South Africa. His multi-disciplinary discussion ranges over a great many themes and concepts, including 'free will, consciousness, selfhood, social capital, spontaneous orders, nudges, flourishing, experimentalism, capabilities, participatory bubbles, reflexivity and rolling best practices' (at 3). Some of these ideas have appeared in Woolman's previous work. Their elaboration, development and application to South African constitutionalism here, carried out with obvious relish, are to be welcomed.

At the heart of this book is a commitment to experimental constitutionalism and flourishing. Central to experimental constitutionalism is the idea that the best practices are likely to emerge in, and come out of, institutions committed to the promotion of social experimentation. The task of state and non-state actors is to determine, within the aspirational normative framework of the Constitution, the policies and laws that best realise its aims. The judiciary, for example, should resolve difficult rights disputes by 'mov[ing] away from traditional models of adjudication and adopt[ing] such experimentalist, problem-solving modalities as meaningful engagement orders, structural injunctions and remedial equilibration' and by facilitating 'debates between shareholders that are often essential for information gathering, information pooling, information sharing, collective action and collective norm setting' (at 425).
Experimental constitutionalism is committed to two central arrangements: shared constitutional interpretation and participatory bubbles. Shared constitutional interpretation challenges traditional conceptions of judicial supremacy, recognising that the various branches of government are all equally engaged in constitutional interpretation, which should be viewed more as a co-operative than a competitive venture. Courts should limit the reach of their decisions, allowing other branches of government to arrive at, and at least sometimes give effect to, their own interpretations. The judiciary should provide 'guidance to other state actors without foreclosing the possibility of other effective safeguards for rights or other useful methods for their realization' (at 205). Participatory bubbles refer to experimentation in smaller units, 'bubbles of limited participatory democracy regarding the content of individual constitutional norms and their application to subject matter-specific, and often time-sensitive, institutional contexts' (at 208) in which provisional agreement on 'best practices' may be reached. Woolman explores the extent to which South African institutions and constitutional doctrines measure up to the ideal of experimental constitutionalism, focusing in particular on two areas of public law: housing and education.

The purpose of experimental constitutionalism is human flourishing, Woolman's second central commitment. Woolman offers an account of the self as 'largely determined' by forms of life or 'language games', yet 'heterogeneous' (at 81). He substitutes the idea of flourishing for what he argues are erroneous conceptions of freedom and free will. In his view, individuals are 'fundamentally conditioned' yet able to use critical tools to 'engage in more optimal forms of behaviour'. Issues surrounding access, coercion, choice, voice and exit must be must be constantly negotiated to permit individuals to have a meaningful opportunity to flourish, which will also require the provision of 'basic goods (material and immaterial) that individuals must possess in order to pursue lives worth valuing' (at 424). Woolman connects experimental constitutionalism with flourishing as follows (at 382):

> '[E]xperimental constitutionalism ... provide[s] a method for creating institutions and doctrines that expand our ability to participate in a greater assortment of ways of being in the world. This extension of the range of ways of being in the world, the material conditions and immaterial norms that make their exercise possible and the realization of the plethora of ends toward which we direct ourselves ... define flourishing.'

Experimental constitutionalism promotes flourishing inasmuch as it envisages a society made up of heterogeneous selves and a state that does not seek to determine or restrict flourishing, but to make modes of flourishing possible. Woolman contends that flourishing is 'an implicit feature of our basic law' (at 382).

Woolman applies his account of experimentalism and flourishing to the jurisprudence of the Constitutional Court, upbraiding it for emphasising freedom instead of flourishing and for its deferential observance of the separation of powers doctrine, instead of engaging in experimental constitutionalism. He analyses and assesses twenty Constitutional Court decisions from the perspective of experimentalism and flourishing, criticising the court's interpretation of rights, the remedies it has granted and the way it relates to other branches and potential stakeholders. The verdict he returns on the court's performance is not uniformly negative, however, since he apprehends (at 423)'a trend in the more recent judgments toward an experimentalist approach: from pre-trial orders for meaningful engagement, to expanded grounds for standing, to rights analysis that invites comment from all interested stakeholders, to remedies that grant suspended orders while parties ... work out the appropriate contours of a legislative "fix" that falls within the broadly framed constitutional norms articulated by the Court, to structural injunctions that ensure that a system of ongoing reports to the Court from interested stakeholders effectively rights the wrong identified by the Court in a manner that allows the parties to work out solutions, over time, by seeing what works and what doesn't.'

Readers familiar with US variants of experimental constitutionalism may have formed the impression that experimental constitutionalism is a purely instrumentalist or process-driven theory that holds out only the promise of greater technocratic efficiency without offering a substantive conception of justice. This is certainly untrue of Woolman's account, in part because he links experimental constitutionalism to an account of flourishing that is informed by a substantive conception of justice.

As well as being crammed with insights, memorable quotations and anecdotes, *The Selfless Constitution* contributes significantly to debates surrounding post-apartheid constitutionalism. It offers genuinely innovative suggestions for thinking about and altering political institutions and doctrines in South Africa. Woolman's critique of South African constitutional cases is always interesting, and reflects intimate knowledge of developments in South African constitutional jurisprudence. The virtues of this book should induce readers to make light of occasional abstruse expression, repetition, folksy rhetoric and copious footnotes at the end of each chapter which interrupt the flow of the text. Judges, legal practitioners and constitutional scholars have much to learn from this book, but will, because of its difficulty (mitigated by the inclusion of a glossary of concepts), have to resign themselves to reading it slowly and carefully.