

## BOOK REVIEW

Stu Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013)<sup>1</sup>

In this impressive work,<sup>2</sup> Stu Woolman sets out to provide an original theoretical foundation for South African constitutional law and jurisprudence by drawing on arguments from contemporary philosophy as well as empirical findings from the sciences and social sciences. The interdisciplinary sweep of the book is remarkable: the ground traversed includes philosophy of mind and action, neuroscience, behavioural economics, consciousness studies, evolutionary epistemology, choice architecture, social capital theory, experimental governance, development theory and the capabilities approach.

Woolman believes that if we fail to avail ourselves of the best work being done in these fields, then 'errant understandings'<sup>3</sup> implicit in the unexamined 'folk' theories upon which most of us have been brought up, and which continue to shape our thinking, will undermine future progress in the development of South African constitutional law. It is of particular importance, Woolman argues, that we should break existing 'metaphysical bottlenecks'<sup>4</sup> regarding the nature of the self, consciousness, free will and what he calls 'the social' – the way we are connected to other 'selves' through our social structures and institutions. Central to Woolman's account of these matters is the idea that 'the self, and its various narratives, is thoroughly a function of physical capacities and social practices over which I have little control or choice'.<sup>5</sup>

With greater clarity on what kinds of individuals we are, the limits to our freedom, and what binds us together, Woolman believes we will have a sounder basis for constitutional theory and practice. He argues, in particular, that an understanding of the theoretical advances in the disciplines mentioned above supports an approach to constitutional theory and practice based upon the notions of experimentalism and flourishing.

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<sup>2</sup> S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013).

<sup>3</sup> Ibid 15.

<sup>4</sup> Ibid 14.

<sup>5</sup> Ibid 44.

Woolman explains that experimentalism recognises that there are limits to conscious individual and collective planning. It accepts that ‘much of our knowledge is tacit, that we suffer from significant cognitive biases, and that the informal aggregation of knowledge along with a formal commitment to reflexivity with regard to our collective wisdom often produces better results’.<sup>6</sup> At the same time:

experimentalism is quite immodest about the possibility of genuine change when multiple experiments regarding the same problems are allowed to occur and accurate information about the results of these experiments is pooled and then disseminated.<sup>7</sup>

How can we encourage experimentation and the learning to which it leads in the constitutional context? Woolman highlights the importance of two central ideals: shared constitutional interpretation and ‘participatory bubbles’.<sup>8</sup> In so far as the first is concerned, he argues that constitutional interpretation should be a joint venture between the judiciary and the political branches of government: experimentalism eschews excessive deference in the form of ‘judicial avoidance’,<sup>9</sup> while simultaneously not being guilty of the hubris of ‘Dworkinian maximalism’.<sup>10</sup> In so far as the second is concerned, experimentalism encourages participation on the part of individuals and communities via ‘small-scale bubbles of limited participatory democracy regarding the content of individual constitutional norms’.<sup>11</sup>

Woolman goes on to argue that by providing information about ‘what works best’,<sup>12</sup> experimentalism is the most reliable route to human flourishing – a value to which the Constitution of the Republic of South African, 1996 is implicitly committed, in his view, and which is less problematic than the value of freedom. By flourishing, Woolman means the ability of individuals, groups and communities to give life meaning, along with the provision of the material resources and immaterial goods that make this possible.<sup>13</sup> Woolman argues that the principles of experimentalism and the concept of flourishing implicitly inform certain South African institutional arrangements, doctrines and judicial decisions, that they help to explain certain developments in education and housing law in South Africa, and that they should be

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<sup>6</sup> Ibid 26.

<sup>7</sup> Ibid 26.

<sup>8</sup> Ibid 204–5.

<sup>9</sup> Ibid 29–30.

<sup>10</sup> Ibid 199.

<sup>11</sup> Ibid 208.

<sup>12</sup> Ibid 80.

<sup>13</sup> Ibid 382.

employed more explicitly, more consistently and more extensively in the on-going elaboration of South African constitutional law. These parts of the book provide a hands-on demonstration of the potential of the theoretical material covered earlier in the book to enliven and enrich legal analysis.

A substantial part of the book is devoted to the arguments by means of which Woolman outlines his conception of the self and human freedom. Recognising the large philosophical issues upon which much of the argument rests, Woolman often pursues these matters in lengthy footnotes, while reserving the body of his text for the main thrust of his argument. This enables readers to keep the bigger picture in mind, while giving them the option of choosing when and where they want to engage with theoretical questions in more detail in the footnotes. These footnotes are a remarkable feature of the book.

It would be a mistake for me to try to summarise the arguments by which Woolman arrives at his philosophical conclusions – and in fact the task would be impossible in the space I have available. It is best to leave readers to explore for themselves Woolman's lengthy and complex explorations on these fascinating subjects. I will, however, offer a few comments regarding his discussion of human freedom.

The traditional philosophical problem of free will arises because of two propositions that both seem undeniable, but which appear to be in conflict. The first is that human beings are subject to the same deterministic laws as the rest of nature, and the second is that human beings are free to act as they choose – that given any chosen action of mine, I could in the same circumstances (or causal state of affairs) have chosen to act differently. The first proposition seems undeniable, because our actions are caused by nerve impulses from our brains to our limbs, while our brains in turn are causal systems which are presumably 'closed' – that is, every brain event, like every other event in nature, is caused by prior physical events. (It seems impossible that a brain event could just 'happen' without a cause.) But in that case we are determined – hence we are not free to choose what we do. The proposition that we *are* free to choose, on the other hand, seems equally undeniable.

Woolman's response to this problem is strongly influenced by the account of freedom defended by American philosopher Daniel Dennett in his book *Elbow Room: The Varieties of Free Will Worth Wanting*. Dennett argues that determinism is compatible with freedom in one sense of that word. Of course, determinism is not

compatible with freedom if freedom is understood as the freedom to do otherwise than we in fact do (all the prior causal circumstances remaining the same). Determinism is, however, compatible with the freedom we associate with weighing alternatives, deciding what we want to do, and then doing it: I do not regularly find that as I am about to do what I want to do, my body simply does something else.<sup>14</sup> According to Dennett, the justification for explaining someone's actions in terms of their intentions is that it works: this is an effective way of explaining and predicting human behaviour – one we use all the time and which it would be impossible for us to do without. Similarly, the justification for explaining events in the brain by pointing to their physical causes is that this is a good way of explaining and predicting those events. Since these two kinds of explanation are justified on independent grounds, they are evidently compatible.

That is Dennett's solution to the free will problem: because we can effectively explain and predict human actions by postulating intentions as their causes, we are justified in saying, independently of what is happening in people's brains, that some human actions occur because they were intended by the agent. In this sense we are free – and this is the only sense of 'free' Dennett thinks worth worrying about. It does not matter that we do not possess contra-causal free will – the ability to intervene in the causal order. Our free will consists in our responsibility for those events that are our intentional actions.<sup>15</sup>

Dennett further supports this compatibilist view by pointing out that human beings have control over their behaviour in another important sense – one that is, again, independent of whether those actions are physically determined. This is that humans can learn by trial and error to avoid actions that have bad consequences and to favour actions that lead to better consequences. This capacity for control is strongly associated with the idea of freedom, and it is simply a fact that we have this capacity. Hence it is compatible with the determinism prevailing over brain events.<sup>16</sup>

Woolman adopts Dennett's account of free will, and is particularly attracted to Dennett's idea that people learn through trial and error to adopt behaviour that promotes human flourishing. He also embraces another idea Dennett emphasises, namely, that our freedom is not unconditional but subject to constant threats, such as

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<sup>14</sup> D Dennett *Elbow Room: The Varieties of Free Will Worth Wanting* (1984) 16, 72, 131–2.

<sup>15</sup> *Ibid* 26–8.

<sup>16</sup> *Ibid* 29.

coercion at the hands of others, and the desperation created by poverty and hunger. This provides the basis for a critique of cases such as *S v Jordan*<sup>17</sup> and *Volks v Robinson*,<sup>18</sup> with Woolman arguing that the Constitutional Court in these cases exaggerated the extent to which sex workers freely choose to engage in sex work and parties to non-marital cohabiting relationships freely choose not to marry, respectively.<sup>19</sup>

Another related strand in Woolman's thinking, also concerning the limits of human freedom, follows from our 'unchosen'<sup>20</sup> nature as selves – the heavily engaged or situated character of our existence. Woolman agrees with Ludwig Wittgenstein in *Philosophical Investigations* that we are from the outset, as a condition of living, committed to established 'forms of life', which we do not choose but are simply part of the world as we find it. In the same vein, Woolman endorses Martin Heidegger's remark in *Lectures on the History of the Concept of Time* that the practices we share with others are constitutive of our 'being' and that this 'common world' is always 'already given'.<sup>21</sup> These points about the involuntary nature of associational commitments are also used for purposes of critique. For instance, Woolman argues that in *Prince v President, Cape Law Society*<sup>22</sup> the Constitutional Court exaggerated the extent to which Rastafarians freely choose to engage in 'deviant' practices.<sup>23</sup>

This brings me to a point of disagreement with Woolman. It seems to me that when he criticises 'folk psychology', he misidentifies what philosophers call folk psychology, identifying it with a much more problematic set of beliefs that are more

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<sup>17</sup> 2002 (6) SA 642 (CC). This case concerned the constitutionality of the Sexual Offences Act 23 of 1957 which, inter alia, criminalised prostitution, and in criminalising prostitution made the prostitute the primary offender and the customer an accomplice at most. The Constitutional Court concluded that the relevant provisions of the Act did not violate the rights to human dignity, economic activity, privacy and equality.

<sup>18</sup> 2005 (5) BCLR 466 (CC). This case concerned the constitutionality of legislation dealing with the maintenance of surviving spouses, which excluded permanent life partners who were not legally married from protection in terms of that legislation. The majority of the Constitutional Court found that the differentiation between married and unmarried life partners did not amount to unfair discrimination; neither was the right to dignity of surviving partners of life partnerships violated.

<sup>19</sup> Woolman (note 2 above) 22–3, 173–4.

<sup>20</sup> Ibid 44.

<sup>21</sup> Ibid 45.

<sup>22</sup> 2002 (2) SA 794 (CC). This matter concerned the constitutionality of the prohibition on the use or possession of marijuana. The applicant had been restricted from becoming an attorney on the basis that he had been previously convicted for possession of marijuana and had expressed his intention to continue to use the drug as part of the practice of his religion. The Constitutional Court concluded that the prohibition did not violate the applicant's right to freedom of religion.

<sup>23</sup> Woolman (note 2 above) 118.

deserving of the criticisms he makes of folk psychology. I believe we should reserve the term 'folk psychology' for the deeply entrenched ways we have of describing, predicting and explaining human behaviour using intentional language ('intends', 'believes', 'wants', 'strives', 'proposes', 'argues', and so on), and that we should distinguish this system of concepts from what Woolman, wrongly it seems to me, calls 'folk psychology' – namely, the very different view according to which a person is a kind of free-floating 'soul' not subject to the laws of nature, hence not part of the body, but which inhabits the body and steers it around like a vehicle by interfering with the causal order from which this 'soul' stands apart. Woolman criticises this 'Cartesian' view for reasons that I believe to be entirely sound. However, unlike Cartesianism, which is hardly coherent, what I am calling folk psychology is, it seems to me, none other than a 'form of life', hence a part of our 'situatedness' in the world which we cannot simply discard. Here I would recall Dennett's point that we need the concept of intention to explain and predict behaviour – a basic capacity we surely cannot do without and without which very little can make sense.

I therefore believe that Woolman needs to distinguish between Cartesianism and folk psychology – the latter consisting in our established intentionalistic way of speaking and thinking about human beings. If one throws out the baby (folk psychology) with the bathwater (Cartesianism), one opens the door to the view that free will is an illusion and that the notion should be altogether abandoned. There are occasional signs in Woolman's discussion that he is attracted to this view.<sup>24</sup> If so, I believe he should resist, because I do not think that it coheres with his overall position. For example, it is inconsistent with Dennett's compatibilism – the view that free will is not an illusion, notwithstanding the deterministic universe. And Woolman's rapport with Dennett on the question of freedom fits well with his overall purposes. Dennett's conception of free will – as a capacity that works within significant constraints and is guided by trial and error – is well suited to Woolman's experimental approach to the interpretation and development of constitutional law in South Africa.

I will end with some remarks on the fruitfulness of Woolman's distinctive way of doing constitutional theory. The distinctiveness of his methodology can best be appreciated by reference to a contemporary debate in metaphilosophy concerning

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<sup>24</sup> See, for example, *ibid* 82–7.

the extent to which philosophical lessons can be learnt from scientific and social scientific research. Three candidate views on this matter have been usefully described as 'separatism', 'replacement' and 'engagement'. On the separatism model, the subject matter of philosophy is fundamentally different from that of the sciences and social sciences and philosophy should operate entirely independently of these empirical disciplines. On the replacement model, advances in science will make philosophy redundant. By contrast with both of these, the engagement model advocates cross-disciplinary engagement between philosophy and the empirical disciplines, with philosophers recognising that empirical work can have implications for philosophy (by, for instance, constraining or supporting possible theoretical options), and with empirical researchers recognising that philosophy has particular strengths in the formulation of hypotheses, the construction of abstract theoretical frameworks and the assessment of methodologies.<sup>25</sup> In my view, Woolman's book demonstrates the virtues of the engagement approach in the area of constitutional theorising. One does not have to agree with his conclusions to appreciate that he has given us a fully elaborated, working model of how an understanding of science and social science can help us to rethink our vision of the purpose of a constitution and its interpretation. Woolman has shown us a new way to go about the task of constitutional theorising. This is a very large achievement and a substantial advance in knowledge.

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<sup>25</sup> W Christensen & J Sutton 'Reflections on Emotions, Imagination and Moral Reasoning: Toward an Integrated, Multidisciplinary Approach to Moral Cognition' in R Langdon & C Mackenzie (eds) *Emotions, Imagination and Moral Reasoning* (2012) 327, 331–4.