

In spite of the few shortcomings pointed out here, *The Bill of Rights Handbook* is much more than a textbook. It is becoming an institution and a necessity. It is certainly a desert island book. If I could take only three law books with me to a desert island this one would certainly be one. *The Bill of Rights Handbook* is a book to buy, to learn from and to treasure. It opens up the brave new world of bill of rights litigation in a sophisticated and tantalising way. If the bill of rights is the yolk in the egg of the constitution, this book makes a fine omelet.

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KOOS MALAN (TRANSLATED BY JOHAN SCOTT)

POLITOCRACY: AN ASSESSMENT OF THE COERCIVE LOGIC OF THE TERRITORIAL STATE AND IDEAS AROUND A RESPONSE TO IT

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Politocracy by Koos Malan, initially written in Afrikaans, was originally accepted as a doctoral thesis by the University of South Africa and then adjusted and extended. To put it in a nutshell, for the author politocracy is a sort of utopia of “an [allegedly] attractive space beyond the straits of the territorial state”, “a legal-political order”, which – according to the author – embodies “true democracy” (10). This utopia is sharply opposed to the traditional national state and its philosophy, statism. It can certainly be best understood against the background of the political situation in South Africa after 1994, when Afrikaners – and among them the author – suddenly found themselves in an acute minority situation. As a result, abandonment by the national (or territorial) state now ruled by the black majority – more precisely by one political party and the concomitant abuses of power – and the steering towards alternative commonwealths are explicable. Whether Malan’s sketch, however, would represent a real improvement for the people concerned is not to be taken for granted.

The work is divided into 10 chapters. Malan’s utopia itself is described only just before the last chapter on “politocracy” (268-314), which at the same time serves as title of the whole book. Before this, Malan offers an outline of the occidental history of political philosophy, establishing the relevant foundations. In chapter 1 (1-10) he explains his conception of the statist paradigm, the chief focus of his criticism, and gives a survey of his study (see 9). Chapter 2 (11-32) deals with the political order of the Middle Ages, the *Res publica Christiana*, dominated by the Holy Roman Empire and coming to an end with the breaking up of religious homogeneity. Chapter 3 (33-63) discusses the philosophical and political decline of the universal Christian and feudal order that was brought about mainly by the Reformation and by the emergence of territorial states in England, France and Spain in the sixteenth century. Charles V of Habsburg, the Emperor of the Holy Roman Empire, is rightly identified as the last exponent of the erstwhile order in sharp contrast to Francis I and, later on, Louis XIV of France (50 ff). In chapter 4 (65-97), Malan discusses the great state philosophers at the time, especially L’Hôpital, Bodin, Pufendorf, Hobbes, Locke, Grotius *et al*, whose ideas and postulations have to be comprehended against the backdrop of the cruel religious wars and conflicts in Europe. Undoubtedly, Hobbes’s Leviathan or “Mortall God” has to be seen as the most eminent promoter of the modern territorial state (*cf* 78). Unlike in the *Res publica Christiana*, religious tolerance and freedom marked the prominent characteristics of a new commonwealth. It is deplorable and affects the scholarly value of the whole book that Malan’s citations here and elsewhere do not refer to the original sources, but only to secondary (or tertiary) literature (*cf* the notes on 7, 65 ff, 150 ff, 195, 216 etc, exceptions *eg* on 80, 102 ff, 132, 191 and 226), suggesting that he did not deal in the original documents at all.

Chapter 5 (99-125) begins to explain the statist paradigm by defining the state: permanent population, defined territory, government and capacity to enter into relations with other states. On this point, Malan refers to the Montevideo Convention of 1933 (100) and Hans Kelsen (102 ff), arguably overlooking the fact that Georg Jellinek anticipated this theory in his “Drei-Elemente-Lehre” (doctrine of three elements) in 1900. In this context, Malan justly criticizes the “arbitrary and flagrant undemocratic tyranny” of the determination of state borders, particularly in Africa (105 ff). In addition, Malan reports the development of the notion of paradigm introduced by Thomas Kuhn in 1962 (116 ff) and its dynamics.

In chapter 6 (127-172), Malan focuses on the process of state building as the basic strategy for state identity. For this purpose, he remarks with reference to South Africa that a territorial state does not need

to have – and usually does indeed not have – a true nationhood, *ie* a homogeneous society (129), but is made up of different groups of people who may differ in terms of ethnicity, language, culture, religion etc. In connection with this, Malan does not fail to refer to the philosophers who serve as a justification of this sort of state building, above all Rousseau and his “*volonté général*”, whose conceptions were however based on a restricted republican model of a city, and only afterwards being transferred to the state and hence probably being abused, or at least misunderstood (131 ff). This entails a totalitarian “democracy” of a coercive character in which the dominant force, the “ruling community”, tends to oppress minorities (142 ff, and especially 150 ff referring to Tocqueville and his insight of the “tyranny of the majority”). In other, more moderate statist varieties, the bullying by the majority may allegedly be reduced, but remains evident nevertheless. In this context, modern state philosophers like John Rawls and Ronald Dworkin are analysed (155 ff).

Chapter 7 (173-203) tries to reveal how the statist paradigm has succeeded in capturing democracy for its purposes. According to Malan, democracy is utilised as legitimacy fiction (188 ff). He is certainly right in affirming that one of the main items of democracy, the majority principle, works only if there is a continual “interchange of majorities”, *ie* when “a specific individual could form part of the majority and with regard to another issue he could be part of the minority”, as well as when governments replace one another at least every third general election (193). At this point it becomes obvious that Malan seems to suffer deeply from the political situation in South Africa, where the predominant party, the African National Congress, has been dominant ever since 1994. Malan bitterly laments the “disparagement of the equality principle and the principle of self-government”, the “uncertain existence” and “helplessness” of the permanent South African minorities infringing on the “dignity of individual members”, degrading the “minority as a group” and excluding it “for all practical purposes” “from the constitution”. To describe this status, Malan uses the Roman legal notion of *precarium tenens* (more accurate: “*precario tenens*”, *ie* “holder at will”) which leads to his coinage “*precariocracy*” (193 ff). This feeling of helplessness and the search for escape seem to be the very motive of Malan’s whole inquiry, as it were. Malan adds another neologism: “*massocracy*”, where – in contrast to the Athenian democracy – the “unstable, atomised and heterogeneous masses” are “avidly engaged in realising their own interests” (197 ff and prefix x). However, it is a moot point whether there could be a contradiction in terms between “*precariocracy*” and “*massocracy*”, because “*precariocracy*” evidently presupposes a stable division of the society into a prevailing and a suppressed group, whereas “*massocracy*” denies that stable division in favour of a complete “atomisation”.

Chapter 8 (205-236) deals with human rights as an allegedly strengthening factor for the statist paradigm. This is surprising, as human rights are meant to protect the individual against the “trespasses” of a near-omnipotent state, and, moreover, to grant the individual basic social security. Having said that, the effect of these rights is allegedly only conceivable within the confines of a territorial state. According to Malan, human rights would not be necessary “if real communal ties existed within the state, founded upon mutual individual trust, respect and cooperation” (225) – perhaps a nice reverie of paradise.

In chapter 9 (237-267), Malan takes two legal conceptions as examples for serving the statist order: the crime of high treason as reaction to the breach of allegiance to the state (with interesting references to the Second Anglo-Boer War, 244 ff) and territorial integrity. The latter is referred to as the model of the Peace Accord of Westphalia in 1648 and contains the following elements: statist sovereignty, territorial integrity and the prohibition on interfering in the internal affairs of other states (246). It is opposed to national self-determination of ethnic or cultural minorities and can thus be compared to a prison. As a prevalent principle it is taken up in the doctrine of “*uti possidetis*” in international law (258 ff). In contrast to all this, chapter 10 develops the idea of “*politocracy*”.

It would go beyond the scope of this review to trace all the diligent and meritorious examinations that Malan undertakes in his opus. Indeed, his reports on established authors and his remarks open new and rewarding perceptions of the issue, *ie* the philosophy and at the same time the reality of the territorial state, which is usually called the nation state, but often does not comprise a nation as such but parts of several nations. What is even more intriguing is the conception of “*politocracy*” which is, however, according to Malan, only sketched in outlines (272). To some extent, the Athenian *polis* serves as a model: Malan even borrows the term *politai* (citizens, 275 ff, 299 ff) and *idiotos* (304, more accurately, “*idiotes*”). The cornerstone of “*politocracy*” is the habitative community, ideally a city with a small hinterland of about one quarter of a million people (274, 310, 313). These habitative communities are meant to exert self-government concerning the *res publicae* (shared or common interests, commonwealth) as *eg* schools, universities and colleges, police services, roads and similar connecting routes, libraries, theatres, public media, public squares, medical and social institutions (298). This recalls the competences of the existing communal self-government (services of general interest, “*Daseinsvorsorge*” as Ernst Forsthoff developed it for the German communal law), likewise more or less for the notions of subsidiarity and correction (282 ff). Further premises of habitative communities are a common language (290 ff), a “*patria*” (common, though restricted territory, 293 ff)

and a real community as a sort of pooling of the “variety of constructive skills, talents, diligence, trade, professional and commercial activities and the like” (297) to the benefit of the whole. As far as could be determined, the notions “township” and “homeland” are not picked up by Malan, although a clarification would surely have been helpful.

The habitative community is supposed to be ruled by a joint government of the citizens themselves (275). However, not all inhabitants are citizens, but rather those who temporarily and jointly govern and control (300 ff): “One becomes and will remain a citizen for as long as you are involved in the *res publicae* and participate in the government of the commonwealth. One will cease to be a citizen as soon as you terminate your involvement and participation” (303). The author further submits: “Should someone prefer to spend all his energy in pursuing his own private affairs, it would be his own concern. He would thereby opt to abandon his citizenship and leave it to those desirous of citizenship to reign over the commonwealth without him” (*sic* 303 ff). Malan continues: “The granting of general adult suffrage purely on the basis of having reached a specific minimum age would seem to be inappropriate” (305). Thus the result is, according to Malan, a “restricted corps of *politai*”, a “politically relevant elite of citizens, owing their elite status to their politically relevant interest in and dedication to the *res publicae*” (306). For this office and status, Malan postulates a suitable qualification (*ibid*), but does not reveal what sort of qualification this might be. “Commonwealth affairs demand a unique kind of proficiency, judgement and skill, removed from private attributes and activities.” And: “a brilliant scientist, academic, lawyer, parson, tradesman or similar specialist might be a bad citizen with a weak grasp of commonwealth affairs, due to the fact that he is preoccupied with his work” (307).

These statements are arguably the most astonishing and – *sit venia verbo* – unsettling trait of Malan’s utopia. In the first place, he seems to forget that democracy entitles everybody to be preoccupied with his private affairs without losing his equal political rights. It would be outrageous if only those who dedicate their occupational life to the commonwealth had a political say. In this context, this reviewer regrets the absence of a sharp renunciation of discrimination for racial, political, occupational and comparable reasons which should be delivered in a revised edition. Moreover, Malan does not explain how “citizens” of his utopia would earn their living – maybe they would live at the expense of the non-citizens who they rule over? Apart from that, the core question is “*quis iudicabit*”, *ie* who would assess the suitability for a “citizen”? Would it be just the will to participate in the “joint government”? And what if all inhabitants or at least too large a number of inhabitants would like to govern jointly? Who would then do the work, who would ensure the economic survival of the habitative community? In this case, elections would be necessary – but who would be entitled to vote? The non-citizens? Furthermore, it is obvious that within the governing elite sooner or later a relentless rivalry for the exertion of power would start that could not be controlled by other than Malan’s vague insinuations of a correction from outside. But who would be the “corrector” if such a construction as a state is denied?

With all due respect this reviewer hopes that the author will reconsider his suggestions. In the meantime, I am quite relieved not to live in the habitative community of Malan’s current idea of “politoracy”. For as a professor loving his occupation and desiring to go on with it, I would be excluded from “citizenship” and – in the worst, but not too unlikely scenario – be dependent on a group of undefined “citizens” claiming to know how to rule a community. As I understand Malan’s suggestions, I would have no opportunity to get rid of them other than by giving up my job, becoming a member of the “restricted corps of *politai*” (if I was admitted and had this “unique kind of proficiency, judgement and skill”) and replacing them (if they agreed – which I seriously doubt).

Having said that, I admit that my talk might be cheap, for I am not confronted by the current situation in South Africa daily, its social dislocations and upheavals, which are arguably not always easy to bear. Therefore I see the value of Malan’s book in the justified criticisms and revelations of the aberrations of the territorial states and weaknesses of their sometimes pretended democracy. At times I understand Malan’s analyses as a cry for help. Against this background, I really hope that South Africa in particular will gradually succeed in granting a differentiated democratic, *ie* “non-massocratic” and “non-precarioratic”, as well as a secure and wealthy future for all its citizens (in the traditional sense of the meaning).

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