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978-0-521-36658-8 - The Invisible State : The Formation of the Australian State 1788–1901

Alastair Davidson

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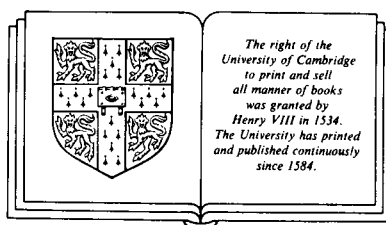
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THE INVISIBLE STATE

The Formation of the Australian State 1788–1901

Alastair Davidson

Department of Government and Public Administration
University of Sydney



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*To my beloved wife, Maryellen,
who has taught me so much.*

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Preface

In a modern State it is presumed that citizens consent to their subjection to the rule of law. In a democracy, however, collective sovereignty resides in the people who have power to override any legal decision whatsoever through legislation. The thesis of this book is that in the Australian State established in 1901 the latter proposition is denied by the courts which successfully assert their right to reject that legislation for illegality. The most important arm of State in Australia is thus the judiciary, which can only assert this privilege by denying the people sovereignty.

It is easy to identify the institutions of the Australian State today: the government departments and quasi-governmental authorities to which we turn for roads; for post and telephone; for health and education and so on, and for the permits to allow private initiatives in any of these areas; the police to whom we look for law and order and the permission to act directly by demonstration in the public arena; the armed forces to which we look to protect the nation from external threat; the institutions which give them all their orders, the executive and the parliament which authorise the former to co-ordinate and regulate all administrative activities of everyday life; the judiciary which passes judgment on, and sanctions, the citizens who have broken one of the many rules set by the latter and implemented and administered by the former.

What this book seeks to do is explain how they all interrelate in practice and which institution or combination of institutions has the final power in the labyrinth of structures of authority. Such a power is not obvious: it is hidden and invisible except in its public effect. Hence the title of this book: *The Invisible State*. It is a knowledge which must be produced in the teeth of the obviousness of received wisdom like: this is a democracy, therefore State power is in the people in the last instance. Where that ultimate power lies can only be discovered by establishing how that State under which Australians have lived was formed as a particular combination of institutions. Hence the subtitle of this book: *The Formation of the Australian State 1788–1901*. The problem it poses itself is: how did the Australians put together all the institutions of State over a century? What is the structure of the combination?

A combination is not an object which can be pointed to in reality: it is a theoretical construction in which apparently disparate and even contradictory facts are related as something else. Thus even where apparent actors—like the Australian emancipists or exclusives of the 1830s or the liberals and squatters of the 1850s—might consciously be opposed to each other, the unconscious effects of their actions might be combined in a way that shows they were not so opposed. So, writing about the formation of a State where all the vying and competing political forces nevertheless combine to form a complementary system is by definition to combine what is complementary in the contradictory practices of the actors. A State is the coherent result of what on the level of intentions are incoherent practices. Writing the history of its formation cannot be writing about what really exists in opposition to that structured effect, though resistance is not always anti-State as it sometimes functions to prevent the circuit of power blowing a fuse. Resistance in such a dimension is part of the study of the State. Normally, however, the study of resistance belongs in the mode of conscious action and thus to politics rather than the political.

In this book I have used the theory of Antonio Gramsci and Michel Foucault to combine the State as a theoretical object. I have also used much other theory which is complementary to these positions. Perhaps the closest single parallel to the position taken in this book is Ernesto Laclau and Chantal Mouffe's *Hegemony and Socialist Consciousness*.¹

Briefly, at the core of the theory I use is the belief that, unlike earlier State forms, the modern State power rests on the consensus of the citizen in its rule. Without that consensus it has no power, and the day consensus is withdrawn the State itself can no longer rely on anything but naked force to maintain itself. Thenceforth its days are numbered. This consensus is no natural given but created in a number of processes of structured hegemonic action. All the givens into which each individual is born are in fact themselves products.

Precisely because individuals are products their actions are explicable only by looking beyond them to the complex structure of social relations which make them. Power, like some energising electricity, flows through them. Yet, the social relations—which can be identified historically—tend to place them in certain positions from which they do not move. The structured system, once established, remains like a great grid with its all-important relays along which the power flows. So, while the explanation for power cannot lie in the actors themselves, no matter how much it appears to be a power which A exerts over B according to the celebrated orthodoxies, it is nonetheless true that in a relatively passive system, they are placed in fixed positions. They see the world from that point of view, from that of A or B. In turn, since it is their world (there is no other in which they live), they can believe in no other, and thus consent to the very forces in their complex structure which made them. One homely example will suffice as an illustration. Children might reject their father or mother or siblings but they can only do so as the undeniable products of a family. They must affirm the latter as reality in their very denial.

And why, it might be asked, following the old Platonic wisdom, cannot such people choose what is not yet, but what ought to be? Why, even if they are explained by the material order through which they are socialised, can they not think of another world? Undeniably, they can dream and fantasise. Yet the system does more to prevent this becoming a reality. As it constructs itself, placing each citizen in his or her place, it also establishes what is unreality; its own negation. This other can be apprehended sensuously. The average person might feel that what exists is wrong, but the system in its division and categorisation creates its own reason to explain all practices. No criticism will be listened to unless it uses that reason.

Among such discourses are those which are prohibited; those which are mad; and those which are unreasonable because they cannot be proven by authorised canons of reference to the very reality which created the standard of reason.

When the individual B, smarting under the oppression of A, seeks to challenge whatever exists, he can only do so in A's terms if he wishes to have access to power against A. If the individual does not attempt to subtract some of A's power from him he will gain nothing. Yet to play the game is to maintain its rules. Again, if the individual does not play the game he or she simply falls into the category of the idiot, or the person whose idiom is irrelevant. To choose the second course of affirming some alternate "truth", which exists nowhere in the world, is to be beaten by its "reasonableness", and to be beaten is to have that will driven by sensuous suffering destroyed. Consent or acquiescence is the result. So the effect of the structure is to make some modes of reasoning authoritative and simultaneously to silence others by placing them in the category of ratbagery.

Thus the products of the always already given complexities, who consent to them because they are the only world in which they live, do not directly consent to the State itself but to the social organisation which is its underpinning. Their consensus in the State has little to do with politics as choice. If there is something which is contradictory in their lived experience of the social arrangements, they, of course, feel those contradictions. But the social arrangements, or the order of things, are such that they cannot find their way out unless they develop a new language of politics. In the meantime they can only shore up the social order as it exists. The activity or practice of shoring up when it becomes concrete in institutions is the order of the State.

One central theme of the book is thus the way the basic unit of the modern State, the citizen-individual, was produced and reproduced socially in colonial Australia, since the latter empowers the machinery of the State by giving consensus to its institutions in the particular combination they have. This is so whether the mechanics for expressing the latter's wishes are democratic, oligarchic or monarchical. The first two chapters inquire how the earliest generations of white Australian citizens were formed—just as we "bring up" our children—by the despotic governors who ruled New South Wales—the only colony in existence—until well after 1823. The social construction of law-abiding citizens (though more obvious here than elsewhere, given the nearly untrammelled power of life and death of the governors) is not seen as some unconditioned creation of the first white Australians according to plans; but as a production using a particular intractable raw material—the land and the human means of production: the overwhelmingly convict population. Frequently the consequences of plans for reform (social engineering) escaped their control. We are not primarily concerned with the intentions of whoever originally laid down this or that plan as decisive in determining the results. Intentions do not determine outcomes. This is why what people then stated they had done or thought they had done is only material to our story in so far as we leave that behind. It is a complex story of the making of the Australian citizenry that is told, but it can be reduced to settling sufficient numbers of people on the land at a controlled pace and marrying them off in a formal, legal way to secure a place and role for the heirs to their property—their children. This settling and marrying resulted—whether they arrived originally bond or free—in a world where everyday life was that of possessive individualists driven by the belief that through work everyone could attain to well-being. They might know of other world-views but they could not believe in them; that is, act effectively on the basis of these other world-views. This widespread belief, which existed by the 1840s, should not be seen as some sort of confidence trick by the despotic governors or their successors. Sufficient numbers were settled and "made it" to believe that owning land and finding security and happiness through it was possible for all.

The third chapter examines the implicit logical results of this policy of settling private landowning individualists on the original owners of the continent: the Aborigines. The latter had to be thrown off their land increasingly rapidly if they did not themselves join in the

settling, marrying and working of the land; that is, give up their own culture. Their majority's refusal to become small-scale cultivators led to their extermination in an uneven battle with the white Australian citizens. No distinction needs to be drawn between the effect of controlled and tightly policed land settlement which the governors favoured until the 1840s and that of the tiny minority of whites who simply "squatted" thereafter on vast areas of land where the Governor's writ could not run physically. While the latter were more responsible for the death of Aborigines through the introduction of a mode of production which covered most of the rest of the continent by 1901, and which was inconsistent with the food cycles which had supported the Aborigines, their mode of production was the *unintended* consequence of the governors' attempts to foster land settlement and ownership as a way to settling down the people. In so far as the latter plan was a great success—the "reformation" of the Australian convicts causing visitors to marvel—the general populace shared the squatters' assertion of the right to the fruits of their labours and lent them their support against the governors.

It was the squatters' opposition to gubernatorial control that created the first political self-definition of Australianness against that of the British, who saw Australia as little more than a gaol or a place where no British rights could exist. The support of a populace whom the governors had reformed, through making possible the material preconditions for a belief in the virtues and desirability of private property, meant that this first opposition of the 1840s was of a cross-class nature. In it the barely emerging objective contradictions between a propertyless working class of minuscule dimensions and an equally tiny squatter group were less important than the subjective common interests in guaranteed rights to the fruits of one's labour, indeed, a belief in the Lockean notion that the combination of the fruits of one's labour with the soil is property. Thus in the colonies, now four in number, but in which only New South Wales and Van Diemen's Land had the population to make them significant, the first movement for autonomy and self-government came in a national-popular form. It was an alliance in which the earlier distinctions between convict and emancipists, and freeman and exclusive, were gradually submerged and forgotten as both sides chose interchangeable middle-class leaders and left behind both democratic and monarchical/aristocratic solutions of an institutional sort.

The differences and antagonisms which opened up between the liberals and the conservatives after 1850, on which many Australian writers have focused, are only apparent differences for the purposes of the study of the State. Like the Foucaultian theory of resistance, the position of the liberals only served to channel the flow of power into the same areas of the State machinery where the squatters also wished them to go. The drive for self-government in 1842–56 meant a drive for control of the institutions which were already combined in a particular way. The curious characteristics of these are discussed in chapter 4. They had all been created to *administer* a despotic and totalitarian State and were overwhelmingly of a police nature. Like all administrations they worked on the command principle of bureaucracies. It was through approaching them cap in hand that the populace had learnt to act in the public realm as the prototypical Australian political animal. No active assertiveness was possible or had been expressed by the majority in the face of men who could order a summary lashing and drew no distinction between bond and freemen. Because the bulk of the population was closely settled in towns and small holdings there had been no escape from the ever-vigilant surveillance of the police and gaolers. Small wonder that the legend developed of freedom beyond the pale of settlement, and those who left it and "went bush"—only 5 per cent of all Australians—became the fantastic mythical *alter egos* of a politically obsequious and dependent population. If they did not flee politics to the mythical world of anarchy

their real *alter egos* remained the institutions which had produced them, before 1856, above all the police. Again, small wonder that the domesticated and timorous majority showed real readiness to subordinate themselves to squatters mouthing the right slogans.

It was as the citizens started to empower a leadership of middle class and squatter against the despotic British governors and their officials that the invisible power within the State began to become identifiable: the law. Chapters 5 and 6 weave together the myriad threads of the law in the formation of the State in the first half of the nineteenth century into the warp it had become in the second half. They explain why the political distinction between squatter conservative and merchant liberal of the 1850s and 1860s was not as important for a history of State formation as that agreement on the need for the paramountcy of law.

The disciplined, produced inhabitant of the first half of the nineteenth century had clamoured for the common law rights which were supposedly the birthright of all Englishmen to protect themselves and their property from the despotic power of the governors. It was a common ground both for the greatest squatter and for the lowest convict. For both, working through the administration by manipulation and corruption only worked so far and had to be supplemented by other channels. Moreover, it was not possible to accept their formal nullity once they moved into the mode of self-conscious Australian subjects, a position some had started to reach by 1824 even if most did not do so fifty years later.

The legal institutions introduced in 1823 thus became in the 1830s and 1840s the place for public political activity in movements for jury trial and a free press. The litigiousness of Australians in defence of the property and families which the earliest governors had forced upon them—to the point that all their children took that world as given and through which they identified themselves—was proverbial. Those acquainted with British history would be struck by the parallel between this stage of Australian political history and that of Britain in the seventeenth century.

The implications of such commitment to law and order for State construction here are explained using what has become known as discourse theory. As the spokesmen for the middle classes leading the Australian citizens, lawyers became the political leaders in the colonies in the 1820s and 1830s. Their view encapsulated the “liberalism” so much discussed by historians of the period 1840–60 when the colonies obtained their first constitutions, which still exist basically unchanged in the Australian states today. Lawyers who were also squatters drew up the constitutions which were designed to entrench the unifying theme of the cross-class alliance of the 1840s and the demand for legal rights. With the institution of elected parliaments the institutions of the Australian State were complete and its specific combination could take place. What is important here is not so much that the citizenry (which had adult male suffrage by 1860) increasingly elected lawyers to the colonial parliaments thereafter. What is important is that in so doing the population privileged a legal discourse in matters of State. The labyrinthine technicalities of this process are discussed in chapter 6. Irrespective of the intentions, the effects on the constitutions of 1855–6 are summed up as shifting all arguments about power in the State into the judiciary, the place of the last instance in the State. The judiciary reasoned as agents of a discipline—that of the law—in one way only and arrogated to itself an exclusive right to speak with authority on matters of State. The concession of pre-eminence to the law was crucial to the further development of the Australian State.

Whatever citizens might think of themselves politically thereafter, that thought would have no authority unless it concurred with that of the law. This was so because it is in the law courts that citizens consent to the lawful application of coercion by endorsing as socially necessary the sanctions imposed. This is so no matter how much any individual might dislike

those sanctions when imposed on himself or herself. This distinction needs to be made further to indicate the subordinate position politics have after the establishment of a State power no matter how important they are in its constitution. Once having established the rules of politics, which is the realm of the State, citizens are regarded as having agreed to abide by those rules, and all politics take place within them. Once a citizen chooses to ignore those rules, his or her actions are “extra-system” and regarded by the State as irrelevant. Put another way the State determines even what the rules of democracy are. It is thus not at the level of politics but at the level of the State that power is distributed, until such politics become “anti-system”.

Chapters 6 and 7 show that this normal equation of the State with the rule of law was given a particular twist in the Australian colonies because here the constitutions had not been won, as in other democracies like France or the United States, through an arrogation of sovereignty by the people. This led to a peculiar lacunae in developing Australian law on the State, or constitutional law. When considering matters of State power the Australian courts did not refer to the historical struggles of the people to impose themselves and their wills on pre-existing institutions of State and thus to found their sovereignty in political matters in law. This was typically the reason of the British courts. Thus what was built into other legal systems which also had the right to speak with authority about matters of State was excluded from legal reason here.

Thus the thesis of this book is that, in the Australian State, the normal subjection to the law to which citizens consent is extended to that law which denies that collectively sovereignty resided in the people, who can thus ultimately, in a democracy, override any court decision by an expression of their will. The people give consensual power to their own bondage.

Between 1858 and 1901, in a string of cases, the law decided that Australians did not have the same form of government here as contemporaneously existed in Britain: responsible government. Given that the law has the last say, the common belief that responsible government existed was irrelevant, no matter how many people stated that it existed. The populace was doubly powerless in its opinions because it mystified reality by defining incorrectly what existed, which it itself had empowered the judiciary alone to decide. It is not useful to explain the judicial legalism by the class or other interests of the judges, who were undoubtedly drawn from an arch-conservative profession. To be lawyers they had to follow the imperatives of their discipline in deciding on the meaning of any proposition and reaching their judgments. This excluded the right of the populace to a voice in the practice of the law.

This situation depended—and is the leitmotif of this book—on the continuing capacity of the State to keep reproducing citizens willing to make this concession. To the extent that this depended on the exclusion of uncontrollable influences coming from outside the system, it was always faced with an incessant struggle to maintain its hegemony. Picking up on parts of chapter 3, chapters 7–9 show that this became increasingly difficult to attain after 1860. From the 1820s Australia had been inserted into the world capitalist system at an accelerating rate and affected by the logics of that system. The simple offsetting solution of providing free or cheap small-scale farms for everyone, and thus protecting the population from the effects of fluctuation in capital markets, became impossible with the failure of the selection experiments of the 1860s and 1870s. To reproduce the highly integrated and system-committed, politically passive citizen of the earlier period required new and more elaborate schemes of “social engineering”. These greatly extended the nature and scope of the administrative apparatus, whose command style had not changed and was strictly speaking not accountable to the populace because of the absence of responsible government. The new experience of

scarcity led to new health, educational and social service systems designed to reproduce citizens committed to the existing rules in the new-found experience. The new State machinery was pastoral in two senses, since it served flocks of sheep and flocks of humans as Wakefield had augured twenty years earlier. It took over and increasingly regulated the lives of those inhabitants who up to the 1860s had been seen mainly as appendages of men: the women and children of the country. They were in fact increasingly manipulated to eliminate attitudes contradictory with the system. The success of this process was measured by increasingly sophisticated demographic techniques. Once again this book does not treat this activity as some sort of centrally guided plan whose goal was that of re-creating the model political being for the maintenance of the power of the invisible State: the law. Australian politicians faced the increasing problems provoked by outside capital market fluctuations like unemployment, homelessness and larrikinism, in an *ad hoc* way, and sought to make the inhabitants happy and functional citizens through an explicitly paternalistic State. But when combined the unintended results were the reconstitution of the basic unit of the State, the citizen-individual committed to the rule of law, which had been threatened from the gold-rushes of the 1850s onwards. Liberal historians have usually told the same story as a boon. It could well be if it is the rule of law of a sovereign citizenry.

Yet by the 1890s—despite the administrative effort of a social welfare state *avant la lettre*—the colonies were increasingly buffeted by forces beyond their control, beyond the control of the State where the law, and not any other institution of State, was paramount. Social classes started to become more important than unity on the basis of possessive individualism. The shock of massive strikes in the early 1890s put the Australian State into crisis. Chapter 8 relates the colonial response. The way out was to extend the colonial State to a national continental State through federation. This was designed to overcome the self-imposed jurisdictional limits of any existing colonial legal system since these could not cope with problems which arose outside the borders of any one colony. Examples were itinerant shearers whose unions extended beyond the borders of any particular colony, or transiting Chinese immigrants coming in legally in one place and thus not being caught by exclusionary immigration laws in another.

The contradictions had been brewing for twenty years before they exploded and compelled a formal rearrangement which kept intact the power of the judiciary which continues to be the ultimate power in matters of State under the federation in which we live. It is a tribute to the success of the construction of a politically passive or absent citizenry over the nineteenth century that there was little or no opposition to the federal project. In fact the few attempts to introduce popular sovereignty in the Australian State system, both by constitution makers and by outside groups, were easily thwarted.

The last chapter discusses this failure of the people to assert themselves and establish their own order of priorities about where final power was to lie in the State within which, as a contemporary comment put it, we are today imprisoned. It does so taking account of the disappearance of the material basis for a belief system which wanted no more than law governing personal property and person. It is a failure which is traced back to the liberal leaders of the 1850s. The latter, when opposing the squatters in the debate on the constitution in 1850–55, had asserted nothing more than the right of the expert leader to rule and thus fostered a popular tutelage little different from that established in convict times. Their concurrence in the primacy of legal discourse on political values, directions and goals had conversely complemented that of the conservatives whatever the different outcomes they wished to achieve. There were occasional sparks of popular autonomy by the people prompted by persons or ideas coming from outside the world in which they lived—“from foreign

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parts". How important these were is shown by the massive repression, like that at Eureka, to silence any suggestion that the people were the privileged voice in politics or the rules of politics, the State. The pattern of privileging experts was continued in the early labour movement.

Thus federation was introduced without the people having established that they were sovereign in the State. The law was able to maintain its privileged voice in matters of State without having ever to advert to any "vague political theory" of popular rights the way the United States and British courts had done. Federation thus only extended the pre-existing State power; it did not change it. Australia still awaits a "bourgeois revolution" in which the people assert that power is ultimately theirs and no other voice is privileged to speak either about State arrangements or about politics.