

A REPLY TO THE A.A.P. CASE

BY GERTRUDE GERARD

Those who are familiar with the poem The Wreck of the Deutschland by Gerard Manley Hopkins (and with its principal character Gertrude, the nun) will recognise that this comment on the A.A.P. Case follows the stanza form of that poem.

Hopkins' early editors found it necessary to apologise for the difficult form of The Wreck of the Deutschland. Robert Bridges, for instance, referring to the poem's placement at the beginning of the poet's collected works, said that it was "like a great dragon folded in the gate to forbid all entrance" (Poems of Gerard Manley Hopkins (2nd ed., 1918) 104); and Hopkins himself wrote in a letter in 1878 that, in his original manuscript, "I had to mark the stresses . . . and a great many more oddnesses could not but dismay an editor's eye, so that when I offered it to our magazine . . . they dared not print it". (Quoted in Poems of Gerard Manley Hopkins (3rd ed., 1948) 220.)

The present editors, though resolved to be more daring and less dismayed by "oddnesses" than their predecessors a century earlier, point out for the assistance of readers that each stanza is organised around two main principles: the rhyming scheme a, b, a, b, c, b, c, a; and a distribution of the number of stresses in each line (not always necessarily corresponding to conventional metrical "feet") in the pattern 3, 3, 4, 3, 5, 5, 4, 6.

It is for the reader to judge whether the present poet memorialises the A.A.P. Case as did Hopkins The Deutschland.

Section 81¹

Is not itself the *source*

From which appropriations run.

The Parliament has, of course,

Express powers—including *placitum* (xxxix),

Which embraces within its incidental force

Laws to assist or support or define

Executive or judicial acts or matters made or done.

But the Parliament's power to make

Its Appropriations Acts

Is *implied* in these powers: to reach it we take

For granted, self-evident facts.

¹ Section 81 of the Commonwealth Constitution provides that Commonwealth revenues "shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth". In the *Pharmaceutical Benefits Case* (1945) 71 C.L.R. 237, and more recently in the *A.A.P. Case* (1975) 50 A.L.J.R. 157, 7 A.L.R. 277, an argument emerged that these words are the "source" of the Commonwealth's power to pass an appropriations law, and that "the purposes of the Commonwealth" means whatever purposes the Parliament determines; so that any appropriation law whatsoever will be valid. From this, some judges seek to derive a consequential validity for certain aspects of the actual *spending* which such laws authorize.

It *inheres* in, is *incident* to, each lawmaking head.
 Hence validity must be a mantle that spending attracts
 From its *subject-matter*. One cannot, instead,
 By appropriations enlarge the powers comprised in the Commonwealth
 cake.

Thus, but on different grounds,
 I follow those who hold
 That, wide though "Commonwealth purposes" sounds,
 The words can only enfold
 A scope confined to the constitutional text.
 But my reasoning seems (to me at least) less bold
 Than finding a limitation annexed
 To a grant of power, all *implied* in a single section's bounds.

There seems to be much more room
 For reading the relevant section
 (81) as meant to *assume*,
 By an obvious back-reflection,
 Appropriation powers found elsewhere,
 With each head of power making its own projection
 Of an earmarking power inherent there:
 Like a hundred flowers, a hundred appropriation powers bloom!

The scheme these sections devise
 (81 and 83)
 Requires a law to authorize
 Any spending, before it can be
 Proceeded with. Clearly *presupposed* by this scheme
 Is a notion of "Commonwealth purposes", I agree;
 And a *power* to authorize. But, it would seem,
 From the scheme itself neither powers, nor limits on "purposes", can
 arise.

For all other statutes, validity
 Determined by judges must stand on
 Laborious legalistic lucidity.
 Why, then, should judges abandon
 Such standards for laws by which Parliament sets the sums
 It will let the executive government get its hand on?
 The source from which Parliament's power comes
 Must include incidental power, and be read without too much rigidity;

But it must be clearly decreed
 By a firm constitutional grant.
 It is not as if there is any *need*
 To interpolate or transplant
 The source of the earmarking power by sleight-of-hand
 Into section 81, where the words are so scant.
 The earmarking power can clearly stand
 As an aspect of all the lawmaking powers specific provisions concede.

Take *placita* (xxxii),
 (xxxiii) and (xxxiv),
 All dealing with railways. On any view,
 The power of making "law"
 On the various aspects of railways must surely embrace
 The power to allocate Commonwealth funds therefor.
 So lawmaking power in *every* case
 Must include the power to allocate funds out of Commonwealth revenue.

We therefore have to read
 Each Appropriations Act
 On the basis, in principle, of a need
 For items to be attacked
 If they specify spending outside the Commonwealth's ambit,
 Or are just so wide and vague that they might in fact
 Include such spending. But no such gambit
 Would ever, as a practical matter, be likely to succeed.

For, first, the information
 Available to the Court
 In a case of bare appropriation
 Is simply not the sort
 That enables courts to determine issues clearly.
 This does not mean that a challenge cannot be brought,
 Or involves "nonjusticiability"—merely
 That presumptions of constitutionality have their full operation.

For if the doubts that arise
 On the issues such cases entail
 Are unresolved in judicial eyes,
 The attempted challenge must fail.
 The plaintiffs are simply unable to make out their case;
 The presumption of valid enactment must therefore prevail.
 There is no hard evidence to displace
 The initial presumption, and thus to discharge the onus of proof that
 applies.

Second, the Act alone
 Can *only* allot an amount.
 It does no spending on its own;
 Nor can it be the fount
 Of validity for an act of spending. Hence,
 The mere earmarking—accounting—does not count:
 Invades no rights, incurs no expense.
 And with no practical interests affected, no standing to sue can be shown.

But I see no way of extending
 This denial of standing to sue
 To any actual granting or lending
 The Commonwealth chooses to do.

Expenditure in excess of power creates
 A real imbalance. It is no longer true
 That no practical issue arises. The States
 (And Attorneys-General) *must* be able to challenge Commonwealth
spending.

Yet although the standing of claimants
 May have to be differently seen
 For appropriations and actual payments,
 This certainly does not mean
 A division of earmarking *power* (of absolute range)
 From a (limited) power to spend. There is no line between.
 The scope of the *power* cannot change
 As we move from Appropriations Acts to disbursements and debts and
 defrayments.

Thus, if we could really swallow
 Section 81 as the *source*
 Of the power to earmark, then it would follow
 (Assuming also, of course,
 That the power thus given admitted of no limitation)
 That the power of spending had also unlimited force.
 A power of bare appropriation
 Without a power to *use* the money thus earmarked, would surely be
 hollow.

“My son, this dollar fifty
 Is your movie money this week.
 But you may not spend it.” Would this be thrifty,
 Or just a fatherly freak?
 So, too, if the son were permitted to pay the cashier,
 But not to sit in the theatre, nor even to sneak
 A look at the screen, he would surely sneer
 At his father as rather an Indian giver; deceitful; illogical; shifty.

In short, a paper transaction
 Without the power to spend
 Or without the right to concomitant action
 Leads to no logical end.
 What is wrong with such views is their effort at *downwards* thinking:
 From earmarking to action. We should rather ascend:
 Beginning with substantive power, and linking
 Equivalent powers to spend and to earmark to that. All else is distraction.

The spending power, then: where
 Does it come from? What section creates it?
 The answer must be stated with care.
 Mr Justice Jacobs locates it
 Within the executive power (including the Crown
 Prerogative: though His Honour perhaps overstates it,
 This immanent power, not written down,
 Gives crucial support to what might otherwise seem to be plucked from
 midair).

What powers to spend does the clause
 On executive power embrace?
 “The execution of Commonwealth laws”
 Clearly takes pride of place.
 Whenever the Parliament passes legislation
 For which clear lawmaking power provides a base,
 Then executive spending in implementation
 Of the Parliament’s schemes, institutions and policies is a legitimate
 cause.

Such spending will be done
 Within the *executive* sphere.
 No *incidental* power is spun
 Into the reasoning here.
 (But of course incidental power, express and implied,
 May support the *law*; and some *limited* spending, *near*
 To the purpose in hand, may be justified
 By implied incidental executive power in section 61.)

Secondly, no one can doubt
 That where the Constitution
 Provides for or simply talks about
 Some office or institution,
 “The maintenance of the Constitution” must run
 To that body’s staffing, facilities, work distribution.
 The source is section 61—
 With its own implied incidental power (if need be) to eke it out.

Third, it is sometimes said
 That (stretched to the uttermost)
 Each specified Commonwealth lawmaking head
 Has a *Doppelgänger*, or ghost,
Within the executive power, which therefore embraces
 The full range of powers the legislature can boast,
 Whether or not any law in such cases
 Is extant. Executive power thus mirrors the maximum lawmaking spread.

The executive therefore enjoys
 (On this view of the law), for example,
 Over lighthouses, lightships, beacons and buoys,
 A power that is equally ample
 Regardless of what has been done on the Parliament’s side.
 But this implication of “parallel” powers would trample
 The true distribution. No index or guide
 To executive power can really be found in such vague impressionist ploys.

Fourth, the prerogative power:
 Law’s mistiest mixture with lore
 Among all that our British traditions embower.
 Clear enough at its core

Are *activities* to which all sovereign powers extend:
Making treaties, for instance, or waging war.

For these the power to act—and to spend—
Requires no stress. But what of largesse, compensation, donation and
dower?

In short, apart from the stock
Of prerogative powers of *action*,
And the payments with which these interlock,
Is there some inherent attraction
By which modern prerogatives draw to themselves, or inherit,
A power of payment *as such*—by grace, benefaction,
Relief of hardship, reward of merit,
Or simply gratuitous gift to a group or a person selected *ad hoc*?

There is; and perhaps every pension
Is at heart an example of this.
But these payments' limited *ad hoc* dimension
Demands more emphasis.
To speak simply of a prerogative power that spends
Without limit, for any purpose, would lead us amiss.
There is *only* a power of making amends
(Or according rewards) to specific recipients deemed to deserve such
attention.

This strict definition should chasten
Any larger prerogative claim.
The payments are only *ad hoc*, and (I hasten
To add) have a limited aim.
Presumably judges mean only *ad hoc* dispensations
Such as these, when they say—in the section 81 frame
Of parliamentary authorizations—
That appropriation may “sanction” a payment. (Thus Mr Justice Mason.)

Moreover, such *obiter dicta*
Have never averred or implied
That in any challenge to spending, the victor
Must be on the Commonwealth side.
Mr Justice Mason treats earmarking laws as extending
A *necessary* condition. They cannot provide
A *sufficient* condition for valid spending.
The language he uses perhaps confuses. His actual view seems much
stricter.

Fifth, the very logistics
Of government as an art
Entail a power to gather statistics,
Inform oneself, impart
And acquire information by governmental inquiries.
This factfinding power lies at the government's heart;
It cannot ever be *ultra vires*.
Policies need to be based on knowledge, not on the visions of mystics.

Suppose, however, we say
 That this power of probing and scanning,
 Of surveying and weighing, has to stay
 In the limits of policy planning,
 And hence of the Parliament's power of legislation.
 This limited power would still end up by spanning
 Unlimited access to *all* information,
 Since the *territorial* lawmaking power is plenary anyway.

Moreover, the so-called "strings"
 Which the Commonwealth may affix
 To the States-grants Greek-gifts power that springs
 From section 96
 May include "such terms and conditions as [it] thinks fit":
 Any purpose or policy that the Parliament picks.
 The subject-matter is infinite.
 Factfinding for policy reasons must therefore extend to all manner of
 things.

This factfinding power inheres
 In *all* governments, not just a "nation".
 But, sixth, a further power appears
 In the framework of federation.
 In such a framework, all levels of government *must*
 Have powers of planning and mutual orchestration:
 And the Commonwealth carries a special trust
 To integrate and coordinate the activities of its peers.

But consultation with States
 Is here a *sine qua non*.
 A Commonwealth which "coordinates"
 Cannot strike out on its own.
 A power of "federal" planning, by definition,
 Excludes any Commonwealth power of acting alone.
 This power can only be used on condition
 That "genuine", "adequate" consultation controls how it operates.

"Genuine." "Adequate." "Real."
 The issue such words suggest
 Seems hardly one with which courts can deal.
 Yet when the issue was pressed
 Mr Justice Mason dealt with it on the spot:
 The Australian Assistance Plan had failed the test.
 The Commonwealth had been "acting not
 Through the States and their agencies", but in an independent excess of
 zeal.

Lastly, our long evolution
 Into sovereign nationhood
 And "identity" under the Constitution
 Has to be understood

(Whenever the facts make Australian identity focal)
 As creating new Commonwealth power, holding good
 For issues whose "flavour" is not "local",
 But "Australian", uniquely appropriate to a national contribution.

This so-called "national" quality,
 And the power it prompts, may inhere
 In our very existence as a polity;
 Or in the textual sphere
 Of the Constitution's "maintenance and execution";
 Or in prerogative power; or in a mere
 Implication. Whatever the chosen solution,
 It is clearly a genuine power, not a mere public relations frivolity.

But it needs the qualifications
 Mr Justice Mason imposed.
 The list of factors attracting the nation's
 Response (though the list is not closed)
 Must show substantially more than the fact that a scheme
 Can "conveniently" be applied, or a need diagnosed,
 By the Commonwealth. Nor can there be an extreme
 (Or a "radical") transformation of federal powers and limitations.

This last point should be restated.
 The "national" power in play,
 However we see it as being created,
 Has mainly *executive* sway.
 But this means that by *placitum* (xxxix) there is vested
 A power to *legislate* in a similar way.
 In this context, it is sometimes suggested,
 New "national" powers and textual *placita* must be assimilated.

This would add one kind of fuel
 (It is said) to the critical fires
 Of Mr Justice Mason's eschewal
 Of "radical" change. He requires
 (On this view) that before we accept a new "national" claim
 We must see if the new head of power to which it aspires
 Corresponds to an old one: is either the same,
 Or so closely analogous that it is clearly a natural further accrual.

On this view, a power for the nation
 To regulate animal health
 Would not be a "radical" transformation,
 Since laws of the Commonwealth
 Can already, by *placitum* (ix), impose "Quarantine".
 And since *placitum* (v) has already expanded by stealth
 To include television, the same test would mean
 That a power pertaining to films would be a legitimate amplification.

But such perverse ingenuities,
 Extending powers piecemeal
 By mere accidental contingencies,
 Surely distort the *feel*

Of His Honour's eschewal of "radical transformation".
 His *dictum* seems rather designed to address an appeal
 To a broad indeterminate limitation
 Invoking the notion of "federal spirit", not grasping at patchwork
 gratuities.

Such a principle falls into place
 As a further application
 Of the *Melbourne Corporation Case*,
 Or the *Payroll Tax* litigation.
 The notion there was that power cannot be used
 To destroy the existence of units of federation.
 So "national" power will be refused
 If its use involves "radical" plastic surgery on the federal face.

One other aspect needs mention.
 Mr Justice Jacobs thinks
 That a matter may merit the nation's attention
 Simply because of its links
 With a need for Australia-wide planning and integration.
 Such a "national" power is different from that which drinks
 From the fountain of "federal" consultation;
 And the former power may even permit the latter's circumvention.

On the one hand, the "national" need
 Will far more rarely arise.
 For instance, it is widely agreed
 That the law of libel cries
 For uniform national treatment. This would favour
 Concerted "federal" efforts to synthesize,
 But would not give libel a "national" flavour.
 In this sense, "federal" power is wider than "national". But proceed.

On the other hand, clear satisfaction
 That particular needs or complaints
 Could *only* be dealt with by Commonwealth action
 Would largely transcend the constraints
 Of the usual need for "federal" consultation.
 So long as the Commonwealth avoided the taints
 Of outright "radical transformation",
 It could simply ignore the States and embark on an independent
 transaction.

The time has come for summation.
 The heads I have sought to rehearse
 Show executive power in operation
 In aspects extremely diverse.
 As to all of these aspects, section 61
 Gives the power of government action, and of "the purse".
 Incidental *lawmaking* powers run
 In a parallel track, having *placitum* (xxxix) as their formal location.

The power of appropriation
 Of the funds the executive spends
 On these various areas' implementation
 Clearly also depends
 On *express* incidental power. For powers bestowed
 More directly, however, each *placitum* comprehends
 Its own *implied* incidental mode
 Of giving Appropriation Acts constitutional justification.

No doubt we should also allow a
 Significant job to be done
 By implied incidental executive power
 In section 61.
 For the powers here listed it may be a part of the source;
 And also for spending. But further than this I would shun
 Use of "incidental" power. Its force
 Is supplementary: adding a buttress, not erecting a tower.

On this ground, I would decline
 To follow (though with regret)
 Mr Justice Jacobs' ingenious line
 Between matters which merely abet
 A power, as *incidents* of it, and those which arise
 On the sidelines, and *incidentally* offset
 A "main action" sustainable otherwise.
 I doubt if the words will bear the elaborate meanings he seeks to assign.

Incidental powers *implied*
 Cover "incidents", no more.
 "Independent actions on the side"
 Are authorized in law
 (He says) by *express* incidental power. If so,
 Then express incidental power would ensure
 That the Commonwealth *Parliament* can go
 Into areas of activity that would otherwise be denied.

But consider how his holding
 Applies this ingenious theme.
 The Australian Assistance Plan was moulding
 A social welfare scheme
 In *some* areas covered by *placita* (xxiii)
 And (xxiiiA). His Honour would therefore deem
Other social welfare payments to be
 Legitimate as "incidental to" the main action which was unfolding.

This reasoning seems infected
 By the very heretical claim
 That Mr Justice Mason rejected:
 That is, that a Commonwealth aim
 May be justified by the "convenience" of the moment.
 And even if Justice Jacobs overcame
 This objection, his "incidental" bestowment
 Of power could only extend to matters the *Parliament* has selected.

For what he had earlier coined
 Was a strict definitional test
 By which "independent" acts, "conjoined"
 To substantive powers, must rest
 On *express* incidental power. Powers *implied*
 Were confined to "incidents". Yet the only *expressed*
 Incidental power is classified
 As *lawmaking* power: Parliament's property, not to be purloined.

It therefore could not aid
 The Australian Assistance Plan.
 For this involved grants of money paid
 On no firmer basis than
 An *executive* scheme, unaided by legislation.
 But if Mr Justice Jacobs' argument *can*
 Be supported, its only operation
 Is in the lawmaking province, which the executive cannot invade.

Thus, for the scheme to be valid,
 It had to be firmly moored
 In *executive* power. The tossed fruit salad,
 The motley smorgasbord,
 Of executive powers explored here had to yield
 An accumulation of arguments which would afford
 Sufficient powers to "cover the field".
 Perhaps they did. But in the end the argument seems rather pallid.