Over the Secular Ridge of Human Wants: The constitutional legitimacy of secular-state funding of chaplaincy programmes in Australia, A. Menuge (ed.), Religious Liberty and the Law: Theistic and Non-Theistic Perspectives, Routledge, Chapter 9, 2017
ISBN: 9781138244474

Over the Secular Ridge of Human Wants: The constitutional legitimacy of secular-state funding of chaplaincy programmes in Australia

Williams n.2: A Case of Illiberal Utilitarianism?

In common law systems, judicial institutions are normally vested with the task of finding solutions to legal dilemmas under the epistemic guidance of rules and precedents. Democratically elected institutions are instead vested with the task of fostering the common good which, in most liberal societies, is associated with the reasoned implementation of utilitarian policies and the redistribution of resources to those in need. Hegel's philosophy of rights delivers one of the most succinct analyses of the issue. 'The essence of the modern state binds together the universal and the full freedom of the particular, including the welfare of the individuals' (Hegel 2008, 138). The balance between the two activities (that is, the promotion of free enterprise and the protection of the weak) varies. So, for instance, the allocation of redistributive policies that support families in Sweden is different to that in Australia. The Swedish parliament might, for instance, provide up to 65 weeks of parental leave (at 80% of pay) shared between the two parents. It is logical to assume that firstly, the Swedish parliament considers such a policy an appropriate response to the desire of parents to care for their children and, secondly, that the majority of the Swedish population perceives the policy as beneficial for the whole community (Addati, Cassirer, and Gilchrist 2014, 137). The Commonwealth of Australia, instead, entitles newborn primary carers to up to a maximum of eighteen weeks at the minimum wage and their partner with two weeks at minimum wage (Ombudsman 2015).

There is, in this example, a great disparity in how the Australian and Swedish deliberative institutions decided to balance the requirement of economic efficiency of their respective work forces with the legitimacy of redistributive policies aimed at engaging an individual aspiration. This aspiration includes a desire that carers might have for spending time with their children. In both instances, parliaments select whom the beneficiary of the policy might be (e.g. the mother, the father, the adopted mother, the adopted father and the carer in a same-sex couple) and how he or she might receive such a benefit. It is important to note that the carers *might need* such support; however, both parliaments decided that they could access these benefits. A court intervention in the evaluation process carried out by parliament might be limited to deciding whether the deliberative institution has the power to make such a decision or, for instance, whether such a policy hinders the rights of other groups. It would be improper, for instance, for

the High Court of Australia (hereafter the HCA) to suggest that a policy that provides paid maternity leave for Australian parents is, by way of comparison to the one granted in Sweden, inadequate. The suggestion would be unacceptable in court, even if a hypothetical plaintiff were to present objective evidence of the inadequacy of the federal policy. This is the case because the accommodation of the parents' desiderata with the policy aim of fostering the common wealth of a country is a political task (Tully 2002) and constitutional law should be 'conceived as a structure of rules and principles which provides the foundation of the political order' (Loughlin 2003, 193).

Constitutional law deals with how law shapes and limits the conduct of politics. In *Williams v The Commonwealth* ([2012] HCA 23 2015), hereafter Williams n.1, the federal government tried to allocate resources to a series of schemes aimed at providing pastoral care for students in state schools. The Commonwealth relied exclusively on its executive power to do so and the HCA considered the policy, quite rightly, as unconstitutional. Williams n.1 might have been perceived as the comeuppance of a final appellate jurisdiction, yet in Williams n.2, the chaplaincy scheme was supported by a series of statutory measures which were, according to the intention of parliament, directly linked to a federal head of power set out in Section 51 (xxiiiA). Again, the HCA, in *Williams v The Commonwealth of Australia & Ors* (hereafter Williams n.2), considered the statutory measure as unconstitutional.

I will return to the technical aspect of the decision in the last section of this chapter, but it is important to note that the HCA questioned the legitimacy of a series of federal statutes. These were the Financial Framework Legislation Amendment Act (No 3) 2012, the Financial Management and Accountability Act 1997 and the Financial Management and Accountability Regulations 1997. In particular, the HCA considered the National School Chaplaincy and Student Welfare Program (hereafter the NSCSWP), which derived its legitimacy from the above statutes, incompatible with Section 51 (xxiiiA) of the Constitution. The aims of the NSCSWP's policy were, as drafted by the Commonwealth: '[t]o assist school communities to support the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community' (The Australian Parliament 2012). The NSCSWP's policy authorised the agreement between the Commonwealth and the Scripture Union Queensland (hereafter the SUQ), which provided pastoral care in the school in which Mr Williams sent his children. Before engaging with the jurisprudential shortcoming of the HCA's decision, I will explain why the HCA should not have tried to define a human want.

The Commonwealth argued that Section 51 (xxiiiA) includes a federal competence to draft legislation that is directed at providing a benefit to students. The HCA argued, instead, that a benefit could only be considered as 'material aid given pursuant to a scheme to provide for human wants'. A policy that provides a service within a state school could not be considered part of federal distributive policies because that type of support does not meet a human want. The narrative appears to have been thrown pell-mell into the decision.

The issue in Williams n.2 was whether the 'benefits to students' could support the legislation that allowed for non-denominational pastoral care in state schools. At first sight, the answer ought to be in the affirmative. Historically, the HCA's jurisprudence has been at odds with other final appellate jurisprudence in common law courts (Aroney and Allan 2008). Aroney and Allan suggest that the HCA has a tendency to construct narrow literal interpretations of constitutional norms that, in turn, deliver decisions in direct contrast with the constitutional text from which they originated. For instance, the HCA has, over the years, endorsed a series of narratives that might appear articulated and plausible, but that support flawed or paradoxical decisions. They deliver such a conclusion in a pungent narrative:

> The ironic result to adopt Herbert's terminology has been a most uncommon body of constitutional law, generated by a most uncommon court, using what appear to be the most orthodox techniques of common law reasoning, applied to the text of the Constitution. (Aroney and Allan 2008, 245)

In Williams n.2, the HCA does it again, so to speak, and, in this case, the penchant for strict textualism has the effect of transferring a prerogative to the court that no common law court has, as far as I know, claimed. That is, the prerogative to set out what a human want ought to be in a liberal democracy.

This is not to say that Australian Justices are the votaries of the paradoxical or that they disport themselves in producing mildly elaborate casuistries. Aroney and Allan's narrative shows instead the epistemic limitations of textualism and the Williams n.2 case confirms the claim. In particular, the HCA argued that a human want in areas of benefits to students is a monetary benefit given to a specified group of individuals. 'And in the case of benefits to students, the relief would be material aid provided against the human wants which the student has by reason of being a student' (Williams n.2, 46). Even within the restricted realm of public-sponsored education, the possibility that a court would be able to qualify the basis of utilitarianism appears difficult to accept. For instance, if we were to return to the example of differences between

parental leave policies in Sweden and Australia, and we assumed that parliaments in both countries had the prerogative to set up legislative policies that have the effect of helping new parents, it would be reasonable to assume that jurisdictional institutions are not entitled to decide on what new parents want. However, in Williams n.2, the HCA accepted Mr Williams's claim and affirmed a lack of legislative competence in respect of the Commonwealth for policies that do not provide a pecuniary benefit to students.

This conclusion is not underpinned by a sound understanding of utilitarianism. For instance, it would be equivalent to the court saying that parliament could not pass legislation that would give unpaid parental leave to parents if their child were in hospital. Indeed, the hospital staff would provide for the care of the child and perhaps the parents' desire to stay with their children might not be materially or psychological beneficial to the child. It might also be the case that giving the parents the opportunity to spend time with their child in hospital would directly hinder the interests of the community. One or both parents might already be providing critical services within the community; they might be, for instance, police officers or firefighters. However, it is a prerogative of the political arena to evaluate those human desires and to set up policies that might accommodate those desires.

Similarly, setting up policies that accommodate the demand for religious support for children in public education is a manifestation of power allocated to a parliament. More precisely, it is a manifestation of the prerogative to balance economic efficiency with the promotion of a common good by caring for a chosen group of individuals (e.g. parents and carers). This evaluative process cannot be extracted, as the HCA appears to have done, from a selective reasoning of its jurisprudence, without overstepping the role of democratic institutions.

Before I support my narrative, a series of issues have to be engaged as a preliminary discussion. Firstly, in Williams n.2, the issue is not whether the wording 'benefits to students' in Section 51(xxiiiA) could be interpreted so broadly that it had the effect of giving the Commonwealth full power over primary and secondary education. We might call this narrative the Australian endangered federalism thesis. There are two reasons for rejecting the Australian endangered federalism thesis. Firstly, it is relatively clear that the Commonwealth does not have a head of power over education. It is a state responsibility. Section 51 (xxiiiA) was inserted as part of a constitutional amendment that allowed the Commonwealth parliament to promote distributive policies (*Constitution Alteration (Social Services) 1946 - SECT 2*). Following the reform,

the new Section 51 allocated the power to legislate in several new areas. That included the benefits to students: 'The Parliament shall, subject to this Constitution, have power to make laws […] with respect of: […] (xxiiiA) the provision of […] benefits to students and family allowances.'

The HCA has a tendency to interpret the Australian Constitution literally and that has the effect of unbalancing federalism in a way that favours the Commonwealth over the states (Aroney and Allan 2008). The HCA is an uncommon constitutional court. Constitutional courts in federal systems have a tendency to fill the constitutional text with significances. Yet the HCA has, over the years, embraced literal textual interpretations which are seldom adopted by other final appellate constitutional jurisdictions in federal systems such as those of Canada, Germany or the USA (Aroney and Allan 2008, 247).

However, the acceptance of a legislative unbalance between states and the Commonwealth might not provide a plausible justification for Williams n.2. To start with, it would be a self-deafening argument to suggest that the HCA in Williams n.2 manifested an intention to swing the balance of Australian federalism in favour of the states. That is per se a political endeavour which would cast a serious doubt over the present and past legitimacy of the HCA's jurisprudence. In addition, the NSCSWP's programme cannot be considered an educational programme that overlaps a state's competence.

The specific aim of the NSCSWP was to help students who, for whatever reason, elected to make use of such a service. The objective of the policy is clearly stated: 'Objective: To assist school communities to support the wellbeing of their students' (The Australian Parliament 2012). In other words, the parliament's NSCSWP scheme did not set up an education policy which altered state schools' pedagogical curricula. It also did not foster a change in state policies by stealth, so to speak, by promoting a change in school policies in exchange for a financial incentive. The financial beneficiaries of the NSCSWP's scheme were the third parties that provided the pastoral care (not the schools). In short, the Australian endangered federalism thesis cannot provide an explanation for Williams n.2.

Secondly, the Australian Constitution does not include a section that has an equivalent effect on public education as the so-called Establishment Clause (U.S. Const. adm. I). At first sight, the wording of Section 116 of the Australian Constitution appears to be similar to the one in the Establishment Clause: 'The Commonwealth shall not make any law for establishing any

religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.' The relationship to the Establishment Clause is obvious: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' (U.S. Const. adm. I). However, in Australia, public education is a state legislative competence and states are not bound by Section 116, which applies only to the Commonwealth.

The narrow interpretation of the term 'religion' might appear controversial. Section 116 is inspired by the Establishment Clause, yet there are strong indications that the historical conditions that justified the 1789 Establishment Clause in America, as well as Bentham's critique of the Anglican Church in 1768, lapsed before the approval of the Australian Constitution. In particular, during the nineteenth century, the coupling of sectarianism and elitism mentioned in Bentham was radically reduced by the UK parliament. The Universities Test Act 1871, for instance, removed the religious requirements for students and staff at the universities of Oxford, Cambridge and Durham: 'No person shall be required […] to conform to any religious observance' (sec 3). The Universities Test Act was preceded by the Northcote–Trevelyan Report, which prepared conditions for the development of an independent civil service (Northcote and Trevelyan 1853) and a series of commissions that substituted the English patronage system with exams and meritocracy (Fukuyama 2012, 110). Furthermore, Australian immigration policies historically favoured British immigration in a way that fostered the expansion of a large community of Anglicans and Catholics. These communities maintained a strong connection with the political sphere and that connection had the effect of reducing the state and federal commitment to maintaining the separation between public institutions and religion (Chavura 2013). In short, Section 116 of the Australian Constitution might mimic the wording of the Establishment Clause, but it does not carry a similar effect in the Australian constitutional system.

Thirdly, the Commonwealth parliament, by using Section 96, might allocate financial resources to states' government of areas that are otherwise outside of federal legislative competences. In the aftermath of Williams n.2, the Commonwealth went back and used Section 96 to give money to the states on the condition that it was used for pastoral care programmes. In short, the Commonwealth is still able to fund chaplains in schools, but has to channel the finance via state governments. At the time of writing this essay, the new procedure has not been challenged in court.

The Constitutional Boundaries of Utilitarianism

In Williams n.2, the HCA's narrative could not be redeemed by considering the decision an attempt to rebalance Australian federalism. In Williams n.2 there might be, instead, an attempt to impose a political evaluation on a deliberative arena. In this section, I will explain the current understanding of the relationship between the utilitarian renderings of human wants.

In describing Jeremy Bentham's 'unfavourable affection' for the Church of England, Philip Schofield draws the reader's attention to two episodes. The first episode is most likely to have happened in 1768. Bentham witnessed the expulsion of six fellow students from Oxford University (Schofield 2009, 171). The students, all Methodists, were accused of heresy. They were meeting in private houses where they prayed and sang hymns. Bentham, at the time at Queen's College, tried to plea against expelling the six Methodists but was reminded by one of the college fellows of the insignificance of his individual opinions: 'His answer was cold: and the substance of it was – that is was not for the uninformed youth such as we, to presume to set up our private judgements against a public one, formed by some of the holiest, as well as best and wisest men that ever lived' (Bentham 1818, xx). The second episode that was mentioned was the undersigning of the Thirty-Nine Articles of the Anglican Church. Bentham was, as were all the Oxford graduates, required to sign them, but this last episode left him with the perception of having compromised his intellectual integrity (Schofield 2009, 173; Bentham 1818, xxiii).

Both anecdotes give us a strong indication of the possible motivation for Bentham's unfavourable affection for the Church of England, but they might also shine a beam of light onto the role of the freedom of expression of religious beliefs in legal systems that endorse utilitarianism (Schofield 2009, 173; Bentham 1988). It is worth remembering that in 1789, Bentham's *Introduction to Principles of Morals and Legislation* prepared the theoretical framework which inspired, among others, H.L. Hart's legal positivism (1961; Schofield 2010), Ralws's studies in political philosophy (Rawls 1993; Rawls 1972) and Dworkin's theory of adjudication (Dworkin 1978; Dworkin 1998). However, utilitarianism and its well-reproduced separation thesis, that is, between law and morals, and not a separation between law and religion, should not be understood as incompatibility between individual religious aspirations and human wants (Chavura 2013).

Bentham, for instance, was quite explicit in advocating a separation between the state and religious indoctrination, analogous to the type of indoctrination that he had received at Oxford

University (1818, 231). The separation, in Bentham, included a prohibition to allocate fiscal recourses, which were, Bentham explained, from unwilling contributors, for the benefit of religious institutions such as the Church of England. Yet, on the same page, Bentham explained that such a limitation would not apply 'for administering of instruction of the sort in question [that is, religious education]' (1818, 232). For Bentham there is, in other words, an intrinsic benefit in having the state support religious education. The logical assumptions from this narrative are that, firstly, non-denominational religious education could be part of, at least for Bentham, a utilitarian society and secondly, that religious aspirations are legitimate human wants. This last logical deduction is particularly relevant to a debate over the legitimacy of the Commonwealth policy that seeks to provide for students' desire to have access to non-denominational pastoral care in school.

Since 1768, the debate over types of state-sponsored education has been rehearsed in several spaces (Dewey 2012; Weber 2008; Fukuyama 2014; Rawls 1993, 196). Rawls, for instance, advocates the connection, albeit minimal, between education and the necessity of knowing the basic rights protected by the constitution (Rawls 1993, 199). The example chosen to explain the importance of education directly engages with the necessity of knowing about religious claims. 'It will ask that children's education include such things as knowledge of their constitutional and civic rights so that, for example, they know that liberty of conscience exists in their society and that apostasy is not a legal crime' (1993, 199). There is, from the quote, grounds for speculating that Rawls envisages a type of childhood education that explicitly engages with and recognises the role of religion in society. It is, therefore, reasonable to assume that Rawls does not advocate the benefit of endorsing religion as a comprehensive justification for a political system. Rather, Rawls argues that children should be made aware of the existence and of the claims that religious communities might make in the political arena and that some of those claims might not be legitimate.

Even those such as Stephen Macedo, who sought to reduce the role of religion in public education to a bare minimum, do not plead for excluding the knowledge of it. Macedo's narrative is, instead, that political liberalism should have a logical priority in the school curricula (Macedo 1995, 487; Calvert 2013, 120). In short, there is little, even in the current conception of utilitarianism, suggesting an incompatibility between spiritual needs and a utilitarian rendering of the concept of human wants.

This point is delicate, so I must be precise. My contention is not that religion is a constitutive part of a liberal society, or that we should assume that students' wants related to a private religious aspiration must be considered. The issue in Williams n.2 is rather this: in the debate over the interpretation of Section 51 (xxiiiA), is a student's desire to have pastoral care from a non-denominational organisation an expression of a human want that is incompatible with the utilitarian underpinning of the Australian Constitution? The short answer should be negative for two sets of reasons.

Firstly, there is no explicit prescription within the text of the Australian Constitution which prevents the parliament from legislating in this area. Quite the opposite, Section 51 (xxiiiA) explicitly gives the prerogative to legislate in this area. This point was conceived, albeit indirectly, in Williams n.1. Secondly, once it was ascertained that that NSCSWP was not an education policy that was reserved for the states, the decision on how to provide for student wants, and that included those desiderata that are a manifestation of religious belief, should have been (within the limit of reasonableness) allocated to parliament.

However, the HCA appears to narrow Macedo's stance even further by requiring that services provided to students by a non-denominational organisation, such as the service provided by the NSCSWP, should be measurable in pecuniary terms and directed to individuals. There is, however, little in the Australian Constitution and in the HCA's jurisprudence that would require a connection between such a farrago of assumptions and the evolution of a human want. If we were to retour to the example of a newborn child in hospital, a parallel narrative would suggest that the parents' desire to take parental leave could not be measured in pecuniary terms, and so the federal policy that provides for parental leave is not an expression of a human want.

Williams n.2; Cognitive Dissonance or Jurisprudential Orthopraxy?

In the previous sections, I explained utilitarianism might not support the use of fiscal revenues to promote proselytism in an educational establishment, but that is not to say that a pastoral service provided by a company that has a religious affiliation is incompatible with a modern liberal and capitalist society. In this section, I will review the line of authority that underpins Williams n.2 and show that the decision is affected by a manifest error. It will be argued that if the criteria extracted from the previous qualifications of Section 51 (xxiiiA) were correctly applied to Williams n.2, the decision should not have favoured Mr Williams.

The Williams n.2 case is indeed multifarious, yet the decision to reject the Commonwealth argument was linked, the HCA argued, to two intrinsic limitations to the Commonwealth legislative competences set out in Section 51 (xxiiiA). Firstly, legislation that provides for a benefit has to be monetary (or evaluated in monetary terms). Secondly, that a benefit should be direct in order to engage a student demand:

> The meaning of the word 'benefits' accepted by the majority in *British Medical Association v The Commonwealth* was that expressed by McTiernan J: 'material aid given pursuant to a scheme to provide for human wants ... under legislation designed to promote social welfare or security'. And that material aid may be provided in various ways. McTiernan J referred to the provision of benefits in the form of 'a pecuniary aid, service, attendance or commodity'. Williams n.2)

These two criteria (the pecuniary aid corresponding to a human want) are not stated in the aforementioned constitution. It might be worth reminding the reader of the text of Section 51 (xxiiiA).

> [T]he provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances. (UK Parliament 1900, Section 51 (xxiiiA))

The two requirements are instead drawn from two precedents. The first one is *British Medical Association v Commonwealth* [1949] HCA 44 (hereafter BMA). In BMA, the HCA explained that handing out free medicines could not be considered as a form of civil conscription. The reasons for inserting the criteria in Williams n.2 as a requirement of a legitimate human want is a matter of speculation, yet it is possible to suggest that in Williams n.2, the HCA misread the BMA case.

The second case considered in Williams n.2 was *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* [1987] HCA 6. The case discussed whether the statutory measure that allowed the government to enter into a contractual relation with a third party, that is, the hospital which provided a service, was considered as legitimate by making reference to Section 51 (xxiiiA). In the Alexandra Private Geriatric Hospital case, the court confirmed the decision based on the BMA case. It was a case of confirming rather than qualifying it. In BMA, the issue of the inclusion of the possibility to pay for a third-party service to the beneficiary, who is the patient,

was already engaged. In BMA, the HCA explained that the process of providing a pharmaceutical good required the payment to two third parties: the doctor who filled in the prescription using the approved government form, and thus providing a service, and the pharmacy that handed out the prescribed remedy. In *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth,* the HCA included private hospitals on the potential list of service providers that might receive money for medical care. Again, given that Section 51 (xxiiiA) explicitly allocates a competence to provide for sick benefits and hospital benefits, the decision that a federal government could pay for a third party to deliver its policy was, as the HCA noted, relatively uncontroversial.

In Williams n.2, the HCA was asked eight questions, but only question four and question six are relevant to the issue discussed in this essay. In question four, the HCA restated the *dictum* in Williams n.1. In particular, the court stated that the Commonwealth had no executive power (without legislative support) to provide money for a chaplaincy scheme. In the case of Williams n.2, the SUQ had a funding agreement with the Commonwealth and provided pastoral care at the school to which Mr Williams sent his children. 'Question 4. Was the Commonwealth's entry into, and expenditure of monies under, the SUQ Funding Agreement, as varied by the First to Fourteenth Variation Deeds, supported by the executive power of the Commonwealth? Answer. No' (Williams v Commonwealth of Australia [2014] HCA 23, 3).

In answering question six, the HCA stated that payments made to the SUQ were illegitimate because the power used by the government exceeded the legislative competence of Section 51 (xxiiiA).

> Question 6. Was the making of the January 2013 Payment and the February 2014 Payment and, to the extent that the answer to question 5 is 'Yes', the January 2012 Payment and the June 2012 Payment, unlawful because it was not authorised by statute and was beyond the executive power of the Commonwealth? Answer. Yes. (Williams n.2, 3)

In the aftermath of Williams n.1, the parliament approved a series of statutory measures that had the aim, among others, to provide legislative backing to the government's chaplaincy schemes such as the one that supported the SUQ. The approved statutes were set out in the Financial Framework Legislation Amendment Act (No 3) 2012 (Cth) (hereafter the FFLA Act). The FFLA Act incorporated aspects of the Financial Management and Accountability Act 1997 (Cth)

(hereafter the FMA Act) and the Financial Management and Accountability Regulations 1997 (Cth) (hereafter the FMA Regulations). Schedule 1AA of the FMA Regulations asserts that (in item 407.013 in Pt 4) one of the FMA objectives is assisting 'school communities to support the wellbeing of their students'. This objective was, as intended by the parliament, sufficient for providing a legislative umbrella for the chaplaincy programme and, in particular, for legitimising the agreement between the Commonwealth and the SUQ.

In Williams n.2, the HCA decided that such an aim could not be considered as included in the legislative power of Section 51 (xxiiiA). In particular, the USQ activity within the school could not be financially supported by making reference to benefits to students in Section 51 (xxiiiA) (Williams n.2, 38–48). The HCA argued that the word 'benefit' in Section 51(xxiiiA) has a distinctive lexical significance. That is, a pecuniary aid, service, attendance or commodity. This rendering of the word benefit was, as intended by the HCA, established by McTiernan in the BMA case.

However, there are strong indications that McTiernan intended to qualify what should not be considered as civil conscription, rather than explaining what a pharmaceutical benefit ought to be. There are two reasons supporting this analysis. Firstly, in the BMA case, a group of pharmacists, who represented the British Medical Association, argued that the list of subsidised prescriptions constituted a manifestation of a civil conscription.

> Latham C.J. It will be necessary to consider the effect of s. 7A with particular reference to the provision contained in s. 51 (xxiiiA.) of the Constitution with respect to civil conscription. It is contended for the plaintiffs that s. 7A compels doctors to practise their profession in a particular way, and therefore amounts to a form of civil conscription. (BMA, 27)

Civil conscription is the only explicit limiting criteria on the head of power set out in Section 51 (xxiiiA): '[T]he provision of […] pharmaceutical, sickness and hospital benefits, medical and dental services *(but not so as to authorize any form of civil conscription)*, benefits to students and family allowances' [my emphasis]. In particular, the BMA contested the constitutional legitimacy of the Pharmaceutical Benefits Act 1947–1949 and the related Pharmaceutical Benefits Regulations (S.R. 1948 No. 56–1949 No. 44). The statute required medical doctors (who wanted to prescribe a treatment from the list of subsidised medicines) and the pharmacists to use a government-approved form (ex. in Section 7(1) Pharmaceutical Benefits Act 1947–1949). The issue is

repeated several times in the decision. 'Rich J. I have confined my judgement to what I conceive to be the crucial question in this matter, namely, whether the provisions of s. 7A of the Act can be regarded as a form of civil conscription' (BMA, 1). The obligatory use of the form should be considered, according to the BMA, as a manifestation of a civil conscription which would make the Act exceed the legislative power of the Commonwealth. The majority of the HCA rejected the claim by explaining that 'a pecuniary aid, service, attendance or commodity' cannot be considered a form of civil conscription on the agencies which were asked to deliver a welfare policy. The full quote might give a clearer understanding of McTiernan's trope.

> The material aid given pursuant to a scheme to provide for human wants is commonly described by the word 'benefit'. When this word is applied to that subject matter it signifies a pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security: the word is also applied to such aids made available through a benefit society to members or their dependants. The word 'benefits' in par. (xxiiiA.) has a corresponding or *similar meaning.* [My emphasis] (BMA, 1)

The definition allowed for the use of similar significance and thus did not intend to be literally prescriptive.

So, the doctors and the pharmacists represented by the BMA, the HCA explained, are not precluded from using other forms, or indeed from using any pharmaceutical treatment, but the Commonwealth will only pay for the ones that are listed and that have been ordered via the form. Similar reasoning might apply to the beneficiaries. Those individuals who are considered unwell by a doctor, if they were willing to pay for it, would be able to obtain a similar service from a pharmacist. The point is made in a clear narrative by Latham C.J.: 'The dilemma which the legislative choice of the first of these alternatives presented to chemists of either coming in or staying out of the scheme does not seem to me to be civil conscription or to place the measure outside the power to provide pharmaceutical benefits' (BMA, 26).

In short, McTiernan's words, which mislead the HCA in Williams n.2, were not reported in the BMA case to explain that Section 51 (xxiiiA) does allow parliament to allocate only money and government-sponsored services to achieve a social aim. Rather, the definition says that Section 51 (xxiiiA) cannot underpin legislation that obliges agencies or beneficiaries to take advantage of such a policy. It is reasonable to suggest that, if the criteria set in the BMA case by

McTiernan were considered coherently in Williams n.2, they would have supported the legitimacy of the FFLA Act, the FMA and finally, the SUQ Funding Agreement which provided pastoral care in Mr Williams's school. In Williams n.2, the government policy's aims, as described in the NSCSWP, were '[t]o assist school communities to support the wellbeing of their students, and they should have been compatible, within the margin of appreciation that is normally allocated to a Parliament, with the wording of Section 51 (xxiiiA)'. Furthermore, like the Pharmaceutical Benefits Act 1947–1949, the method the government chose to deliver the NSCSWP's aims included, as McTiernan stated in the BMA case, a pecuniary aid, service, attendance or commodity that both the agencies (the public schools and the entities that offer the pastoral care) and the beneficiaries might never use. Lastly, like the doctors in the BMA case, in Williams n.2, it was a third-party institution (the state's education policies) that defined who should be considered a beneficiary.

There is indeed a correlation between McTiernan's test and the concept of a benefit in Section 51 (xxiiiA), yet, McTiernan's trope cannot be used to define what a benefit *must be*. The conclusion appears to have been reached without adequate critical engagement. McTiernan simply stated that the correlation between the Australian open market for medical and pharmaceutical services (and goods), and a pecuniary aid, service, attendance or commodity cannot be constructed as a civil conscription. Again, Latham comes to reinforce this narrative: 'If persons or institutions choose to remain outside the benefits of the scheme there is not in my opinion anything in the Act to compel them to accept those benefits […] It only offers to them an opportunity of coming into the Commonwealth scheme if they think fit' (BMA, 62). A similar narrative should be applied to Williams n.2.

In addition, it cannot be argued that a benefit to students should be tested in practice. In the BMA case, the HCA does engage the issue directly. It was not possible, the British Medical Association argued, to make a direct correlation between the Pharmaceutical Benefits Act 1947–1949 and an effective patient benefit. Given that a benefit to patients was a legitimacy requirement of the Pharmaceutical Benefits Act and that it could not be ascertained in all instances, the British Medical Association argued that the Act should be considered unconstitutional. However, the majority of the HCA rejected the reasoning and explained that an allocation of services or goods which provides for unforced demands should be considered, in principle, as beneficial. So, a statutory measure that is intended for the benefit of patients does not need to be beneficial in practice for all the recipients of the policy. It is also plausible to

assume that, at a general level, policies which provide gratuitous allocations of resources (money and services) towards a constitutionally recognised policy end will produce a beneficial effect. If all the narratives taken from the BMA criteria were applied correctly in Williams n.2, it would be very difficult to dismiss, as the HCA did, the Commonwealth's argument that considers its statutory measure as legitimate. The Commonwealth policy provided financial support for a service that a school might elect to provide and that might benefit some students.

In BMA, there is little help from Dixon's definition of the word 'benefit'. His rendering of the word was not accepted by the majority of the HCA.

> The general sense of the word 'benefit' covers anything tending to the profit advantage gain or good of a man and is very indefinite. But it is used in a rather more specialized application in reference to what are now called social services; it is used as a word covering provisions made to meet needs arising from special conditions with a recognized incidence in communities or from particular situations or pursuits such as that of a student, whether the provision takes the form of money payments or the supply of things or services. (BMA, 9)

The definition is lexically well formulated, but it was rejected by the majority because the reasoning that followed was perceived as unconvincing. In particular, none of the Justices considered Section 7A(2) of the Pharmaceutical Benefits Act 1947–1949 as incompatible, as justice Dixon did, with the Constitution.

However, in Williams n.2, Dixon's minority opinion is referenced in tandem with McTiernan's qualification, as they were part of an uninterrupted line of reasoning (Williams, 30–40). A closer reading of the case would note that McTiernan's qualification restricted the concept of civil conscription, whereas Dixon's narrative attempted, but quite importantly failed to convince the rest of the judges that Section 51 (xxiiiA) did not include a civil conscription limitation for pharmaceutical policies. In Dixon's opinion, the civil conscription restriction would apply only to medical and dental services: 'The purpose no doubt was to prevent laws made with respect to medical or dental services imposing duties which would amount to a form of civil conscription' (BMA, 11). So, the pairing of Dixon's trope with McTiernan's test should be considered as a manifest casuistry. Dixon's narrative denied the relevance of civil conscription that McTiernan sought to qualify.

It is reasonable to suggest that the HCA misread the case. McTiernan's test of civil conscription and Dixon's minority opinion are drawn from different assumptions and produce different conclusions in the BMA case. It is the case even without considering that Dixon's minority opinion should not have been considered binding in Williams n.2. The HCA surmised, for an unexplained reason, that both Justices' opinions were equivalent, but failed to apply them to the object they were originally designed to engage.

Conclusion

In Williams n.2, the HCA confirmed its reputation for being an uncommon court in a common law system. It has done so in a way that is, perhaps, unique for a final appellate jurisdiction in a modern democratic society. It misinterpreted the correlation between the constitutional allocation of legislative competences in a federal system and the parliamentary prerogative to draft legislation which engages a human want. I argued that constitutional law in a liberal and utilitarian society should be considered as a set of prescriptions and innumerate principles that provides the limits of the political sphere. Those limits need, for very good reasons, to be protected, yet the debate within the walls of parliament cannot be policed. A comparative analysis shows, for instance, that legislation might have similar intentions in areas such as paid parental leave, but the way in which such legislation engages parents' desires changes drastically. These variations might be difficult to justify rationally. They might produce a negative financial impact on the community and a large relocation of resources from other essential public services, yet it is an exclusive parliamentary prerogative to set up the best policy, within the limit of reasonableness, to engage political desires.

However, in Williams n.2, the HCA concluded that a policy supporting non-denominational pastoral care for students was not an appropriate legislative response to a human want. In this essay, I explained that Williams n.2 is a precarious decision in terms of two sets of self-standing explanations. Firstly, a desire to have religious-based pastoral care in a public school cannot be considered antithetical to the liberal underpinning of a modern society. Given that the Australian Constitution does not impose a separation between religion and public institutions, the unforced desire to access religious-based pastoral care in public schools should be considered as a manifestation of a human want. In the literature on utilitarianism, there is little to suggest that the manifestation of a desire to obtain a benefit from a religious organisation should be perceived as incompatible with the principles endorsed by a utilitarian society. Even the most robust argument for the separation between state and church accepts, for instance, that education policies might

accommodate the desire to know about religion and that public money might be used to support such a policy. In Williams n.2, the debate is, by way of a comparison of educational policies that in Australia are the state's competence, subdued. In Williams n.2, students are not forced to learn about religion and institutions are not compelled to teach it. The pastoral care scheme allowed students attending schools (that requested access to a government scheme) to use a service. This political desire should be considered as a manifestation of a 'human want' that a parliament might decide to engage.

The second argument for considering Williams n.2 as unsupported is internal. There are strong indications, from the reading of the decision, that the HCA misread its own line of authority. In Williams n.2, the court asserted that the parliament has the prerogative to legislate on policies that provide benefits only in the form of 'a pecuniary aid, service, attendance or commodity'. The services have to be used to meet a human want, as defined by Dixon. Both restrictions are not mirrored in the Constitution.

The limits on the parliament's discretion are instead taken from a line of authority which commenced in 1949 with an position put forward by the British Medical Association. However, in the BMA case, the majority opinion repeatedly and consistently considers the parliament's competence to set policies in areas covered by Section 51(xxiiiA) as only being limited by the prohibition of civil conscription. Given that the policy engaged in the BMA case, which allowed for the free distribution of pharmaceutical goods, was, in McTiernan's words, 'a pecuniary aid, service, attendance or commodity', it could not be considered as a form of civil conscription. The policy did not prevent doctors and chemists from prescribing and selling medicines which were not subsidised. Thus, the requirement of 'a pecuniary aid, service, attendance or commodity' was not a requirement of the benefits, but a test for assessing whether the agencies that deliver such a policy and the beneficiaries have been forced to accept it. If McTiernan's test had been applied correctly in Williams n.2, it would have denied Mr Williams's claim. The schools were not forced to adopt the government policy and the students were not obliged to take advantage of it. A further indication of the HCA mishandling its own line of authority is the reference to Dixon's minority opinion in the BMA case. In Williams, Dixon's narrative is coupled with one of McTiernan's, but the two decisions are cognitively dissonant. Dixon's reasoning is rejected by the majority and its qualification does not engage the same object as in McTiernan's test. The coupling of the two qualifications shows either a lack of cognitive

awareness of the Justices or a misunderstanding of the role of final appellate jurisdictions in modern liberal democracies.

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