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Geoghegan J.'s views no doubt are well founded but did he approach the problem from the wrong direction? Is it the executive and legislature that are invading the preserve of the Judiciary?

"The practice of vesting functions which are other than Judicial in nature in Judges has attracted some significant attention and concern in other comparable jurisdictions."

The practice of vesting functions which are other than Judicial in nature in Judges has attracted some significant attention and concern in other comparable jurisdictions.It has been argued in this and other jurisdictions that a Judge sitting on extra Judicial Inquiries is improper and in some instances unconstitutional.The basis of the argument is three-fold

1. A sitting Judge as chairman of a Tribunal of Inquiry is open to the criticism of partiality and bias.
2. A sitting Judge in such a position assumes an unacceptably politicised role and function.
3. The Judicial system as a functioning organ of state may be undermined and debilitated by the alternative use of the Judiciary in such extra Judicial functions.

The US Position

The issue has been debated extensively in the United States. Canon 5 of the Code of Conduct relied upon by the US judiciary[5] states as follows:

"Valuable services have been rendered in the past to the States and the Nation by Judges appointed by the executive to undertake important extra curial assignments. The appropriateness of conferring these assignments on Judges must be reassessed, however, in the light of the demands on Judicial resources created by today's crowded dockets and the need to protect our Courts from involvement in extra Judicial matters that may prove controversial. The Judge should not be expected or permitted to expect governmental appointments that could interfere with the effectiveness and independence of the Judiciary"

In an article entitled *'Extra Judicial Work for Judges: The Views of Mr Justice Stone*[6] published in 1953, Mason states that in the United States Chief Justice Stone fought strenuously to preserve the Judiciary's integrity and independence. He felt obliged to avoid 'off Court' assignments at all costs which threatened even the slightest involvement in politics. In 1942, shortly after Justice Robert's had been detailed to probe the Pearl Harbour catastrophe, Chief Justice Stone was asked by Franklin D. Roosevelt to head an investigatory commission into the rubber industry.

The President envisioned that the recommendation of such an eminent Judicial figure might restore peace among his feuding aides, placate congress, and the citizens in general.

Stone declined the invitation and in his reply, the learned Judge stated:

"Apart from the generally recognised consideration that it is highly undesirable for a Judge to engage actively in public or private undertakings other than the performance of it's Judicial office, there are special considerations which must be regarded as controlling here."

He went on to say;

"A Judge, and especially a Chief Justice, cannot engage in political debate or make public defence of his acts. When his action is Judicial he must always rely on the support of the defined record upon which his action is based and of the opinion in which he and his associates unite as stating the ground of the decision. But when he participates in the action of the executive or legislative departments he is without those supports. He exposes himself to attack and indeed invites it, which, because of his peculiar situation inevitably impairs his value as a Judge and the appropriate influence of his office."[7]

Lewis J. Liman addresses this issue in his article *"The Constitutional Infirmities of the United States Sentencing Commission"*[8]:

"The Judiciary in our tripartite system is limited to deciding cases and controversies, and exercising those non judicative administrative powers that are essential to the running of the Courts."

He argues[9] that the case and controversies requirement and the principle of Judicial independence forbids Judges from making determinations outside the case and controversy context on matters external to the administration of justice or from entering into a formal working relationship with members of other branches of government.

Chief Justice Warren made the following observations when he reflected on his initial refusal to participate in the commission set up to inquire into President Kennedy's death.[11]

TRIBUNALS & THE PARAMETERS OF THE JUDICIAL FUNCTION

John Quirke BL *assesses the constitutional implications of the appointment of members of the judiciary to chair non-judicial inquiries, such as Tribunals of Inquiry under the Tribunals of Inquiry Acts.*

Introduction

In recent years there has been a dramatic increase in the numbers of Tribunals of Inquiry. The media-driven publicity of the issues inquired into by these Tribunals has brought the workings of Tribunals of Inquiry into the centre of public attention. The complex nature of these workings (and misrepresentations by the press) have, arguably, caused the function of the Tribunal to be misunderstood by the public in general which in turn is having an effect on the Tribunal itself. Thus, the Tribunal may be gradually turning into something which it was never designed to be.

It is also arguable that any misunderstanding by the public of the role of tribunals is added to by members of the Judiciary being appointed to act as chairmen of Tribunals. This article will examine the role of Judges as chairmen and consider whether the premise that they are the most suitable persons for the job is a viable one.

The Tribunal Of Inquiry and other extra-Judicial Commissions

The Tribunal of Inquiry is a creature of the legislature, inherited from English legislation at the foundation of our state. Its main purpose is to allay public fears by inquiring into matters of urgent public importance.[1] As a consequence it has a legal, social and political effect on our society. The correction and improvement of social policy by enactment is a fundamental consequence of these inquiries.

It is true that familiarity of Judges with legal matters, their legal training and their fact finding role as Judges would appear to make them the most suitable people for the job of chairman but are these the only relevant considerations? Do such appointments in fact create more problems for Tribunals of Inquiry than they solve? The most obvious misconception of Tribunals of Inquiry (not helped by bad reporting) is that these are 'Judicial Inquiries'. While tribunals may be 'judicial' in the sense that they must be conducted in accordance with the principles of natural justice, they are not 'judicial' in the sense of determining the rights and obligations of parties. This subtle but vital distinction is perhaps not fully appreciated by the public and certain sections of the media. Ironically, a major reason given for the appointment of Judges to chair Tribunals is to make them appear more like Courts of law and to give them the import of Judicial authority.

This appearance of a court with which Tribunals are cloaked, distorts the general public's perception and magnifies media interest. The result of this is that the public can become disgruntled with the operation of a Tribunal as they may believe that its purpose is the same as that of a Court of law, with a clear and distinct outcome, a winner and a loser, a right and a wrong. For a society so used to an adversarial system of law it causes confusion to put Judges of that system in charge of an entirely different one, namely, the inquisitorial system. The public sees a Judge and expects all the clarity and finality that a Court case brings; they are misled into believing that this is the purpose of the Tribunals. This misconception may cause Tribunals to become distorted to appease the public or to be dismantled altogether, outcomes which would not be satisfactory.[2]

It is arguable that the entire perception of a Tribunal would be changed if some person other than a Judge was chairman. It is manifest that no imperative exists constitutional or other, which requires a sitting Judge to act as chairman of a Tribunal of Inquiry. Indeed, any element of necessity would be further undermined by the existence of ample and amply qualified alternatives in relation to the chairmanship of inquiries.[3]

The effect on the Judiciary of Judges taking on extra-Judicial activity.

Geoghegan J. stated in *Haughey -v- Moriarty and others.*[4]

> " On the question of appointing a Judge as sole member of the Tribunal, I cannot see that this in any way involves an infringement of the constitutional separation of powers. The Tribunal is not in any sense a Court and there is nothing in the 1921 act which prevents a person oth a Judge or indeed a person other than a lawyer from a sole member or chairman of a Tribunal. It may w matter of legitimate public debate as to the extent to it is appropriate that Judges should be chairmen of t commissions, Tribunals etc. but that debate would arise out of a legitimate concern as to a potential con interest in the future. It could not be suggested that t anything illegal or unconstitutional about Judges appointed to any of these positions provided of cour they do not receive any remuneration. Traditionally been thought that a Judge because of his profe training and independence is ideally suited to positions and particularly of course if the body has facts. But in Mr Justice Moriarty becoming sole men this Tribunal there is in no sense some invasion Courts into the realm of the legislature or the exec cannot see, therefore, that the argument put forw sustainable.'

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"First, it is not in the spirit of constitutional separation of powers to have a member of the Supreme Court sit on a presidential commission; second, it would distract a justice from the work of the Court, which had a heavy docket; and third, it was impossible to foresee what litigation such a commission might spawn , with resulting disqualification of the justice from sitting in such cases."

U.S. Judges have consistently recognised the boundaries to extra Judicial functions, declining positions which might have compromised their independence. Moreover, the Judiciary persistently have refused to accept remuneration for performing extra Judicial government functions.

The US courts have also examined the issue. In *Mistretta -v- US,*[10] for instance, the U.S. Supreme Court had to consider the constitutionality of the Sentencing Reform Act 1984, and the propriety of article three Judges sitting on a sentencing commission which from time to time would issue binding guidelines in respect of sentencing policy. Although the Supreme Court upheld the constitutionality of the act it did so on a narrow basis. The overriding principle expounded by the Court is as follows:

"The Ultimate inquiry remains whether a particular extra Judicial assignment undermines the integrity of the Judicial branch."

In relation to the matter of Judges sitting on the Sentencing commission, the Court held that any possibility of bias could be facilitated by the recusal of the Judge in question. However, the Court expressed itself to be troubled and concerned about the politicisation of the office. The Court stated as follows:

"We are somewhat more troubled by the petitioner's argument that the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial branch. While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from Judiciary involvement in the making of policy. The legitimacy of the Judicial branch ultimately depends on its reputation for impartiality and non partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colours of Judicial action."

The Irish Consitiutional Position

Perhaps the concerns of *Mistretta* apply equally to the situation in this jurisdiction. The recommendations required by chairmen of Tribunals of Inquiry are not matters 'uniquely within the ken of Judges'. Moreover, it is arguable that the chairman is positively required to invest in 'the legislative business of determining what conduct should be criminalised (as does the chairman of the law reform commission) or the executive business of enforcing law' as a consequence of his recommendations on policy.

There is a danger that Chairmen of Tribunals may be seen to engage in policy making by virtue of the fact that they are enjoined to make recommendations in respect of legislative policy in areas not necessarily within their expertise and experience.

Sentiments similar to those of the US judiciary were expressed by Chief Justice O'Kennedy who was one of the principle architects of the free state constitution when he was requested by the then Taoiseach, Eamon deValera to assume the office and functions of the Governor General. O'Kennedy C.J. replied with a strongly worded memorandum on the 1st November 1932.[11]

"The complication of the Judiciary with both legislature and executive which would result from the proposal in question does not arise out of any constitutional or other necessity and is, therefore, earnestly to be deprecated."

The argument in relation to politicisation and partiality on the part of the Judiciary was recognised in a more contemporary context by the Constitution Review Group. In their report (1996) in relation to the independence of the Judiciary the review group stated as follows:

"Many Judges hold honorary appointments, often charitable. Judges have often been appointed as chairpersons of Tribunals of Inquiry. Indeed the government tends increasingly to appoint Judges as chairpersons of groups or bodies required to report on policy issues. This may be undesirable as Judges risk becoming, Judicially identified with the policies of the group or body concerned, or may be put in any position of either critic or supporter of the government. It is important for public confidence in the Judiciary and public perception of their independence and impartiality that Judges do not directly or indirectly make public statements on matters of policy. The Review Group recognises, however, that there may be certain areas, for example relating to the administration of justice, where it is proper for Judges to participate in a group or body whose report may have a policy dimension.

The Review Group considers that the prohibition on Judges taking up paid appointments should remain, but in addition, it considers that they should be prohibited from

"There is a danger that Chairmen of Tribunals may be seen to engage in policy making by virtue of the fact that they are enjoined to make recommendations in respect of legislative policy in areas not necessarily within their expertise and experience."

taking any position which is inconsistent with the office of Judge under the constitution."

The recommendation assumes added significance when one considers that the US constitution is not as strong as Bunreacht na hEireann in relation to preserving the independence of the Judiciary. There is no provision in the US constitution corresponding to Article 35.3 which provides for the prohibition on a Judge holding 'any other office or position of emolument'. In fact it may be the case that the inclusion of this

article precludes present Irish Judges from taking positions which are outside their Judicial remit or directly involved in the administration of Justice.

Article 35.3 states:

"No Judge shall be eligible to be a member of eithe of the Oireachtas or to hold any other office or pos emolument."

As Chairman of a Tribunal of Inquiry, a Judge is not a his Judicial capacity, he is holding an altogether d position. To say that this position is extra judicial is so misleading. It is not a position which is over and ab position as a Superior Court Judge and for which he r no remuneration. It is not 'Extra'. The interference Judicial activity is absolute and he may be in that positi period in excess of four years. Were a Judge to perfo judicial functions and then hold another position unrel the administration of justice (and for which he would additional remuneration from whatever source) he almost certainly be considered to be in breach of artic even if this 'extra' remuneration came from the Judicial The Judge's function as a Judge is entirely superseded function as chairman and he receives a salary. He perilously close to appearing to hold another posit emolument. The source of his remuneration is less relev

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Shortage of Judges.

When the extra judicial activity of a Judge causes a detri effect on the operation of the Judiciary itself and tha judicial activity is within the sphere of either of the oth branches of government, there may be a breach separation of powers.

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The only difference with the appointment of a judge to a Tribunal is that he does not perform his judicial functions any more, therefore he does not require an additional salary. His only function is as chairman until the conclusion of the Inquiry. He is receiving his salary for holding a position which is extra judicial and this is arguably unconstitutional.

Shortage of Judges.

When the extra judicial activity of a Judge causes a detrimental effect on the operation of the Judiciary itself and that extra judicial activity is within the sphere of either of the other two branches of government, there may be a breach of the separation of powers.

This might occur if a significant percentage of the Judiciary were excluded as a consequence of this extra curial activity. When one considers the very small number of Superior Court Judges in our Jurisdiction it is very detrimental to the Judicial system when: (a) a number of Judges at a time are required to sit as chairmen of protracted Tribunals of Inquiry and (b) having conducted the Inquiry and made recommendations in respect of legislative policy, the judges must recuse themselves from future cases where there may be a perception of bias.

The proliferation of Tribunals of inquiry in recent years also adds to the significance of this argument. Indeed, this argument was adverted to by Chief Justice O'Kennedy at a time when Tribunals of Inquiry were set up with less regularity.

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Conclusion

The appropriateness of appointing sitting Judges as chairman of Tribunals of Inquiry must be reassessed in the light of the very significant demands on judicial resources created by contemporary Court systems.

It would appear that even if it is legally within the parameters of a Judge's remit to chair such extra judicial Tribunals they are not the ideal people for the job. The advantages they offer in legal expertise are outweighed by the disadvantages such as the interference and disruption caused to the judiciary itself as courts strain under heavy workloads through shortage of Judges. Their only real advantage over a suitably qualified Senior Counsel is the perception of 'Judicial weight'. This, ironically (a) creates a distorted public perception as it distorts what the true nature of a Tribunal is; a fact finding exercise, not a court case with winners and losers, and (b) leads to an undermining of the independence of the Judiciary.

Lowering the profile of Tribunals by appointing non Judicial Chairpersons would in this writers opinion relieve pressures on the already overworked court system and would remove any concern that there was a breach of the separation of powers.

Finally it would facilitate a better public understanding of the purpose and operation of Tribunals.●

1. The Supreme Court in *Goodman International -v- Hamilton (No.1)* {1992} IR 542 indicated that there was an inherent power in the Oireachtas in pursuit of its legislative functions to set up a Tribunal for the purpose of inquiring into a matter which may lead to legislative enactment.
2. Some terms of reference require the chairman to make recommendations on their findings. This is arguably outside the scope of a chairman's remit.
3. For example, the appointment of Roderick Murphy S.C. (now Mr. Justice Murphy) as Chairman of the inquiry into sex abuse in swimming albeit that this was not a Tribunal of inquiry under the relevant legislation.
4. Unreported, High Court, Geoghegan J. 20th January 1998 at p11.
5. This extract was obtained from an administrative office of the United States Courts.
6. Mason, A.T., *Extra Judicial work for Judges: The views of Mr. Justice Stone.* Vol. 67 Harv. LR 193.
7. The Sentencing Commission which was the subject matter of the *Mistretta* case has come under criticism for similar reasons.
8. Lewis J. Linman., *The Constitutional Infirmities of the United States Sentencing Commission.* Yale Law Journal: Vol. 96; 1363 (1987)
9. At pg. 1378.
10. *Mistretta* -v- U.S.109 S. CT 647 (1989).
11. See Appendix B of McMahon (1982) 17 IR Jur 142.