

# Lessons from Anti-Poverty Action in Ireland: Flexibility, Failure and the Pitfalls of a ‘Fourth Branch’ Model

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Eoin Carolan\* 

## Abstract

This article reviews the experience of Ireland’s Combat Poverty Agency and asks what lessons it may have for fourth branch scholarship. The lesson of the Agency is, in part, one about the pitfalls for novel institutions operating within a traditional tripartite model of constitutional government. The article also suggests, however, that the Combat Poverty Agency’s history may point to the positive potential for the design and operational strategies of non-traditional bodies charged with the promotion of specific social or economic goals. In so doing some reservations about both the specific implications and overall utility of framing these bodies in ‘fourth branch’ terms are also raised. These include concerns regarding the distinctiveness and (relatedly) authority of some conceptions of a ‘fourth branch’. In particular, however, the article queries whether the elevation of independent agencies to ‘branch’ status is always beneficial; and whether, in fact, the location of anti-poverty agencies at a sub-constitutional level may, under certain conditions at least, offer advantages in terms of flexibility and practical problem-solving power.

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## I Introduction

The recent revival of academic interest in ‘fourth branch’ institutions points, once again, to the limitations of classical liberal models of government. For decades, there has been a recurring interest in constitutional theory in the identification or establishment of novel governmental ‘branches’. Whether conceived as an alternative<sup>1</sup> or a supplement,<sup>2</sup> or configured as having

1. Daryl J Levinson and Richard H Pildes, ‘Separation of Parties, not Powers’ (2006) 119(8) *Harvard Law Review* 2311; Eoin Carolan, *The New Separation of Powers* (Oxford University Press, 2009).
2. See Peter Strauss, ‘The Place of Agencies in Government: Separation of Powers and the Fourth Branch’ (1984) 84 *Columbia Law Review* 573; Frank Vibert, *The Rise of the Unelected* (Cambridge University Press, 2007).

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\* Professor of Law, University College Dublin. This is submitted as part of a special symposium on fourth branch institutions and inequality. I am very grateful to all participants in the symposium for their helpful comments, and in particular to David Kenny who kindly acted as discussant.

four,<sup>3</sup> five<sup>4</sup> or even seven<sup>5</sup> branches or powers, each of these theories reflects a sense that the traditional tripartite model may promise too much while prescribing too little. While the three-branch model may — perhaps — have once provided a comprehensive account of government functions, it does not easily capture or correspond to many aspects of contemporary governance.

Fourth branch scholarship can be seen as a response to this descriptive deficit: an effort to adapt and apply the promise of constitutionalism to the expanded responsibilities of the modern state. As many of the case studies covered in this symposium demonstrate, there is potential in a strategy that defines and deifies a ‘new’ institution as an independent equivalent to the traditional branches. By contrast, this article considers whether there are lessons to be drawn from the opposite case: the novel anti-poverty commission that ‘fails’.

The basis for this reflection is the experience of Ireland’s Combat Poverty Agency from its establishment in 1986 through to its absorption into the Department of Social Protection in 2008. As even the basic details of its demise indicate that the experience is one which speaks directly to the concerns with independence, entrenchment and insulation from political control that have always been a feature of fourth branch scholarship. The lesson of the Agency is, in part, one about the pitfalls for novel institutions operating within a traditional tripartite model of constitutional government. The article also suggests, however, that the Combat Poverty Agency’s history may point to the positive potential for the design and operational strategies of non-traditional bodies charged with the promotion of specific social or economic goals. In so doing, some reservations about both the specific implications and overall utility of framing these bodies in ‘fourth branch’ terms are also raised. These include concerns regarding the distinctiveness and (relatedly) authority of some conceptions of a ‘fourth branch’. Finally, the article queries whether the elevation of independent agencies to ‘branch’ status is always beneficial; and whether locating anti-poverty agencies at a sub-constitutional level may, under certain conditions at least, enhance their flexibility and problem-solving power.

## II The Combat Poverty Agency

### A Establishment

The Combat Poverty Agency (‘Agency’)<sup>6</sup> was established as a statutory body under the *Combat Poverty Agency Act 1986* (Ireland) (‘Act’).<sup>7</sup> The establishment of the Agency was preceded by the creation of a non-statutory Combat Poverty Organisation (‘CPO’), which was asked to review and submit plans for a new specific anti-poverty body to the relevant Minister.

The CPO review identified the critical need for anti-poverty policy to be an integral part of national economic and social planning and for any agency to have a ‘direct involvement in the

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3. Strauss (n 2).

4. Henry J Merry, *Five-Branch Government: The Full Measure of Constitutional Checks and Balances* (University of Illinois Press, 1980).

5. Giovanni Boggetti et al (ed), *Dividing powers: A Theory of the Separation of Powers*, ed Antonia Baraggia and Luca Pietro Vanoni, tr Kieren Bailey (Wolters Kluwer, 2017).

6. The use of ‘Agency’ here reflects the title of the ‘CPA’. It does not necessarily identify the CPA as an ‘agency’ within the specific meaning of the US ‘fourth branch’ literature on administrative agencies. See Strauss (n 2).

7. *Combat Poverty Agency Act 1986* (Ireland).

planning process so as to help in determining priorities for effective action in the fight against poverty'.<sup>8</sup>

Given how clientelism has long been a core feature of political and administrative decision-making in Ireland, it is of some note that the Minister responsible for the Bill expressly disclaimed the possibility that the proposed Agency would provide a new source of discretionary funding. The Agency's role was framed not in terms of the direct delivery of anti-poverty goods but rather in terms of its expertise and independence.

In particular, the justification for the Agency was articulated as making the goal of combatting poverty more visible within, across and outside government. Importantly, this was not limited to advice on outputs in the sense of specific poverty-oriented government schemes. It also included the development of methods of ensuring that the goal of combatting poverty was a more prominent input into government action. As the Minister put it: 'the notion of poverty itself is, I feel, a somewhat vague one to many people and it will be important for the new agency to "operationalise" the concept and make it meaningful in concrete terms'.<sup>9</sup>

## B *The Combat Poverty Agency Act 1986 (Ireland)*

The centrality of this profile-raising role was reflected in the statutory scheme establishing the Agency. The long title of the Act stated that it was:

An Act to provide for the establishment of a body (to be known as the Combat Poverty Agency) to advise the Minister for Social Welfare on all aspects of economic and social planning in relation to poverty in the State, to initiate measures aimed at overcoming such poverty and to evaluate such measures, to examine the nature, causes and extent of such poverty and for that purpose to promote, commission and interpret research [and] to promote greater public understanding of the nature, causes and extent of such poverty.<sup>10</sup>

More significantly, it also found expression in how the functions of the Agency were statutorily defined. Section 4 of the Act provided that:

The Agency shall have the following general functions—

- (a) advising and making recommendations to the Minister on all aspects of economic and social planning in relation to poverty in the State;
- (b) the initiation of measures aimed at overcoming poverty in the State and the evaluation of such measures;
- (c) the examination of the nature, causes and extent of poverty in the State and for that purpose the promotion, commission and interpretation of research;
- (d) the promotion of greater public understanding of the nature, causes and extent of poverty in the State and the measures necessary to overcome such poverty.

Notably, the Act specifically provided that these functions included an independent remit to identify potential new policies and programmes for the purpose of overcoming poverty (section 4(2)(b)); and an independent entitlement to establish and maintain contact with other

8. Ireland, *Parliamentary Debates*, Seanad Éireann — Combat Poverty Agency Bill 1985 (Ireland) Committee, 15 May 1985, (Séamus Pattison, Minister of State at the Department of Social Welfare).

9. Ireland, *Parliamentary Debates*, Dáil Éireann, 25 February 1986, (Gemma Hussey, Minister for Social Welfare).

10. Long Title, *Combat Poverty Agency Act 1986* (Ireland) (n 7).

government departments, public bodies and voluntary agencies ‘as seem appropriate to the Agency to enable it to perform its other functions’ (section 4(2)(e)). This was subject to a requirement under section 5 for the Agency to submit a strategic plan to the relevant Minister ‘outlining the Agency’s projected activities’ over a 3 year period for his or her approval.

### C On Jurisdiction and Goal Choice

There are a number of aspects of the statutory scheme that merit comment at this point.

The first is that the Act, by comparison to most other Irish legislation establishing statutory bodies, is relatively short and succinct. Aside from sections 4 and 5, the remainder of the Act is directed to the particular rules and principles pertaining to the Agency’s members, and the holding of its meetings. It is possible that this reflected the fact that the Agency’s powers were — by comparison with most other statutory bodies — somewhat unusual in that they do not clearly involve the exercise of anything approximating to delegated legislative or quasi-judicial functions. As such, the Agency did not obviously raise concerns regarding the delegation to it of broad rule-making powers. Irish constitutional law (at least at the time)<sup>11</sup> was that any statutory delegation of a rule-making power was permissible only if the parent Act included a relatively prescriptive statement of legislative principles and policies.<sup>12</sup> Whatever the reason, however, the consequence was that the Agency was subject to relatively few specific statutory constraints.

The second, and related point, is that the functions of the Agency are expressed in language which can broadly be characterised as goal-oriented. The Agency is directed by the Oireachtas to pursue certain broad policy objectives with little in the way of specific guidance as to how this is to be achieved. Given the already-observed absence of other forms of statutory constraint, this necessarily vested a significant degree of autonomy in the Agency itself in determining how best to pursue these goals.

Thirdly, the Agency was also vested with a range of differential functions. In general terms, these can be defined as the giving of advice; the initiation of policy measures; the promotion of research and acquisition of specialist expertise; and the education of political and public opinion. These functions crossed a range of government departments and involved, in some instances, quite different forms of professional expertise. This underlined the point that the Agency role — and assumed expertise — was goal-oriented rather than function-specific.

The broad autonomy of the Agency in this regard was reinforced by a fourth feature of note: the specific entitlement under section 4(2)(e) to establish and maintain contact with bodies across and outside government as it saw fit. This may, in part, have been provided in recognition of the historical involvement of a range of voluntary organisations in anti-poverty actions. However, it is also of some structural significance in its somewhat unorthodox disregard of the traditional boundaries between public and private spheres, between lines of political accountability and between central and local government.

Taken together, this meant that the Agency enjoyed a considerable degree of autonomy in interpreting the scope of its statutory powers. It is well known that defining a delegate’s functions in terms of a particular goal inevitably requires the delegate to make extensive choices in pursuing that goal. The necessity for independent judgement is expanded when the delegate is also required to make choices between goals. In the Agency’s case, this theoretical autonomy was further increased

11. There is arguably a move away from this test in more recent decisions like *Bederev v Ireland* [2016] 3 IR 1; *O’Sullivan v Sea Fisheries Protection Authority* [2017] 3 IR 751.

12. *Cityview Press v an Chomhairle Oilina* [1980] IR 381.

by the absence of more conventional jurisdictional limits. Its functions under section 4(1) arguably straddled traditional separation of powers boundaries, while section 4(2) expressly permitted it to act across formal institutional and political lines. Thus, the Agency was not only entitled to but was practically required to reflect on, and make independent choices, about the purpose, scope and most appropriate sphere(s) of its activities.

One explanation for this expansive approach to the Agency's functions and jurisdiction may have been the absence on its part of any formal powers of accountability or enforcement. The view may have been that the Agency could be conferred with a form-free jurisdictional mandate precisely because it lacked either rule-making or adjudicative powers.

## D Performance of the Agency

In general terms, it is difficult to form definitive judgments as to the success — or even causal contributions — of the Agency during its lifetime. That is particularly so, given that the statistical successes during this period in reducing levels of poverty and relative deprivation coincided with sustained improvements in the overall Irish economy. Broadly speaking, poverty levels decreased at the same time that employment levels soared, wages increased, asset values rose and government surpluses became common. Moreover, the end of the Agency coincided with an increase in poverty and relative deprivation — but also with a major economic crisis. This makes it difficult to isolate the contribution made, if at all, by the actions of the Agency.

Having said that — and even allowing for the potential bias that follows from the fact that the domestic literature on the Agency was largely produced by scholars with an interest in the success of its work<sup>13</sup> — it does seem fair to accept that the Agency had some influence on government policy during this period. This took various forms.

The Agency was a key actor in the development of the first National Anti-Poverty Strategy ('NAPS') in 1997. This was a 10-years strategy for poverty reduction in Ireland. It identified five key areas for consideration in tackling poverty: income adequacy, unemployment, educational disadvantage, urban concentrations of poverty and rural poverty. The NAPS was reviewed in 2001 to include updated targets for the original five themes, new targets on the additional themes of housing/accommodation and health, and new associated targets and actions on child poverty, women's poverty, older people, travellers, migrants and members of Black and other minority ethnic groups, and people with disabilities. A second 10-year NAPS was published in 2007.

The Agency was also heavily involved — as its sponsoring Minister had hoped — in the development of practical methodologies for the identification and evaluation of anti-poverty effects. One of the most influential aspects of the Agency's work was on the development and promotion within Irish officialdom and the public of a multi-dimensional conception of poverty.

The NAPS contained a government commitment to a concept of relative poverty that 'recognises that people have social, emotional and cultural needs as well as physical needs' and was 'thus ... multi-dimensional, dynamic and impacts on individuals, households and communities'.<sup>14</sup> The NAPS thereby defined poverty in the following terms:

People are living in poverty if their income and resources (material, cultural and social) are so inadequate as to preclude them from having a standard of living which is regarded as acceptable by Irish society

13. See Combat Poverty Agency (Ireland), *23 Years working for a Poverty-Free Ireland* (2009).

14. Government of Ireland, *National Anti-Poverty Strategy* (1997) 2.

generally. As a result of inadequate income and resources people may be excluded and marginalised from participating in activities which are considered the norm for other people in society.

The Agency commissioned a number of research reports into the technical aspects of anti-poverty analysis. This led ultimately to the introduction of a formal commitment to poverty proofing in the NAPS. This was given effect to the following year when the Cabinet imposed a requirement on government departments that all memoranda for Cabinet on ‘significant policy proposals’<sup>15</sup> indicate clearly their impact on groups in poverty or at risk of poverty.

Furthermore, the Agency was actively involved in efforts after its introduction to educate government departments about the existence and scope of the obligations contained within the NAPS, and on how to comply with it. This included the production of guidelines to enhance departmental capacity in the area and the development of an analytical framework to identify where the obligation arose. This framework required departments: to identify the goals of their proposed measures; to consider specific questions concerning their potential impact on the living situation of citizens; to evaluate the rationale for any identified impacts; and in so doing consider whether there were specific at-risk groups affected. This was intended by the Agency to guard against a perceived risk that the required anti-poverty assessments would be confined to projects that were themselves already concerned with the problem of poverty. The goal was instead to make visible the problem of poverty by mainstreaming poverty proofing across all government planning.

This profile-raising was not limited to its activities in advising government. The Agency also initially devoted significant efforts to highlighting the existence of a poverty problem in Ireland and, later, to developing mechanisms to identify and assess it. In 1989, the Agency published the first ever national study of poverty relative to income distribution. This found that one in three people in Ireland were living below the poverty line — a finding that attracted significant political and public comment at the time.

These efforts to educate, inform and equip persons to act continued with the development of an index of relative deprivation in 2007. This index was made possible by the collection from 2004 onwards of EU-directed data on relative poverty and living standards. The overall EU measures offered limited insight in the national context given the very wide variations in living standards across the Union. However, the extensive data was used to compile an Irish-specific scale which defined persons as in relative poverty if they were unable to afford at least two of the 11 items below:<sup>16</sup>

- two pairs of strong shoes
- a warm waterproof overcoat
- buy new (not second-hand) clothes
- eat meal with meat, chicken, fish (or vegetarian equivalent) every second day
- have a roast joint or its equivalent once a week
- had to go without heating during the last year through lack of money
- keep the home adequately warm
- buy presents for family or friends at least once a year
- replace any worn out furniture
- have family or friends for a drink or meal once a month
- have a morning, afternoon or evening out in the last fortnight for entertainment

15. Republic of Ireland, Department of the Taoiseach, *Cabinet Handbook* (2006) 29.

16. These deprivation indicators were formally adopted by Government in 2007 and are available at ‘What is Poverty?’ *Department of Employment Affairs and Social Protection* (Web Page) <[www.socialinclusion.ie/poverty.html](http://www.socialinclusion.ie/poverty.html)>.

This expansive approach also extended to its view of its statutory mandate to act in respect of the nature and causes of poverty. In keeping with its multi-dimensional understanding of poverty, the Agency perceived its mandate as extending to issues such as: health; community development; family supports and childcare; education; and social inclusion. This also included the undertaking of activities with community groups and partnerships in Northern Ireland on the basis of the Agency's view, developed in its commissioned research,<sup>17</sup> that there was a recursive relationship between poverty and conflict.

The adoption of this more compendious concept of the causes of poverty had the consequence that the Agency came to act in subjects and spheres far beyond government fiscal policy. Its focus on the role of communities in combatting poverty meant, for example, that the Agency was heavily involved in the development and support of a variety of local community-based services, such as: its recommendation for the establishment of local-based Money and Advice Budget Services for people with debt or money management issues; its provision of materials, support and training to community and local development projects; and its establishment of training programmes and strategic policy committees to assist local authorities in developing and progressing anti-poverty measures at the micro-level.

This was in keeping with the more general emphasis in the Agency's annual reports on matters of analysis, implementation and delivery. While the Agency actively engaged in policy-related work such as making policy statements, submissions to external consultations by other statutory bodies or participation in government advisory groups, these appear to have been primarily conceived within the Agency as a means of contributing its expertise and knowledge rather than the making by it of an independent policy judgement. This self-perception of the Agency as an expert body was also evident in its extensive — and often self-initiated — efforts to take a lead role in co-ordinating different forms of anti-poverty action. This could be seen in its encouragement of links between local and national organisations; public with voluntary bodies; and in its cross-border engagements with anti-poverty bodies in other EU countries.

These are only examples of the myriad of programmes and organisations that the Agency engaged with during its 23 years. They demonstrate, however, that the Agency interpreted and applied its functions in a broad and flexible manner that — in its view — permitted it to act across institutional, legal and national boundaries.

## E The End of the Agency

While the Agency — as is clear from the above — operated in close proximity to government officials across many contexts, it was generally regarded as an independent and forceful voice on anti-poverty issues in Ireland. Indeed, the Agency appeared for a long time to have succeeded in winning the trust of both public and government. Its public activities and pronouncements not only educated the public on the existence and seriousness of the poverty problem in Ireland but also earned it respect for its willingness to speak openly and, on occasions, against government views. As one media piece put it, the Agency 'has been a stone in the shoe of successive governments because of its work in raising public awareness about the extent of poverty'.<sup>18</sup> There was, for example, disagreements between the Agency and some governments about how it chose to define

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17. See Paddy Hillyard, Bill Rolston and Mike Tomlinson, *Poverty and Conflict in Ireland: an international perspective* (Institute of Public Administration, 2005).

18. Opinion, 'Combat Poverty Agency' *The Irish Times* (online, 23 August 2008) <[https://www.irishtimes.com/opinion/ combat-poverty-agency-1.933904](https://www.irishtimes.com/opinion/combat-poverty-agency-1.933904)>.

poverty. At the same time, its expertise was acknowledged by the government officials with whom it had repeated and direct engagement. It was also widely admired by community organisations and voluntary agencies that had benefitted from its support.

Nonetheless, the Agency's independent existence ultimately came to a swift and largely unforeseen end in 2008. At the time, Ireland encountered an economic crisis in the aftermath of the effective default and nationalisation of a number of Irish banks. A general review and rationalisation of government and independent agencies followed with many organisations being amalgamated, abolished or subsumed into others. This was the fate of the Agency. The 1986 Act was repealed by section 38 of the *Social Welfare (Miscellaneous Provisions) Act 2008* (Ireland). The Government stated that the Agency would be amalgamated with an Office for Social Inclusion in what was described as a 'new strengthened unit' within the Department of Social and Family Affairs. The Unit remains in existence within the Department, where it undertakes certain public activities such as the organisation of an annual Social Inclusion Forum which 'provides the opportunity for people experiencing poverty and social exclusion and the community & voluntary sector groups that represent them to engage directly with policy officials and policy makers from a range of government departments', the report of which is laid before the Houses of the Oireachtas.<sup>19</sup> In general, however, the extent of the Unit's activities are — at the very least — much less visible than those of the Agency when it operated as an independent statutory body with significant autonomy over its own direction, priorities and remit.

### III Fourth Branch Reflections on the Agency

This section of the paper examines the Agency's role in light of 'fourth branch' scholarship. The first and important point to make at the outset is that it is doubtful whether the Agency would be regarded by most current 'fourth branch' scholars to merit that description.<sup>20</sup> It was not expressly concerned with the advancement or enforcement of a constitutional norm.<sup>21</sup> Moreover, as a statutory body without any constitutional status, it could be argued to offer a 'second-best solution to the problems of conflicts and convergence of interests'.<sup>22</sup> More fundamentally perhaps, the Agency was not independent in the sense of being formally — or even functionally — insulated from outside intervention. The 1986 Act did not confer ultimate responsibility on the Agency in any area.

This reflected another difference between the Agency's role and that generally assigned by current scholars to 'fourth branch' actors. While there are variations in how the functions of these bodies are defined, most current theories regard them as fulfilling what might broadly be described as a 'checking' role: that is, their function is to supervise, monitor and, at least in some instances, enforce the compliance of the traditional 'branches' with specific forms of rules. By contrast the Agency did not enjoy any such powers of review. In fact, its statutory functions were expressed in almost entirely prospective terms.

As such, it is doubtful whether the Agency could be said to constitute a fourth branch. Nonetheless, as the review of the Agency's activities above shows, the experience in practice was

19. 'Social Inclusion Division', *Department of Social Protection* (Web Page) <<https://www.gov.ie/en/organisation-information/be955a-social-inclusion-division/#>>.

20. There is an argument that the Agency would fit some aspects of the American sense of an independent administrative 'fourth branch'. See Peter Strauss, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 84 *Columbia Law Review* 573.

21. Tarunabh Khaitan, 'Guarantor Institutions' (2021) 16 *Asian Journal of Comparative Law* 40.

22. Mark Tushnet, *The New Fourth Branch* (Cambridge University Press, 2021), 46.

that the Agency was able to act with a significant degree of autonomy in its choice of strategy, subject matter and sphere of activity. Moreover, there is an argument that this degree of autonomy may have been, at least in part, attributable to the absence of a traditional jurisdictional remit on its part. The Agency's goal-oriented design meant that it lacked a functionally-defined area for which it had overall statutory authority. However, this also resulted in a flexibility of functions that was a source of considerable strength.

First of all, this had the consequence that the Agency enjoyed significant discretion in interpreting the nature and scope of its own powers. This follows from the fact that goal choice inevitably engages both substantive and institutional concerns. Any consideration of how best to pursue or promote a particular goal also involves institutional choices about the best process by which to do so. These institutional choices, in turn, have important implications for the identity and extent of engagement permitted to interested parties. The Agency was, accordingly, generally at large to determine: how to interpret its goals; how to prioritise between them; what techniques to employ; what areas to operate in; and with whom to engage.

Supporting this, the fact that its powers were defined as the promotion of particular goals allowed the Agency to operate in a manner that was largely unconstrained by the kinds of concerns for *vires* that can often preoccupy statutory (or constitutional) bodies that are vested with more traditional functional forms of power. Indeed, there is an argument that this freedom was in part facilitated by the absence of strong checking or review powers on the part of the Agency. It is plausible to suggest that the absence of formal legal powers to hold a body to account reduces the prospect of that body reflexively adopting a defensive or law-based approach to any engagement by the Agency. The Agency was thus able — both in practical and legal terms — to operate across institutional, functional and public-private boundaries without an enduring threat of legal challenge or political pushback.

A further benefit to this flexibility was that it provided scope for the Agency to develop its own public profile and networks. This allowed the Agency to develop a reputation and support base that — for a period at least — entrenched it against political pressure or control. The Agency was able to fund research, make public pronouncements and organise educational initiatives that not only elevated its own profile and reputation as an independent and expert body, but also emphasised the importance to the public of the social problem with which it was concerned. By putting poverty on the public and media agenda, the Agency also ensured that its own role was perceived as being of value.

Ultimately, of course, this was insufficient to protect the Agency from being brought under departmental control in 2008. That outcome has to be seen, however, in the context of the wider political narrative at the time, both that the country was facing an existential crisis and that one of the necessary responses was a wholesale re-organisation and reduction in the number of public bodies. Given that even the constitutionally-entrenched judiciary experienced significant political intervention at the time, it would be unrealistic to have expected any one statutory body to have the authority to resist the re-organisation narrative.

Overall, therefore, the CPA experience points to several factors as potentially significant in supporting the success (or otherwise) of an anti-poverty or other 'novel' agency. Independence, at least in the sense of the autonomy to set its own agenda, to plan and to act, is clearly important. This operational autonomy allows an agency to make decisions about priorities and, critically, to review and reformulate its approach in light of the practical knowledge and experience it acquires. In addition, a level of autonomy also allows an agency to reflect on its profile and perception, and to make strategic decisions as to how best to present itself to others. That includes its presentation not only to the public but also to key groups. One of the major strengths of the CPA was that it was

perceived by the public, by voluntary groups and by government officials as an agency with specific and valuable expertise in policy delivery. This reputation was built up through engagement over time with these constituencies. This highlights the ‘soft power’ that can be acquired by an agency through performance that communicates and confirms the value of its expertise, knowledge and role. All of this, however, depends on the agency having the leadership, flexibility and sufficient autonomy to use these techniques to strategically build, establish and maintain its position.

#### IV After the CPA: The Irish Human Rights and Equality Commission

In considering potential insights from the CPA’s role as an anti-poverty agency, there may be some value in comparing it to the body currently charged with an equality remit in Ireland: the Irish Human Rights and Equality Commission (‘IHREC’). This body has its roots in the same 2009 rationalisation exercise that abolished the CPA when the facilities and offices of the (then separate) Human Rights Commission and Equality Authority were combined. IHREC was formally established by the *Irish Human Rights and Equality Commission Act 2014* (Ireland). The functions of the Authority include the protection and promotion of human rights and equality in Ireland, the encouragement of a culture of respect for human rights, equality and intercultural understanding in the State, and promotion of tolerance and acceptance of diversity in the State and respect for the freedom and dignity of each person.<sup>23</sup> Section 10(3) of the Act provides guidance to the Commission in exercising these functions, stating that it should do so by reference to several principles, including that ‘(d) each person has a fair and equal opportunity to participate in the economic, political, social or cultural life of the State’.<sup>24</sup>

By comparison with the CPA, IHREC enjoys more significant legal powers of action and enforcement. In a litigation context, it is entitled to apply to act as *amicus curiae* in proceedings involving a human rights or equality dimension; or to provide practical and legal assistance to persons seeking to vindicate their statutory rights. It also has powers to undertake its own reviews and inquires. It may conduct equality reviews at its own behest. Perhaps most notably, it has the power to conduct an inquiry on foot of evidence of a serious violation of human rights or equality of treatment obligations either in respect of a person or a class of persons, or into a systemic failure to comply with human rights or equality of treatment obligations. This may, ultimately, lead to the sanctioning and grant of an injunction against an offending party. From the perspective of the institutional powers, therefore, IHREC appears a stronger body than the CPA. It enjoys a statutory guarantee of independence and a suite of legal powers to supervise and monitor other actors (including government departments) and to pursue and vindicate its rights-protective function.

Nonetheless, it is arguable that this more conventional law-oriented function may also — by comparison — impose procedural and practical constraints on IHREC which did not necessarily apply to the CPA. It is striking, for example, that the section 10(3) principle that rights should be understood as necessary to enable persons to participate in the economic life of the State is expressly disappplied for the purposes of the Commission’s powers of enforcement.<sup>25</sup> This represents a clear decision on the part of the *Oireachtas* (Parliament) to narrow the jurisdictional remit of the Commission as the price for the conferral of stronger formal powers. It highlights the tension that may exist between the conferral of strong formal powers, on the one hand, and a greater degree of jurisdictional autonomy on the other. This is reinforced by the fact that bodies with stronger powers

23. *Irish Human Rights and Equality Commission Act 2014* (Ireland) s10(3) (‘IHREC Act’).

24. *Ibid.*

25. *Ibid* pt 3.

of enforcement and sanction are more likely to find the exercise of those powers contested by those against whom they may be exercised. This creates an ongoing litigation risk for bodies such as the Commission — which may, in and of itself, discourage those bodies from embracing more robust constructions of their role.

Even leaving aside the formal limitations imposed by statute, the expression of its mandate in law-oriented terms can influence the agency's approach to its task. A focus on litigation or formal inquiries is inherently legalistic and backwards-looking. It tends to position an agency like the Commission in a more negative and reactive role where its primary concern is stopping discrimination on specified grounds rather than tackling poverty in a general sense. More generally, the focus on a legal conception of equality and human rights also means that considerations of class or of rural poverty do not appear to be referenced in the Commission's operations. The language of poverty does not appear in the Commission's self-articulation of its values or purpose on its website. Where the Commission does engage with economic issues, they are described not in general anti-poverty terms but as questions of 'economic equality' that affect 'marginalised groups'. The Commission's stated priorities in this area in its current Strategy are to improve 'equality of access' to employment and housing 'in particular for groups facing high or systemic barriers'.<sup>26</sup>

There is a notable contrast here between the CPA's broad anti-poverty mandate, which it treated as a prospective exercise in realising a substantive and broadly conceived outcome for all affected persons, including particular groups; and the Commission's emphasis on the narrower (although important) issues of housing and employment; its use of the more process-based language of 'equality of access'; and its overriding focus on specific and defined minority groups.

## V Lessons for 'Fourth Branch' Analysis?

Given that the CPA should not, in any particular sense, be conceptualised as a 'checking' or 'integrity' branch, there is a legitimate question as to the lessons it can offer for this debate. Nonetheless, this section of the article reflects on whether there may be aspects of the Agency's experience that might point to the potential and pitfalls of alternative ways of thinking about independent bodies with responsibilities for aspects of social and economic policy.

### A The Benefits of Functional Flexibility

In particular, the Agency's experience suggests that there may be particular scope for 'new' bodies to make a positive contribution to functions other than the articulation of social and economic policy. The Combat Poverty Agency experience highlights the value of forms of activity beyond rule-making or adjudication. Its expertise and research played an influential role in shaping government policy. However, it was perhaps in the space between the articulation and implementation of policy that the Agency exerted the most novel impact. This was primarily due to the way in which its goal-oriented functions allowed it to adopt a problem-solving approach that involved education, engagement and co-ordination across formal and institutional boundaries. This is consistent with Richardson's view of the value of agencies 'tak[ing] up the conclusions of democratic procedures as provisional premises of truth-oriented noninstrumental reasoning about what we ought to do'.<sup>27</sup> The Agency's role was a flexible and jurisdictionally roving one which does

26. Irish Human Rights and Equality Commission, *Strategy Statement 2022–2024* (2021).

27. Henry S Richardson, *Democratic Autonomy: Public reasoning about the ends of policy* (Oxford University Press, 2002) 141.

not fit easily within a traditional tripartite analysis — other than by turning to the kind of ‘catch-all’ conception of executive power that obscures the issues of executive dominance and conflicts or convergence of interest that partly motivate the case for a fourth branch in the first place.

In acting across formal boundaries and in different context, the CPA itself was also more likely to obtain the kind of practical knowledge and experience that is invaluable in the effective pursuit of public policy goals. As Richardson again has argued, this can generate:

The kind of deeper understanding of a range of goods that comes from experience in seeking to promote or respect them in a range of concrete contexts .... In short, through their responsibility and specialisation, one skill these workers develop is a ready ability to pick out different ways that the general goals with which they are charged may be specified and sense of when one specification or another is apt in given circumstances.<sup>28</sup>

This was arguably borne out by the way in which the CPA’s approach to its work underwent significant change and evolution in the course of its existence: from its early focus on the development of high-level metrics and engagement with government to increasingly greater emphasis on direct engagement with community and local political leaders.

### **B Contests and Confusion: The Risks of Being a ‘Branch’**

The value of this functional flexibility may point to broader limitations in an approach that treats non-traditional bodies — of any kind — as a ‘fourth branch’. Conceiving of non-traditional bodies in this way necessarily takes as its starting point the logic of the Montesquian model. It defines the body by reference to the tripartite distinction. Furthermore, it designates the claimed ‘branch’ as the exclusive supplement to this traditional arrangement.

This carries a number of risks for the asserted new branch. One is that the exclusivity of this designation incentivises the inclusion of a range of bodies within the concept of the ‘fourth’ branch. There are elements of this problem with the older notion of an ‘administrative’ fourth branch, as well as in the more recent work on an ‘integrity’ branch. The inclusion of multiple bodies can, however, have the effect that the definition of the branch becomes unwieldy. This may create confusion over its identity and obscure the case for its existence, thereby weakening its practical authority to engage with and, if necessary, contest the policies of other ‘branches’.

Indeed, the Irish experience suggests that a capacious concept that elevates multiple agencies to ‘branch’ status may conversely provide less security by complicating the capacity of any one agency to make the public or political case for its role. The number and diversity of agencies in existence in Ireland at the time had encouraged the development of a reflexive and pejorative narrative about ‘quangos’. The bodies also made it more difficult for any single agency to rally public or political support for its own survival on the face of the programme of mass ‘rationalisation’ undertaken in 2008–2009.<sup>29</sup>

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28. *Ibid* 225.

29. By way of illustration, the abolition of the CPA was one of 30 rationalisation measures announced in Budget 2009: Department of Public Expenditure and Reform: ‘Budget 2009, Annex D: Rationalisation of State Agencies’. The establishment of a special group was also announced. It ultimately recommended an additional 43 measures: Department of Finance, *Report of the Special Group on Public Service Numbers and Expenditure Programmes* (Report, 16 July 2009) Volume 1 [2.14].

Another issue is that, by implicitly accepting the functional assumptions of the traditional model, the fourth branch approach makes it more difficult to carve out a clear and distinctive remit for the ‘new’ body. This follows from the fact that the traditional division of functions is primarily concerned with legal rules. Each branch’s role is defined in terms of a specific stage in the legal process, over which it has presumptive control. It is, in effect, a theory of power expressed in the language of laws. This raises an issue, however, for any new branch given the lack of an obvious role in that legal process. This risks giving rise to an ‘ultimacy’ problem for a purported fourth branch: namely, that — when seen from the model’s starting perspective of a concern with legal rules — it lacks an equivalent area of competence. Thus, while many fourth branch versions commit the new branch to a role in ‘checking’ one or more of the traditional branches, that process may lead to conflict in individual instances over the functional, and thus jurisdictional, nature of the power being exercised. This can encourage a damaging confusion, both formally and in public perception, about the place of the ‘other’ branch and, in particular, its entitlement to check more established organs of state.

### *C An Alternative? Agency Autonomy Under a Two-Level Separation of Powers*

These are the kinds of existential conflicts over role and remit that the Combat Poverty Agency was largely able to disregard during its existence. Its lack of formal remedial or enforcement powers paradoxically appears to have allowed it a greater degree of freedom in pursuit of its goals than, for example, the more formally powerful Irish Human Rights and Equality Commission. This suggests that there may be potential in certain contexts for eschewing a ‘branch’-based approach in favour of one that embraces and defines a role for non-traditional bodies in terms of their capacity for independent, expert goal-oriented judgement.

Such an approach avoids the problems of ultimacy and institutional conflict that arise where the body is elevated to ‘branch’ status. It does so, of course, by making clear that the body is accountable to the control of one, or more, of the traditional bodies. However, the Agency’s experience shows how the absence of a strong power to ‘check’ these branches may paradoxically give a body greater operational freedom by liberating from the presence or prospect of close political scrutiny.

Moreover, from a conceptual perspective, an approach that accepts the sub-constitutional status of a goal-oriented agency like the CPA is not necessarily inconsistent with its maintenance of significant influence within a separation of powers system. The argument has been made elsewhere that it is possible to develop a two-level model of the separation of powers that recognises and affirms the normative value of autonomous agencies. This approach holds that:

[T]he primary purpose of [agencies] under the proposed model is to improve the quality of government decisions by providing a space for practical deliberative reflection upon the most effective and normatively appropriate means of implementing a particular measure. The focus ... is on securing the good.<sup>30</sup>

The flexible goal-oriented approach also differs from the ‘fourth branch’ model in that it does not necessarily imply an equivalent top-down role for the body. This allows such a body to operate autonomously in the practically-important — but often constitutionally-obscure — space between

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30. Carolan (n 1) Chapter 6. The specific model there was a triangular separation of powers under which political and judicial bodies operated a higher level, and administrative bodies at a lower one. A two-level approach could also apply, however, to other conceptions of the separation of powers.

political command and policy effects. The traditional separation of powers model folds this area into the 'executive' where it becomes publicly invisible and presumptively subject to clear lines of political control. By contrast, establishing non-traditional bodies as independent goal-oriented agencies has the benefit not only of bringing an independent perspective to bear on these issues but also of making them more visible. Vesting responsibility in a separate body may also provide a degree of protection from arbitrary political will by raising the visibility and thus the political costs of interference.

Indeed, one of the practical strengths of the Combat Poverty Agency's position was that many of its activities happened out of party political sight and mind. There is, in practical terms, significant autonomy in the exercise of sub-constitutional problem-solving powers in the gaps, grey holes<sup>31</sup> and blind spots between legislative and judicial action; and significant power in acting in reasonable expectation of political inertia. Once an agency like the CPA has acted in these areas, a default is created which increases the political and informational costs of rescinding. That is not to say, of course, that problem-solving agencies with capacities to act from government to street-level are panaceas in all instances. They may, however, offer certain practical and structural advantages that are not available to bodies positioned at the more politically-conflictual and jurisdictionally-contested level of a constitutional 'fourth branch'.

#### ORCID iD

Eoin Carolan  <https://orcid.org/0000-0001-9327-8586>

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31. Adrian Vermeule, 'Our Schmittian Administrative Law' (2009) 122 *Harvard Law Review* 1095.