International Political Science Association
World Congress of Political Science

Brisbane, Australia

July 2018

The Fourth, Integrity Branch of Government: Resolving a Contested Idea

(Australian Political Studies Association 2018 Presidential Address)

A J Brown[1]

Ever since Montesquieu's 'The Spirit of the Laws' (1748), the principle of the separation of powers has come to dominate important themes of government, particularly related to the institutional division and diffusion of power for the purposes of limiting and prevention despotism and, more recently, corruption. But was this vision truly limited to only three species of power (legislative, executive and judicial)? Do international constitutional trends towards the entrenchment of independent integrity institutions (anti-corruption agencies, auditors-general, ombudsmen and the like) indicate a fundamental and lasting evolution toward a more sophisticated framework, requiring a rethinking of how horizontal and vertical accountability interrelate in modern society? This national presidential address and its accompanying commentaries will review current Australian debates and international evidence over whether such an evolution is occurring, how it should be understood, whether it should be valued and how it can be reconciled with existing constitutional traditions.

Introduction

Where do non-judicial agencies responsible for ensuring integrity in the discharge of public office "fit" in the constitutional framework of modern liberal democracies? Within political traditions dominated for three centuries by the idea of three branches of government – legislative, executive and judicial – is it time to consolidate the idea that there may, in fact, be a fourth? This paper is far from the first to suggest that independent integrity institutions, beyond the courts, may be best understood as constituting a fourth constitutional branch in liberal democracies. However, it presents what are intended as positive steps – conceptually and empirically – towards some more settled answers to these questions. Currently, there is

[1] Professor of Public Policy & Law, Centre for Governance and Public Policy, Griffith University, Australia. Boardmember, Transparency International. Email a.j.brown@griffith.edu.au.

an enduring dispute between constitutional commentators who insist that any such statutory bodies plainly and necessarily remain part of the Executive branch;[2] and others who contest this, or who surmise or argue that, even where currently true, that classification opens up more questions than it answers regarding what the constitutional position of integrity agencies *should* be.[3] At the same time, while some older, "classic" liberal democratic constitutions continue to frame the institutions of government as just three clear branches, there is growing consciousness that, internationally, the contents of many national constitutions do not conform neatly to that pattern. Does this mean some kind of breakdown, or new, evolving constitutional chaos? Or, does international practice point towards a different *grundnorm* of institutional design, with which political and constitutional theory needs to catch up?

These questions are not mere curiosities, of the kind that entertain legal or politics scholars eager to map out neat typological orders. As we all know, the real world of politics is inherently more messy, problematic and interesting. Montesquieu himself observed that each type of government can be examined from the perspective of either its 'nature' or its 'principle': 'The one is its particular structure, and the other is the human passions that set it in motion'.[4] These issues matter, for at least two reasons. First, there is little reason to believe that we have the problem of problem of corruption "licked", even in so-called advanced democracies – across the developed and developing worlds alike, debates over the independence and security of officials charged with policing public integrity could scarcely be hotter. But are we confident that the purposes of these institutions can be properly fulfilled within a threefold understanding of governmental power? Can the community believe promises that such agencies can work effectively as extensions to our systems of "checks and balances", and help curb risks of corruption, excess and abuse of power, if their true level of independence from executive control remains open to conjecture? Second, as independent integrity institutions grow in importance and the strength of their powers, how are their performance and accountability to be maintained? Without a settled understanding of where they stand, how can we be clear to whom they are, or should be, answerable, and how?

This paper seeks more settled answers to both questions. The first part clarifies what type of institutions we are talking about as candidates for a fourth branch of government, based especially on Australian experience. The second attempts to provide a clearer sense of

---

[2] See text accompanying n. below.
[3] See text accompanying n. below.
[4] Charles-Louis de Secondat, Baron de La Brède et de Montesquieu (Montesquieu), *The Spirit of Laws*, 1748, Thomas Nugent translation 1752; Batoche Books, Kitchener, 2001; Book III, Chapter 1.

whether, and how national constitutions around the world are also evolving to more explicitly recognise the role of these types of institutions. The third tackles the debate about how they should be classified, and why despite constitutional objections, the concept of the fourth branch seems to refuse to go away. Fourth, in response, the paper returns to political theory to understand whether even within our current, "classic" liberal democratic traditions, it makes sense to see government as limited to just three branches, or types, of power. As we will see, emerging constitutional practice does mitigate in favour of a more developed understanding, and even in 1748, when Montesquieu suggested that 'in every government there are three sorts of power',[5] there was good reason to *not* see the branches and types of power as so crisply limited in number. To make sense of these issues, political and legal interpretation need to recognise that these institutions' constitutional position is determined not by their legal genesis, but by their purposes, character and above all, relationships with the other institutions with which they share governmental power. In conclusion, viewed this way, a distinct, fourth branch of government is not just a theory waiting to be realised: where these conditions are met, it is already a constitutionally-intelligible reality. The real questions become, not whether it is happening, but what steps need to be taken to better define, enable, interpret and regulate its power.

1. The fourth branch – more than an idea

Internationally, the concept of a fourth, integrity branch of government is perhaps best known from Bruce Ackerman's *Harvard Law Review* article, 'The New Separation of Powers' (2000) – but as we will see, eighteen years later, we can look back on this article as only partly prescient, only tangentially relevant to most of the world, and in many respects already out of date. Ackerman's advocacy for a fourth, integrity branch occupied two pages of a 96-page article,[6] otherwise mostly concerned with Americans' challenges to understand their own Constitution since the post-1920s explosion of the modern administrative state. In the United States, the problem which 'has long been an embarrassment for constitutional law',[7] was the rise of powerful administrative agencies equipped not only with executive power, but also with powers theoretically belonging to the other branches: legislative (rule-making) and judicial (deciding rights, disputes and justice in individual cases). Indeed, in

[5] Montesquieu, *The Spirit of Laws*, 1748; Book XI, Chapter 6, p.173.
[6] Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633-729, at 694-6.
[7] Jacob E. Gersen, Unbundled Powers, 96 *Va. L. Rev*. 301, 305 (2010) as cited by Michaels (2015) at n.9.

1937, it was the US President's Committee on Administrative Management who described the administrative explosion as producing 'a headless "fourth branch" of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers', with no reference at all to integrity functions or agencies.[8] More recently, Michaels argues it was this 'twentieth-century shift to administrative governance' which 'toppled the Framers ' tripartite constitutional regime' in the United States; but was also a problem answered by 'the subsequent construction of an *administrative* separation of powers… an act of constitutional restoration, anchoring the modern administrative state firmly within the constitutional tradition of employing rivalrous, heterogeneous institutional counterweights to promote democratic accountability and compliance with the rule of law.'[9]

This American history is relevant, mostly because it provides support for the idea that, to understand how the branches and powers of government can and should interrelate, we need an 'enduring, evolving' concept of the separation of powers[10] -- in place of powers defined by only three branches, fixed for all time. Indeed, Ackerman's plea that we would 'honor Montesquieu and Madison best by seeking new constitutional forms…, even at the cost of transcending familiar trinitarian formulations',[11] was expressed in support for not only a fourth, integrity branch of government, but a fifth, *regulatory* branch, whose defining power was neither legislative, executive nor judicial, but that of 'expertise'.[12] In this, Ackerman's primary target remained the effects of a strict American-style separation between the legislative and executive branches: 'the ongoing competition between House, Senate, and Presidency for control over the administrative apparatus', creating 'an excessively politicized style of bureaucratic government, transforming the executive branch into an enemy of the rule of law'. Hence, his main argument was for new constitutions to opt in favour of 'constrained parliamentarianism' with clearer accountability of the executive to parliament (and limits in turn on the parliament), configured entirely differently to the US.[13]

---

[8] President's Committee on Administrative Management, *Administrative Management in the Government of the United States,* US Government Printing Office, 1937, p.36 – as extracted in Blackshield & Williams, *Australian Constitutional Law & Theory*, 4th Edition, Federation Press, Sydney, 2006, p.23.
[9] Jon D. Michaels (2015), 'An Enduring, Evolving Separation of Powers', *Columbia Law Review*, Vol. 115, No. 3, pp. 515-597. Emphasis added.
[10] Michaels (2015).
[11] Ackerman (2000), p.729.
[12] Ackerman (2000), pp.696ff.
[13] Ackerman (2000), pp.640-641. In this, 'Westminster as well as Washington' are rejected as the guide, with Ackerman nominating the reconstructed Axis powers and post-British Empire constitutions as offering the best balances to date, particularly the constitutions of India, Canada, and South Africa, but also Germany, and Spain. While Ackerman discusses Australia in relation to contests between legislature and executive (i.e. the 1975 dismissal), he otherwise does not mention in it in the context of these traditions overall, nor in respect of its experience with the integrity branch.

Given its brevity, it is no surprise that Ackerman's suggestion (almost a thought bubble) that 'the credible construction of a separate "integrity branch" should be a top priority for drafters of modern constitutions'[14] failed to notice the extent to which this had already been occurring, in many countries. His examples of precedent institutions were limited to Britain's public accounts committees and independent Audit Commission; US inspectors-general; and the anti-corruption agencies of Hong Kong and Singapore.[15] As seen in the next section and Appendix 1, a systematic review identifies many, many more. Even though Australia escaped Ackerman's scan, its significance as a case is reinforced by its importance in the chain of non-US, post-British traditions he identified as preferable, but perhaps even more so when it comes to issues of the separation of powers. Australia not only started down the road of progressive, colonial adaptation of British responsible government over 160 years ago; but unlike Canada, almost 120 years ago, united its colonies under its own adaptation of a directly US-style tripartite (and federalist) separation. The Australian case, therefore, gives a particularly significant window on how principles and practices of the separation of power have evolved, and can evolve, within this nest of traditions.

The political ideas themselves will be further explored below. Here, it's enough to say that Australian experience already made a fourth branch far more than theoretical when Ackerman wrote, and give a concrete example of what such a branch involves. Indeed, it was a senior Australian public servant, Bruce Topperwein, who perhaps first articulated in legal circles that the development of integrity institutions was pointing to a distinct integrity branch or arm of government.[16] In 2004, the then chief justice of NSW, Jim Spigelman AC, gave a considered outline of the range of bodies effectively functioning as a 'fourth branch' of government alongside the legislature, executive and judiciary:

> …there have been a number of candidates for a 'fourth branch' designation over the years. The number does not matter. The idea does. The primary basis for the recognition of an integrity branch as a distinct functional specialisation, required in all governmental structures, is the fundamental necessity to ensure that corruption, in a broad sense of that term, is eliminated from government. However, once recognised as a distinct function, for which distinct institutions are appropriate, at a level of significance which acknowledges its role as a fourth branch of government, then the idea has implications for our understanding of constitutional and legal issues of broader significance.[17]

---

[14] Ackerman (2000), pp.694-696.
[15] Ackerman (2000), p.695.
[16] B Topperwein, 'Separation of Powers and the Status of Administrative Review' (1999) 20 *AIAL Forum* 1. See Robin Creyke, 'An 'Integrity' Branch' (2012) 70 *AIAL Forum* 33, at p.36.
[17] Hon J Spigelman AC, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 72, at p.75.

While Australian administrative lawyers were among the first to recognise the operational existence of a fourth branch, this coincided with a relatively clear, empirical picture of who forms the branch.[18] Unlike in the US, administrative lawyers and political scientists have not seen its emergence solely or primarily as a response to the rise of the administrative state, although that has relevance; rather, it is a more holistic coming together of a variety of strands of enhanced or reinforced government accountability and anti-corruption, more generally. The fact that not only lawyers, but the practitioners leading the institutions have led open discussion of the branch, emphasises that this is not just theory. In 2010, it was the serving national Ombudsman and Inspector-General of Intelligence and Security who together described the growing 'familiarity of this model of independent review' over the Executive, emphasising 'the profound nature of this change'.[19]

Both at a federal and state level, official reviews have identified around 15 different government agencies or institutions, of different kinds, as typically engaged in making the integrity system "work".[20] However, not all of these are independent, statutory bodies, nor is their work always solely or primarily focused on integrity and accountability of government as such – being the features that, in practice, define the institutions which count as 'core' to the integrity system.[21] Since the 1970s, all Australian jurisdictions have come to have a relatively similar picture of five 'core integrity institutions', consisting of the Auditor-General, the Ombudsman, an independent anti-corruption commission of some kind, the Information Commissioner, and the public sector commissioner, wherever this role includes standard-setting, strategy and/or enforcement relating to integrity and conduct. In different

---

[18] See generally A J Brown (2014), 'The integrity branch: a 'system', an 'industry', or a sensible emerging fourth arm of government?' in M. Groves (ed.), *Modern Administrative Law in Australia: Concepts and Context* (pp.301-325) Melbourne: Cambridge University Press, at pp.306-309. In this, research mapping and assessing 'national integrity systems', as auspiced by Transparency International since 1996, has been instrumental – see also previously A J Brown, 'What is a National Integrity System? From Temple Blueprint to Hip-Pocket Guide' in B Head, A J Brown & C Connors (eds), *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate, 2008), 33.

[19] J McMillan and I Carnell, 'Administrative Law Evolution: Independent Complaint and Review Agencies', (2010) 59 *Admin Review* 35. See also C Field, 'The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability' (2013) 72 *AIAL Forum* 24 (a state ombudsman); D Solomon, 'What is the Integrity Branch?' (2012) 70 *AIAL Forum* 26 (a state integrity commissioner); and J Kinross, 'The Transmission of the Public Value of Transparency through External Review' (2012) 71 *AIAL Forum* 10 (a state information commissioner).

[20] For federal, see Attorney-General's Department, *Discussion Paper: Australia's Approach to Anti-Corruption*, Canberra, March 2012, at p.12; and generally, Senate Select Committee on a National Integrity Commission, *Report*, Canberra, September 2017, pp.15-63. For state, see R Smith, 'Mapping the New South Wales Public Integrity System' (2005) 64 *Australian Journal of Public Administration* 54, 57 (Table 2) (NSW); Hon IDF Callinan AC and N Aroney, *Review of the Crime and Misconduct Act [Qld 2001] and Related Matters: Report of the Independent Advisory Panel*, Queensland Government, Brisbane, 28 March 2013 <http://www.justice.qld.gov.au/cmareview> (viewed 11 May 2013) (Qld).

[21] See A J Brown (2008), 'What is a National Integrity System?...' 33, at 39-45.

jurisdictions, other independent agencies or statutory officers exist, with similar functions focused on accountability and integrity, and hence join this group as variations on the theme. These core institutions may even officially "network".[22]

What is explicit is that these core institutions are united, conceptually, by a relatively clear common purpose within the political and constitutional system. The meaning of 'integrity', as an encapsulation of this purpose, is a deserving topic in its own right. Definitions span many contexts and dimensions, and institutional and personal elements, but generally cohere around whether institutions or individuals are acting in accordance with accepted values and in service of their public mission.[23] Concepts of accountability, responsibility and integrity also often travel together, but all can in fact have different albeit related meanings, depending on the perspective and assumptions with which they are approached (see Table 1). The crucial thing is that, despite all this diverse and complex thinking, it is clear this commonality of purpose is understood in practice, and exercised as an empirical reality. Even when debate over the structure, efficiency or performance of integrity institutions and systems may run hot, practitioners, policymakers and commentators involved operate with an increasingly clear view that these do, or can (and should) cohere around this purpose. For example, in Queensland – the lead Australian jurisdiction for research and discussion around the integrity 'system'[24] – former High Court justice Ian Callinan and Professor Nicholas Aroney conducted a highly critical government review of the system, as 'bloated, inefficient' and 'over-elaborate'.[25] However they did not question its existence or necessity, and suggested a simple definition of "integrity" to better encapsulate its purpose,

---

[22] E.g. in Queensland, the five 'integrity commissioners' established over the last 20 years coordinate as an Integrity Committee: the Ombudsman, Auditor-General, chair of the now Crime and Corruption Commission, Information Commissioner and Integrity Commissioner (a statutory office providing ethical scaffolding to parliamentarians and senior public servants): see J Kinross, 'The Transmission of the Public Value of Transparency through External Review' (2012) 71 *AIAL Forum* 10. In Western Australia, the five core offices organise themselves as an Integrity Coordinating Group: the Ombudsman, Auditor-General, chair of the Corruption and Crime Commission, Information Commissioner, and Public Sector Commissioner (formerly Public Sector Standards Commissioner): see Field (2013), above, 25.

[23] For an advanced concept based on conceptions of legitimacy, see Nikolas Kirby, 'An "Institution-First" Conception of Public Integrity', Working paper, Building Integrity Workshop, Blavatnik School of Government, University of Oxford, 3 May 2018. For a sophisticated analysis of three sometimes complementary, sometimes competing models of integrity – 'institutional-legal', 'effectiveness/implementation' and 'personal-responsibility' – see Pat Dobel (1999), *Public Integrity*, Baltimore, Johns Hopkins University Press. For a morally neutral construction of 'consistency-integrity', 'coherence-integrity' and 'context-integrity' based on accordance with 'claimed' as opposed to accepted values, see Hugh Breakey, Tim Cadman & Charles Sampford, 'Conceptualizing Personal and Institutional Integrity: The Comprehensive Integrity Framework' in *The Ethical Contribution of Organizations to Society*, *Research in Ethical Issues in Organizations*, Volume 14, 1-40.

[24] See N Preston & C Sampford (2002), …,

[25] Op cit, 144 and 215 respectively.

Table 1. Defining Accountability, Responsibility and Integrity[26]

Meaning (Weber) (Dobel)	Technical (*Process-rational*) (Institutional-Legal)	Substantive *(Value-rational)* (Implementation / Effectiveness)	Personal *(Pre/post-rational)* (Personal-Responsibility)
'Accountability'	**Individual actions are, or can be held to account.**	**Individual actions invite, are open to accountability.**	**Accountability *makes* person trustworthy.**
'Responsibility'	**Individual actions are, or can be held responsible.**	**Individual actions are responsive, responsible.**	**Person *is* responsible, trustworthy.**
'Integrity'	**Actions accord with stated purposes/ values; trust is honoured.**	**Actions are honest, honourable.**	**Person *is trusted*, has honour.**

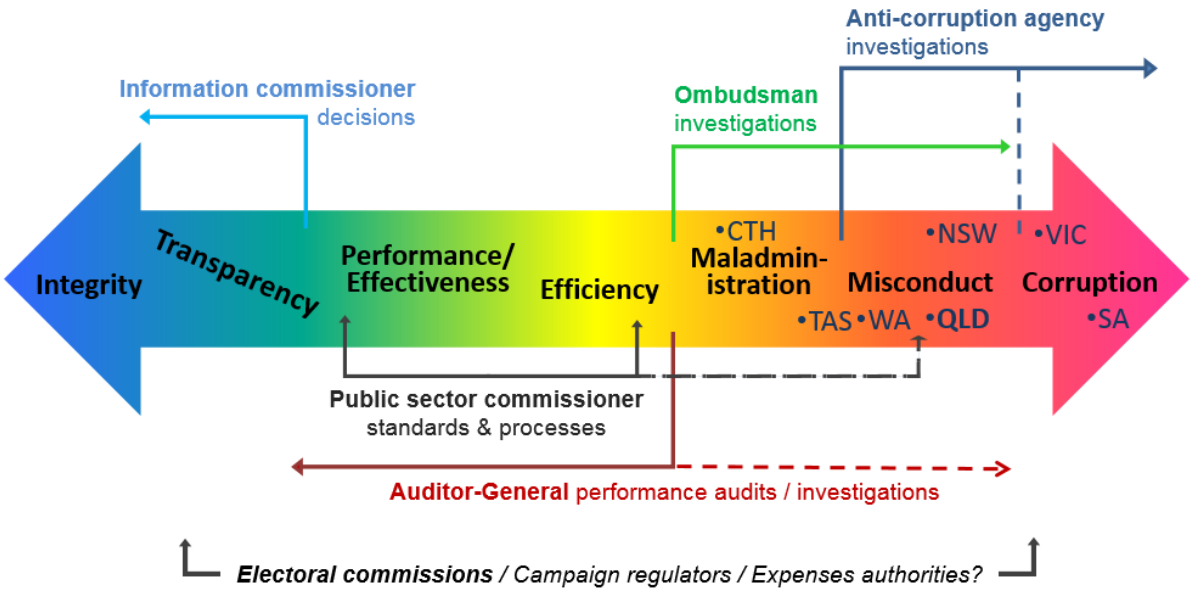
with 'three fundamental and very simple elements…: honesty, fairness and openness',[27] combined with 'an obvious element of overall diligence'.[28] The fact that these elements correspond closely to the core business of the core integrity institutions above (anti-corruption bodies, ombudsmen, information commissioners, auditors-general and public sector commissioners), tends to help explain and reinforce why, in practice, they cohere as an integrity 'branch'.

This remains a stylised summary of the purposes and jurisdictions of key integrity branch members, even for Australia. In practice, they vary. Figure 1 below emphasises this by plotting some of the ranges of jurisdictions of these otherwise similar agencies, on the spectrum of official conduct they are seeking to promote and/or fight. The dots further emphasise this by locating the different statutory definitions of 'corruption' for the seven federal and state jurisdictions, at different points on the spectrum. There are also logical questions about further specific institutions which should also fit on this map; hence, Electoral Commissions and related agencies are added, even though most (but not all) Australian practice sees them function quite separately. The point here, is that like it or not, we seem to

[26] Source: A J Brown (2008), 'What is a National Integrity System?...' 33, at 47. As well as Dobel's dimensions, above, this framework was developed using concepts of rationality expressed by Max Weber (1954), *Law in Economy and Society*, Cambridge Massachusetts (Rheinstein ed) and Ken Hoskin (1996), "The 'awful idea of accountability': inscribing people into the measurement of objects", in *Accountability: Power, Ethos and the Technologies of Managing*, R. Munro & J. Mouritsen (eds), London, Thomson Business Press: 265-282 – along with other sources.
[27] Op cit, 8.
[28] Op cit, 215.

have an integrity branch, consisting of a number of core institutions, together pursuing distinct if overlapping dimensions of a common purpose.

Figure 1. A conceptual spectrum of core integrity agency responsibilities (Australia)[29]



2. Constitutional trajectories: some international indications

Is Australia alone in its development of an integrity branch? More importantly, on what basis should we regard this as a *constitutional* development, rather than simply an administrative one? Already, we know even from Ackerman's advocacy that a range of institutions from a range of countries point towards emergence of such a branch. Indeed, Australia may join the US in being relatively slow to diagnose the extent of its emergence, specifically because our older constitutions create relatively few institutions and do so primarily within the prism of the tripartite (legislative, executive and judicial) branches. On a wider constitutional landscape, however, growth in the number, stature and functional importance of integrity agencies has prompted general rethinking of the ways in which public power and accountability work. Hence the debate among political scientists, and those concerned directly in the fight against corruption, over the arrival of stronger mechanisms of

[29]Source: Developed by author, responding to Figure 10 in State Services Commission (Victoria), *Review of Victoria's Integrity and Anti-Corruption* System, Melbourne, May 2010. NB the original Figure dealt with a limited number of agencies and pointed only towards corruption.

'horizontal accountability' described by Guillermo O'Donnell, particularly in more recent democracies.[30] Concerned with the new significance of horizontal accountability agencies, i.e. those 'legally enabled and empowered... to take actions... in relation to [unlawful/wrong] actions or omissions by other agents or agencies of the state', O'Donnell pointed to the same group of agencies in constitutional terms:

> …for this kind of accountability to be effective there must exist state agencies that are authorized and willing to oversee, control, redress and/or sanction unlawful actions of other state agencies. The former agencies must have not only legal authority for proceeding in this way but also, de facto, sufficient autonomy with respect to the latter. This is, of course, the old theme of the division of powers and the system of checks and balances. It includes the classic institutions of the executive, the legislative and the judiciary; but in contemporary polyarchies it also extends to various overseeing agencies, ombudsmen, accounting offices, *fiscalias,* and the like.[31]

How 'accountability' relates to 'integrity', for the purposes of characterising these agencies, is another discussion already noted above. What is important is, again, that a general phenomenon appears to be underway, rather than just theory or an isolated case. By identifying agencies that perform this horizontal accountability function, we are differentiating them from those who make 'vertical accountability' work, meaning the conventional process of the people holding elected officials to account, who then hold executive officials to account.[32] To this can be added a third axis of 'social' or 'societal' accountability (also sometimes called 'oblique' accountability), in which citizens, civil society and non-state actors including the media, exercise power to control government outside or alongside formal vertical accountability – including by activating or supporting the processes of horizontal accountability.[33] Figure 2 sets out these basic concepts.

---

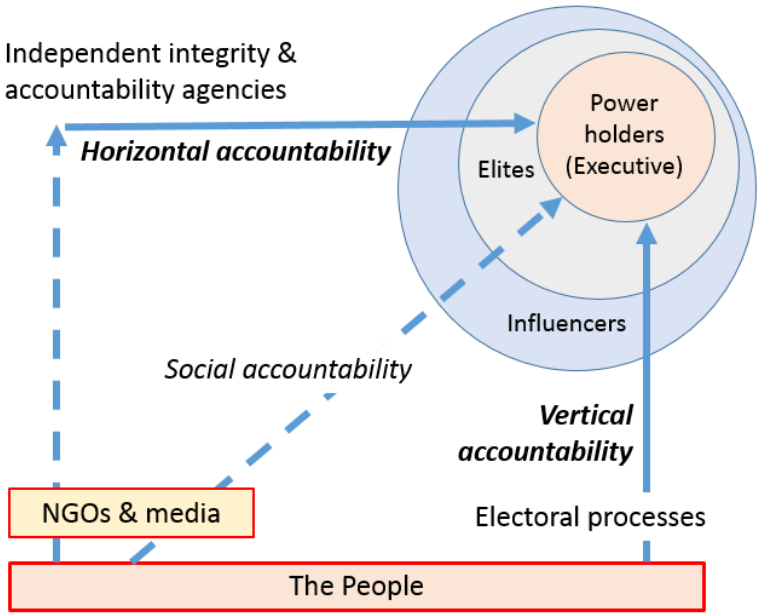
[30] See e.g. G O'Donnell, 'Horizontal Accountability in New Democracies', in A Schedler, L Diamond, & M Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner, 1999) 29; O'Donnell, G. (2003). 'Horizontal accountability. The legal institutionalization of mistrust'. In Mainwaring, S., & Welna, C. (Eds.). *Democratic accountability in Latin America*: 34–54. Oxford: Oxford University Press.

[31] O'Donnell (1999), p.39. On the alternative term 'mutual accountability' see R Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave McMillan, 2003) 232.

[32] Kenney, C. D. (2003), 'Horizontal accountability: concepts and conflicts' in Mainwaring, S., & Welna, C. (Eds.). *Democratic accountability in Latin America*: 55–76. Oxford: Oxford University Press, 61, at p.68: 'Vertical accountability is exercised by societal actors with respect to state actors, and horizontal accountability is exercised within the state by different state agencies. … Horizontal accountability shares with other forms of accountability—such as vertical accountability—the idea that some actors may sanction other actors for their acts and omissions. Horizontal accountability shares with other kinds of governmental self-controls—such as legislative checks and balances—the idea that these are intrastate and interagency relationships designed to constrain the exercise of power.'

[33] For a longer discussion, see Finn Heinrich & A J Brown (2017), 'Measuring accountability performance and its relevance for anti-corruption: introducing a new integrity system-based measure', Crime Law Soc Change (26 September 2017), DOI 10.1007/s10611-017-9712-4. For groundbreaking research on the interactions between social and horizontal accountability, see Samuel Ankamah, *When Do Anti-Corruption Agencies Need Society? A*

Figure 2. Vertical, horizontal and social accountability explained[34]



Taking a broader perspective on modern political accountability, and the full plethora of actors involved, re-opens the question of which institutions are usefully classified as belonging to a discrete 'integrity' (or 'accountability') branch – if anything, in even wider terms. After all, long before the 'fourth branch', the 'fourth estate' was identified as a part of the emerging Westminster political system, meaning the role of the media as reporters upon three estates of parliament (the Lords Spiritual, Lords Temporal and Commons).[35] More of Lords below; for now, Figure 2 reminds us that indeed, an effective, independent media are a pivotal part of any national integrity system. So, while the previous section was able to identify the typical group of accountability agencies that qualify for the integrity 'branch' in an Australian context, on a general landscape there remains a question of how wide to go.

The first step in getting a better handle on whether such agencies are growing in functional importance, and in particularly taking on Constitutional significance, is to have a look. **Appendix 1** sets out the results of a scan of 100 of the world's most recent or most recently revised national constitutions, from newest to oldest.[36] The results are also summarised in Figure 3 below.

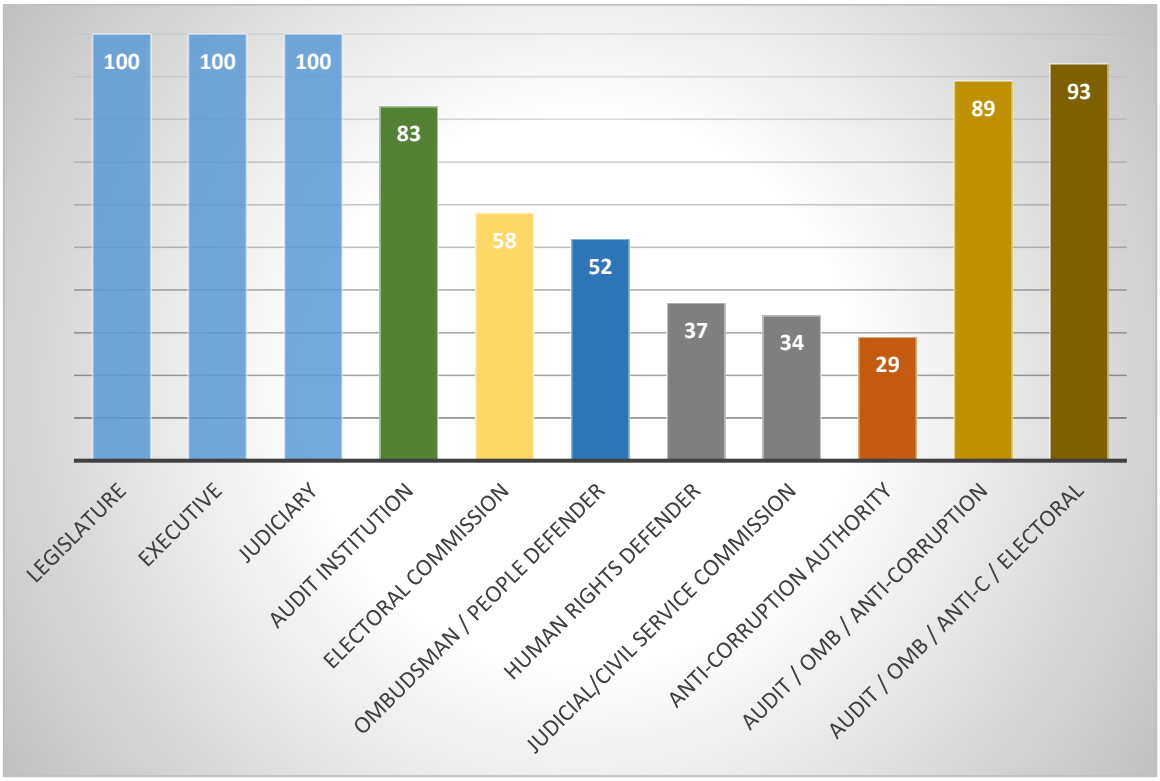
Study of the Nature and Effectiveness of Interactions between Horizontal Accountability Agencies and Social Accountability Actors in three Australian States (PhD Thesis, Griffith University), forthcoming.

[34]Source: Developed by author.

[35] See Solomon, above, 30-31.

[36] I am grateful to Stephen Lowein for research assistance in compiling these results.

Figure 3. Constitutional bodies in 100 of the world's most recent/recently revised Constitutions[37]



As shown, while 100 per cent of the nations include a legislature, executive and judiciary in their Constitution, the majority also provide for, and in most cases require, a wide range of other permanent institutions. Indeed, the range often extends beyond those shown, to include other bodies ranging from permanent central banks, to truth and reconciliation commissions, and social and economic councils. Of interest here are bodies relating to the regulation of the state itself. The picture is more complex than shown, since frequently, the same institution may be entrusted with more than one role. For example, in some countries, the Ombudsman is also charged with human rights protection, and/or anti-corruption responsibilities. The Dominican Republic's 2010 Constitution allocates all three of these responsibilities to the Defender of the People; while Madagascar's 2010 Constitution (Article 43) creates a High Council for the Defense of Democracy and of the State of Law, responsible for 'respect for the ethic of power, of democracy and of the respect for the State of Law, and to control the promotion and the protection of human rights'. Similarly, supreme audit institutions are often constituted as "courts" of audit, even though they are usually (but not always) stand-alone institutions, independent of the normal court system. The results also sometimes understate the presence of constitutionally independent bodies. For example,

[37] For detail see Appendix 1.

Hungary's 2011 Constitution (Article 23/1) does not provide for an anti-corruption body, but alongside a Commissioner of Fundamental Rights, does authorise the legislature to 'establish autonomous regulatory organs to perform and exercise certain functions and powers belonging to the executive branch.'

Nevertheless, some patterns are clear. Increasingly common are human rights commissions (in 37 per cent of cases), which is not surprising since 73 per cent of the constitutions also contain a bill of rights. Moreover, 89 per cent include at least one of the core integrity institutions listed earlier, with the most common being a supreme audit body (83 per cent), followed by an ombudsman or equivalent (52 per cent), and anti-corruption agencies (29 per cent) – the last becoming clearly more popular over time. If electoral commissions are added to that group (58 per cent), the total with at least one constitutional integrity agency rises to 93 per cent. For a large number of countries, integrity agencies are more than a sub-constitutional phenomenon – and have been for some time.

Of course, just being mentioned in a Constitution does not automatically mean that an institution, or group of institutions, automatically represent their own governmental 'branch'. Indeed, it does not even always guarantee that such a body will be created – Bangladesh's Constitution (Article 77) provides only that Parliament '*may*, by law, provide for the establishment of the office of Ombudsman', and it has never actually done so. However, the Constitution provides a positive indication that, if created, such an office would be exercising a somewhat unusual type of power – by placing it in Part V of the Constitution, dealing with the Legislature, rather than the Executive. Is this because the Ombudsman would exercise legislative power, or even delegated rule-making powers? No, it is because the Ombudsman is intended to support and be answerable directly to the legislature, for functions which include oversighting the Executive, thus requiring it to be independent of that branch. This independence is often explicit – for example, in Fiji's 2013 Constitution (Article 45, Part 7) where 'the Commission shall be independent and shall not be subject to the direction or control of any person or authority, except by a court of law or as otherwise prescribed by written law.' Everywhere else, it is implicit. Some Constitutions extend this textual separation to powers of parliamentary appointment, in terms that place these agencies on the same footing as the independent Judiciary. For example, under Hungary's Constitution (Article 1(2)(e)) it is for the National Assembly to 'elect… the members and the President of the Constitutional Court, the President of the Curia, the President of the National Office for the Judiciary, the Prosecutor General, the Commissioner for Fundamental Rights… and the

President of the State Audit Office' – where otherwise, these would default to being appointments of the executive government.

Similar hallmarks of an independent 'branch' of government can be found elsewhere. As in the US, apart from recognising the States, Australia's national Constitution (1901) contains only three branches, and the classic tripartite institutions that go with them – with only indirect reminder that there must also be an auditor, under the Constitution's requirement for 'review and audit by law of the receipt and expenditure of money on account of the Commonwealth'.[38] At State level, however, things are different. South Australia's Constitution requires an electoral boundaries commission, chaired by a judge of the Supreme Court.[39] And Victoria's Constitution requires there to be Auditor-General, Ombudsman and Electoral Commissioner, providing that each of these are not an executive body but an 'independent officer of the Parliament'.[40] Moreover, even when Australian State Constitutions are silent about these officers, the legislation creating them gives them a unique constitutional character. State Ombudsmen are created not as part of the Executive but rather, as in Victoria, as statutory 'parliamentary commissioners of administrative investigations'. By convention and increasingly by legislation, each of the core integrity agencies is subject to special oversight by a dedicated parliamentary standing committee, often with extra resources, unlike most other species of statutory agency.[41]

No Australian anti-corruption agency is mentioned in a Constitution, but, in addition to these arrangements, all have statutory appointment mechanisms aimed at bolstering their political independence, which surpass those of the constitutionally-entrenched courts. Indeed statutory requirements that anti-corruption commissioners are only qualified for appointment if they have served or are qualified for appointment as a judge of a superior court[42] – along with other court-room like powers – contribute deliberately to perceptions that these agencies are independent, at least to the same degree as the judicial branch, and possibly more. Statutes require that the commissioner may be appointed 'only if the person's nomination is made with the bipartisan support' of the relevant parliamentary committee,[43] or meets other

[38] Section 97; see Hon WMC Gummow AC, 'A Fourth Branch of Government?' (2012) 70 *AIAL Forum* 19.
[39] Constitution Act 1934 (SA), s.78.
[40] Constitution Act 1975 (Vic), ss. 94B(1), 94E(1) and 94F(1).
[41] Roger Wettenhall (2012), Integrity agencies: the significance of the parliamentary relationship, *Policy Studies*, 33:1, 65-78.
[42] See e.g. *Crime and Misconduct Act 2001 (Qld), Crime and Corruption Act 2001 (2014) (Qld),* s.224.
[43] *Crime and Corruption Act 2001 (2014) (Qld),* s.228(2). Prior to amendment in 2014, the Act also provided that if there is was no parliamentary committee at the time, the Minister must consult 'the Leader of the Opposition and the Leader in the Legislative Assembly of any other political party represented in the Assembly by at least 5 members': s. 228(1)(b).

requirements for parliamentary approval, veto or consultation.[44] Australia's anti-corruption agencies are not alone in this – in India, the selection committees for appointment of Central Vigilance Commissioners and Information Commissioners, among others, must also include the Leader of the Opposition.[45] The United Nations Convention Against Corruption (UNCAC) provides that corruption-control bodies shall be granted 'the necessary independence' to carry out their functions 'effectively and free from any undue influence'.[46] The Jakarta Statement on Principles of Anti-Corruption Agencies (2012) identifies that anti-corruption heads should have 'security of tenure', 'be removed only through a legally established procedure equivalent to the procedure for the removal of a key independent authority specially protected by law (such as the Chief Justice)', and 'be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence'.[47] How this independence is achieved and whether or when it is useful can be controversial.[48] In Australia, anti-corruption agencies' concern for independence has been criticised as an 'obsession'.[49] However, while especially important in anti-corruption,[50] 'the appropriate degree of independence from government, or at the very least, operational autonomy,' is actually a defining feature of all integrity agencies.[51]

These efforts to ensure the independence of integrity agencies therefore take on constitutional significance, whether expressly contemplated by a Constitution or simply taking these statutory forms. Especially where written constitutions are old or hard to change, it becomes both valid and necessary to look to 'historical practice' to understand the nature and dynamics of governmental power, rather than trying to rely purely on bare-bones

---

[44] The South Australian committee must 'approve' the proposed appointment. In the case of the NSW ICAC, Police Integrity Commission and Crime Commission, and Victoria's IBAC, the committee must be consulted and may veto the proposed appointment. In Western Australia and Tasmania, the equivalent parliamentary committee must at least be consulted. See Queensland, *Crime and Misconduct and Other Legislation Amendment Bill 2014: Report No. 62*, Legal Affairs and Community Safety Committee, April 2014, p.20.

[45] *Central Vigilance Commission Act; Right to Information Act*, India.

[46] United Nations (2004) *United Nations Convention Against Corruption*. United Nations Office on Drugs and Crime, New York, Article 6, p 10.

[47] Jakarta Statement on Principles for Anti-Corruption Agencies (2012) Jakarta, 26–27 November 2012, <http://www.unodc.org/eastasiaandpacific/en/2012/12/corruption-kpkl/story.html>; <http://www.undp-pogar.org/publications/ac/aciac/JAKARTA STATEMENT - Principles for Anti-Corruption Agencies - 26-27 November 2012.pdf> (viewed 12 March 2015).

[48] See e.g. Martin Painter, 'Myths of Political Independence, or How Not to Solve the Corruption Problem: Lessons for Vietnam' (2014) 1(2) *Asia & the Pacific Policy Studies* 273–286.

[49] Former Australian Federal Police Commissioner Mick Keelty, as quoted by Robyn Ironside, 'Review savages Crime and Misconduct Commission and recommends staff changes', *The Courier-Mail* November 20, 2013.

[50] See N Passas (2010), 'Anti-corruption agencies and the need for strategic approaches', *Crime Law & Social Change* (2010) 53: 1–3.

[51] D Solomon, 'What is the Integrity Branch?' (2012) 70 *AIAL Forum* 26, at 32. See also C Wheeler, 'Review of Administrative Conduct and Decisions in NSW since 1974 – An Ad Hoc and Incremental Approach to Radical Change' (2012) 71 *AIAL Forum* 34 at 38-9, 55-6. See broadly A J Brown and B Head, 'Institutional Capacity and Choice in Australia's Integrity Systems' (2005) 64 *Australian Journal of Public Administration* 84, at p.91.

constitutional text.[52] Thus, in the US, the Supreme Court's approach to independent statutory agencies has come to shield them from the otherwise unlimited prerogative of the President to hire and fire 'at will', and to grant 'the independence of independent agencies ... a quasi constitutional status'.[53] At least, until now.

Whether constitutional or quasi-constitutional, the position of integrity agencies leads directly to the heart of debate over what branch they belong to, or whether they have come to represent a branch in their own right. Why is it, in Australia, that the statutory procedures for appointment to some types of integrity agencies have come to be more politically robust than anything for the judiciary – for whom the prerogatives of selection and appointment continue to lie exclusively with the Executive, with no safeguards at all?[54] It appears to be because these agencies exercise a special type and degree of power, different to that of the judiciary, or indeed any other branch. In Queensland, when the government tried to weaken the special political appointment procedure for the chair of the Crime and Misconduct Commission (CMC), arguing in part that what was good enough for judges should be good enough for integrity bodies, it suffered an intense public backlash and was forced to back down.[55] However, also at play are fundamental differences between the roles of integrity agencies and the exercise of judicial power, just as there is fundamental need for independence from the Executive. As spelt out by a former chairman of the Commission, these differences reinforce their special purposes, functions and powers:

> There are other potentially contentious positions (such as judicial positions) the appointment to which does not require bipartisan support. Comparison of those positions with the Chairperson of the CMC is unhelpful, however; the differences for present

---

[52] See e.g. Curtis A. Bradley and Trevor W. Morrison (2012), 'Historical Gloss and the Separation of Powers', *Harvard Law Review*, Vol. 126, No. 2, pp. 411-485

[53] Jack M. Beerman, 'An Inductive Understanding of Separation of Powers', 63 ADMIN. L. REV. 467, 491 (discussing Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB), 5 130 S. Ct. 3138 (2010)); as quoted by Bradley & W. Morrison (2012), p.483 (n.339).

[54] For some of the many proposals to remedy this, see R. Davis & G. Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review* 819; G L Davies AO QC, 'Why we should have a Judicial Appointments Commission', paper delivered at the *ABA Forum on Judicial Appointments*, Sydney, 27 October 2006; G. Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 163; S. Evans and J. Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 297; G. Appleby, 'Appointing Australia's highest judges deserves proper scrutiny', *The Conversation*, 9 December 2014 <https://theconversation.com/appointing-australias-highest-judges-deserves-proper-scrutiny-35039>; H G Fryberg QC, 'Judicial Appointments in Queensland', *Accountability and the Law*, Brisbane, 9 February 2015.

[55] See *Crime and Misconduct and Other Legislation Amendment Bill 2014: Report No. 62*, Legal Affairs and Community Safety Committee, April 2014, p.20, Recommendation 2. See Brown, 'Will Queensland corruption reforms pervert the course of history', *Brisbane Times / Canberra Times*, 6/7 May 2014 <http://www.canberratimes.com.au/it-pro/will-queensland-corruption-reforms-pervert-the-course-of-history-20140506-zr5pv.html>; Brown, 'Labor's first test: putting integrity before politics in Queensland', *The Conversation*, 13 February 2015 <https://theconversation.com/labors-first-test-putting-integrity-before-politics-in-queensland-37373>.

> purposes are greater than the similarities. The CMC is an investigative body which rightly has wide, invasive, proactive powers it can use of its own motion in a way that courts do not. The CMC initiates, courts adjudicate. Courts only decide cases that are brought before them, and they decide them in public.
>
> A failure by the CMC to be proactively courageous in initiating investigations against people in power would be disastrous, as would a mere perception of such failure. … [I]f there is suspicion that a body like the CMC is not as independent of the executive as human ingenuity can make it, cynicism about its willingness to expose the corrupt in the first place will fester, to the calamitous detriment of its mission.[56]

3. When do twigs make a branch?

> The recognition of a new branch of government is… a matter of considerable contest. ... What is less contestable is that we can identify a very mature, and continually expanding, framework of agencies, functions and activities in our system of government that has at its heart the protection and promotion of institutional and personal integrity. … [T]here is no need for any constitutional contortions to identify, and critically analyse, an integrity framework of government.[57]

While it may be being thrust into *de facto* existence by modern constitutional evolutions, does the integrity branch *deserve* to be recognised as a fourth branch of government, in its own right? Is it necessary, and what purposes would it serve? As we have seen, knowing where integrity agencies "fit" is pivotal to knowing whether they will be empowered with the necessary independence to do their job and support public trust; and also, to whom they are answerable. But even among Australian sympathisers, where they fit remains contorted. Far from presenting the integrity branch as independent, Spigelman described 'the three recognised branches of government, including the Parliament, the head of state, various executive agencies and the superior courts' as the key institutions through which the 'fourth' branch did its work.[58] Similarly vaguely, Dr David Solomon described integrity agencies as 'not a separate, distinct branch', but intertwined with the traditional, existing three branches, which 'collectively constitute the integrity branch of government…. there would be no advantage in trying to remove those functions and send them off to a fourth'.[59]

---

[56] Professor Ross Martin QC, Submission No. 25, page 2; as quoted in *Report No. 62*, Legal Affairs and Community Safety Committee, April 2014, p.19.
[57] Chris Field, Ombudsman of Western Australia (2013), above, 28.
[58] Spigelman, above; Creyke, above.
[59] Solomon, above, 26, 32.

So, where then do integrity institutions fit – what are the nature and limits of their power, and whose job is it to hold them to account? Does this mean they sit everywhere and anywhere, with the consequence that, notwithstanding their need for independence, it remains valid for any other branch to hold them to account, as if they were just another Executive agency? Against this unsettling vagueness, opponents of a fourth branch designation understandably seek more certainty – but do so in divergent directions. One former High Court judge, William Gummow, rejected Spigelman's proposition that the fourth branch idea might provide 'broader context' to inform constitutional and administrative law, instead finding it offered 'little utility and some occasion for confusion'.[60] But for Gummow, the reason why an integrity branch required no recognition was that this function was fulfilled by the existing third branch. Administrative remedies for administrative failures and breaches were the province of administrative law, which in turn was simply 'a subset of constitutional law'; questions of public integrity ultimately came back to the authority of the High Court as the peak arbiter of whether government officials were acting within power.[61] Central to this diagnosis of the judiciary as senior integrity custodians was an assertion of constitutional hierarchy, and objection to the idea that within the integrity system, integrity agencies were politically or constitutionally equivalent to the judiciary, in ways that might mean they intruded on it, or worse, expected to go judicially unchecked. A similar objection was raised by the chief justice of Western Australia.[62] Whether the different integrity twigs made up a branch or not, Gummow made it clear which branch was top of the tree:

> It remains open to the Federal and State legislatures to create by statute organisations and bodies to oversee good governance and investigate corruption and malpractice. But those entities and their members cannot be placed by the enabling legislation in islands of power where they are immune from supervision and restraint by the judicial branch of government.[63]

On the other hand, others argue, more conventionally, that integrity agencies have little or no formal determinative role in administrative law, nor any other area of law. So, while they may be subject to judicial oversight, they do not exercise judicial power, nor function simply as a junior limb of the judicial branch. Nor do they exercise legislative power, and we wouldn't want them to. Hence, a different answer is provided by Callinan and Aroney, who regarded the absence of any '*constitutionally established* fourth arm of government, distinct from the Legislature, the Executive and the Judiciary' as meaning that, 'by its nature', an integrity

[60] Gummow, above n**Error! Bookmark not defined.**, 19.
[61] Gummow, above n**Error! Bookmark not defined.**, 20.
[62] Martin 2013; cf Wheeler 2014.
[63] Gummow, p.24.

agency is 'a part of the Executive.'[64] Other academics have also described as simply 'unrealistic', the idea of 'an integrity or accountability branch not subordinate to executive government but equal to it'.[65]

Unfortunately, neither account resolves the question. Putting aside multiple objections to the idea of limiting integrity agencies to judicial or strict 'rule of law' roles, the courts cannot be regarded as themselves the backbone of the modern public integrity system, directing these agencies. As Martin notes above, their roles and functions, while sometimes overlapping, are in other ways too different. As Creyke notes, while courts are a major part of the integrity *system* and ensure the legality of integrity agencies, they must operate independently of those agencies to fulfil their own purposes.[66] Returning to political theory, O'Donnell sees the judiciary and other integrity agencies as all exercising horizontal accountability on the executive, and each other, but distinguishes between the '*balance*' horizontal accountability exercised by the judiciary when determining legality, and the '*mandated'* horizontal accountability exercised by integrity agencies, aimed at 'specific, but still quite general, risks of encroachment and/or corruption'.[67] Unlike other bodies charged with policing integrity among Executive officials, the judiciary is also reactive, not proactive, with no 'own motion' jurisdiction to initiate review – thus lacking a central feature of proper accountability.[68]

On the other hand, the *raison d'etre* of integrity agencies is to act independently of the Executive, in order to ensure its integrity at all levels, as well as in areas of the legislative branch (and indeed, judicial). So, to describe them as simply constituent agencies of the Executive cannot be accurate, unless this independence is in fact chimerical, or their fundamental purpose has already been defeated. Callinan & Aroney as much as admit this, also acknowledging that such agencies are different to most, if not all of their Executive counterparts. As 'auxiliary precautions', added to the constitutional system in support of the continuing quest for government to maintain control over itself,[69] they go beyond the 'distinct roles played by the fundamental institutions of Parliament, the Executive and the Courts'. Further, 'most… are also creatures of statute, enacted by the Parliament and responsible to the Parliament or one of its committees,' rather than to the Executive government.[70]

---

[64] Callinan & Aroney, p.25.
[65] Scott Prasser (2012) Australian integrity agencies in critical perspective, *Policy Studies*, 33:1, 21-35, p.31.
[66] Creyke, R. 2012. 'An "Integrity" Branch' *AIAL Forum* 70: 33–41, at p.37.
[67] O'Donnell, G. (2003). Horizontal accountability. The legal institutionalization of mistrust. In Mainwaring, S., & Welna, C. (Eds.). *Democratic accountability in Latin America*: 34–54. Oxford University Press, pp.44-45.
[68] Creyke, above; see also Wheeler (2014), p.745); Howe & Haigh 2016, p.311
[69] Callinan &Aroney, above, p.23, quoting US federalist James Madison.
[70] Ibid, 23-4.

And so, we are back where we started. In fact, if we go back to the administrative dilemmas that first saw the outbreak of regulatory bodies labelled as a fourth branch in the US, and trace similar developments in Australia, we get an even clearer picture why integrity agencies form a distinct and unique part of the system, beyond even the most independent of the other "independent" Executive agencies. Ackerman's suggestion that other independent regulatory agencies still deserve a 'fifth branch' status, to protect the role of expertise, also prompts this comparison. Arguably, the inclusion of central banks in recent constitutions could be examples of this. But beyond that, the suggestion becomes as doubtful as it was in 1937 – to try and protect the government's sources of free, frank, informed advice by insulating them from the branches that need it, would seem likely to either doom them to irrelevance or commit officially to technocracy. Hence, in Australia, Julius Stone rejected the American idea of separating the 'administrative' power from the political Executive and attaching it to Congress as a fourth branch, because it simply wouldn't achieve its aims. Rather, administration is 'a fourth group of functions, not sharply and clearly distinguished from the traditional three, but interstitial and supplementary to these.'[71] So, one measure of whether integrity agencies remain part of the Executive like other regulatory agencies, is to compare them, and see whether they are similarly interstitial and supplementary.

Another Australian advantage, thanks to our colonial political economy, is that of having long ago got used to large, "independent" statutory authorities (especially state-owned railways), and managing them as a major component of executive government without feeling the need to declare them a fourth branch. So too with regulatory agencies, part of Australia's particular 'pre-eminence in transmuting power conflicts into arbitral and administrative processes', ostensibly at "arm's length" from government.[72] Take three bodies – the national corporate regulator ASIC, the Australian Federal Police, and the Director of Public Prosecutions – all of whom are created, like integrity agencies, with strong independence to go with strong investigative and regulatory powers and roles, of "backbone" importance to society, in order to ensure public confidence in their objectivity and impartiality, and insulate themselves and politicians from allegations of self-interest or interference. The comparison is revealing. Despite all this, and despite the high expectation that these agencies will act with autonomous discretion when it comes to who and what to investigate, charge or penalise, their

---

[71] Julius Stone, *Social Dimensions of Law and Justice*, Maitland Publications, 1966, p.702 -- see Blackshield & Williams, *Australian Constitutional Law & Theory*, 4th Edition, Federation Press, Sydney, 2006, p.22.
[72] R S Parker, 'Power in Australia' in Colin Hughes (ed), *Readings in Australian Government*, 1968, p.25; see also A J Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48 at p.82.

independence remains short of absolute *at law*. Recent events in Australia confirm that the Executive is still expected to take responsibility if major areas of corporate misconduct are going unaddressed; and at law, it retains specific powers to direct the policies and priorities of ASIC, even to the point of directing that particular matters be investigated.[73] For the AFP, as with many police services, powers of ministerial direction over operational and individual matters are more circumscribed, and at least in theory, mean the Executive (e.g. Attorney-General) cannot direct any individual police officer in how to exercise their discretion about who or whether to arrest or charge. However, the Minister retains a power to direct the Commissioner 'with respect to the general policy to be pursued' in relation to the performance of any functions of the AFP;[74] and in any event, like any person, can themselves lay individual charges by instituting proceedings for a breach of criminal law.[75]

Similarly, the creation of Directors of Public Prosecution – so that normally, decisions to institute proceedings are made by an independent officer guided by principles set out by law, rather than by the Executive – does not deprive the Attorney-General of their own power to bring prosecutions on behalf of the government or people. And while circumstances vary, the Commonwealth DPP – despite describing itself as 'the independent prosecuting authority'[76] – is still subject to written direction by the Attorney-General in respect of any of its functions or powers, right down to 'the circumstances in which the Director should institute or carry on prosecutions', and 'in relation to particular cases'.[77] The only disincentive to the Executive giving capricious or self-interested directions is the requirement that they be transparent, via publication in the Gazette and the parliament.

These relationships are instructive for multiple reasons. Most importantly, they provide a clear point of differentiation with our core integrity agencies, whose statutory independence is far stronger – none are subject to *any* of these kinds of reserve powers of

---

[73] See *ASIC Act* 2001, s.12 (Directions by Minister) (1), for 'written direction about policies [ASIC] should pursue, or priorities it should follow, in performing or exercising any of its functions or powers…' (other than certain excluded provisions), provided (2) there is first written consultation with ASIC, and (3) no direction 'about a particular case'; s.14 (Minister may direct investigations) (1), for 'public interest' directions in writing to investigate 'a particular matter'.

[74] See *Australian Federal Police Act* 1979, s.37 (General administration and control), (2), notwithstanding (1), and providing (3) for 'written directions (either specific or general)' in relation to a selection of purely administrative matters, and protective service functions.

[75] E.g. *Crimes Act 1914* (Cth), s.13.

[76] See https://www.cdpp.gov.au/victims-and-witnesses/frequently-asked-questions (viewed 8 July 2018).

[77] *DPP Act 1983* (Cth), s.8 (Directions and guidelines by Attorney-General). Contrast *Director of Public Prosecutions Act 1986* (NSW), s.26 (Guidelines by Attorney General) which (2) 'may relate to the circumstances in which the Director should institute or carry on prosecutions', but (3) 'may not be furnished in relation to a particular case' (emphasis added).

executive direction. In Queensland, proposals that the anti-corruption agency be made subject to a requirement for ministerial approval even, and only, in respect of its research plans, received strong objection and was reversed.[78] The only formal means of Executive influence are the power to: appoint (which as seen above, may also be uniquely restrained); threaten to institute legal or parliamentary proceedings for removal; persuade the parliament to abolish or change their legislation; and reduce or cancel their budget.[79] On all these, the closer comparison is again with the courts, rather than the most independent of executive agencies.

Second, the comparison with independent executive agencies affirms why the latter remain 'executive' in nature, even when independent. This confirms earlier responses about the limited value of a separate 'administrative' or 'regulatory' branch.[80] Moreover, the comparison helps explain not only that integrity agencies do not 'sit' in the same way in the Executive branch, but that their power is not 'Executive' in nature. Yes, the independent executive agencies operate independently, and exercise a range of powers that are also not purely executive or administrative in nature (e.g. delegated rule-making powers subject to supervision by parliament). These also include powers of legal process, enforcement and judgment which can be quasi-judicial, and are subject to judicial supervision – including to the extent that, where their main job is to place cases before the court, the executive advocate is both a government employee *and* an "officer of the court".

But these agencies' formal relationships with the Executive remind us that ultimately, they conduct regulatory affairs which if necessary could be (and on occasion, still are) pulled back into the direct control of traditional departments, answerable to their Minister. They may then function less well, or be subject to more political uncertainty or controversy, and there may be disquiet from the community – but the discretions would still be able to function. Indeed, in many political systems without the same penchant for independent regulation, this is exactly what happens. The most acid test becomes, perhaps, what the community will accept. The community can accept this; it is part of the government doing its job. But the community would not accept the same thing in respect, for example, of

---

[78] See *Crime and Misconduct and Other Legislation Amendment Bill 2014: Report No. 62*, Legal Affairs and Community Safety Committee, April 2014; Brown, 'Labor's first test: putting integrity before politics in Queensland', (2015) above [update on leg needed].

[79] See OAIC – deleted the budget but couldn't get rid of the legislation or terminate the appointment; so carried on; budget reinstated. The government's cancellation of the budget of the Office of the Australian Information Commissioner in 2014 – notwithstanding refusal of the parliament to abolish its functions. See Mannheim, M. (2014). Freedom of information law overseen by one man working from home. The Canberra Times, 11 December 2014 http://www.canberratimes.com.au/national/public-service/freedom-of-information-law-overseen-by-one-man-working-from-home-20141211-124rc6.html.

[80] See Julius Stone, op cit.

the courts – even though, in Anglo-Australian history, these too began their life as a subset of the royal i.e. Executive court, and were not "born" independent.[81] And now, the community would not accept it, if the Executive or government attempted to revert independent integrity agencies to ministerial direction. The political trend is all the other way. Hence major Australian debates over both the effective independence of existing integrity agencies,[82] and the case for new ones – specifically to convert functions currently done under executive control, into ones done with formal, legal and institutional independence.[83]

Of course, the fact that independent integrity agencies are more analogous with the independent courts, than they are with independent executive agencies, does not mean that they do or should exercise judicial power. As already noted, nor does it mean that they are, or should be, free of oversight by the courts. Indeed, quite the reverse – it underscores why the extent of judicial oversight is a critical issue. As Justice Gummow noted, the whole basis of the system is that the existing tripartite structure provides 'in significant respect for the oversight of each of the three branches of government by the other two',[84] and the principle should remain, even if there are not three, but four. Thus, there are practical implications of the fact that, as well as having special independence from the Executive, integrity agencies may not be subject to the 'same degree of scrutiny' as other agencies with similar powers, making real the old question *quis custodiet ipsos custodes?* (who shall guard the guardians?).[85] The question is not whether integrity branch agencies should remain subject to the rule of law, but how it should be achieved, and whether normal "administrative law" is enough. This is a healthy debate in Australia.[86] Suggestions that key operational discretions of an anti-corruption agency should be made subject to merits review, even where equivalent discretions of other investigative agencies are not, received especially vociferous reactions.[87]

---

[81] Cross reference to Grzegorz paper on the Polish backlash?

[82] E.g. NSW ICAC.

[83] E.g. Senate Select Committee on a National Integrity Commission, etc. Conversion to the IPEA particular instructive; but also the Ministerial Standards debate. And more broadly, the APSC Code of Conduct debate.

[84] Gummow (2012), above, p.21.

[85] Juvenal, *Satire VI* (attributed); see Callinan and Aroney, above, p.25.

[86] See especially Sarah Withnall Howe & Yvonne Haigh (2016), 'Anti-Corruption Watchdog Accountability: The Limitations of Judicial Review's Ability to Guard the Guardians', *Australian Journal of Public Administration*, vol. 75, no. 3, pp. 305–317; and the Hon T F Bathurst AC, Chief Justice of NSW, 'New tricks for old dogs: the limits of judicial review of integrity bodies', James Spigelman Oration 2017, 26 October 2017. Also, previously, J Wenta, 'The Integrity Branch of Government and the Separation of Judicial Power' (2012) 70 *AIAL Forum* 42; the Hon Wayne Martin CJ, 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government', 2013 Whitmore Lecture, (2014) 88 *Australian Law Journal* 106; and Chris Wheeler, 'Response to the 2013 Whitmore Lecture by The Hon Wayne Martin AC, Chief Justice of Western Australia', (2014) 88 *Australian Law Journal* 740.

[87] See Grant Hoole and Gabrielle Appleby, 'Integrity of Purpose: A Legal Process Approach to Designing a Federal Anti-Corruption Commission' (2017) 38 *Adelaide Law Review* (in press); 'Integrity of Purpose:

Nor does any of this mean that the courts should be left behind, when it comes to constitutional innovations for enhancing independence, sustainability and effectiveness. Behind many judicial objections to the notion of an integrity branch can be seen palpable resentment of the risks of further attritions in judicial independence, or sight of these being, if there is a competitor branch. Hence, the fact that some integrity agencies already have superior appointment mechanisms than the courts, as noted above, should provoke a wider debate. Similarly, with the autonomy of budgets. For anti-corruption agencies, the Jakarta Principles (2012) noted earlier also set out the fundamentality of 'timely, planned, reliable and adequate resources', and there is no question that in some contexts, such principles translate into special budgetary arrangements or requirements, superior to those protecting some courts. For example, New Zealand's National Integrity System assessment revealed the relative success of arrangements whereby the Auditor-General and other bodies negotiate directly with the parliament rather than the executive for their budget, via a Parliamentary Officers of Parliament Committee; whereas pressure on the courts to deliver higher performance with the same or fewer resources has led to judicial-executive relationships described as 'difficult'.[88]

The issue is everywhere. In the US, suggested answers include the exercise of the 'inherent power' of a court to legally require the executive to provide the funds necessary to maintain its constitutional duties.[89] Overall budget protection may now be a more important issue for judicial autonomy and independence than the traditional protections of individual judicial tenure and salary.[90] In Australia, the Chief Justice of the High Court has warned publicly of the risk of 'reductionist' approaches to performance management and finances, leading governments to treat the courts simply as 'another executive agency, to be trimmed in accordance with the Executive's discretion in the same way as… its own agencies'.[91] Chief

---

Designing a Federal Anti-Corruption Commission', paper to Transparency International Australia's First Biennial Conference, National Integrity 2017, Brisbane, Australia, 17 March 2017.

[88] See Transparency International New Zealand (2013), *Integrity Plus:* New Zealand National Integrity System Report, Wellington, New Zealand, pp.229 and 110, respectively. See also Mongolia's statutory requirement that the ACA's budget 'may not be less than… in the previous year': *Law of Mongolia on Anti-Corruption 2006*, Article 29.3. See generally, A J Brown and Mark Bruerton (2017), *Crime Law & Social Change ….*

[89] Yates, Andrew (2013), 'Using inherent judicial power in a state budget dispute' (2013) 62 *Duke Law Journal* 1463; see previously, Lindner, C. L. (1995). Budget crisis: judiciary is not just a county department, *Los Angeles Times*, Los Angeles, California, 9 July 1995, p.1.

[90] Douglas, J. W. & Hartley, R. E. (2003). 'The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?' (2003) 63(4) *Public Administration Review* 441, p.444.

[91] French, R. S. (2009). Boundary conditions – the funding of courts within a constitutional framework, Speech, Chief Justice, High Court of Australia, Australian Institute of Judicial Administration, Australian Court Administrators' Group Conference, Melbourne, 15 May 2009, pp. 2–3. <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj15may09.pdf>. Also citing Brennan 1998, p.35: Brennan, Sir Gerard, Chief Justice (1998). The State of the Judicature, (1998) 72 *Australian Law Journal* 33. Chief Justice French's solution was a 'separate Appropriation Act' for the High Court, sought by the executive from the parliament, but not lying within the general envelope of departmental

Justices, like integrity agencies, routinely have to fight off executive attempts to impose the same types of 'efficiency dividends' (or reductions in non-salary funding) imposed on other agencies of government.[92]

The purpose here has been to test arguments for why the types of core integrity agencies that are increasingly being constitutionalised around the world, should *not* qualify for their own branch in an Australian context. They simply do not fit, as a question of constitutional *or* sub-constitutional practice, under the Executive branch in the manner typically argued. Nor are their existence, powers and roles explained by their relationships with the judicial branch, much as these deserve discussion and debate. Nor do integrity agencies exercise legislative power, and we wouldn't want them to. Yet their fundamental need to remain independent of the Executive, as well as the courts, leaves them with few other places to go. Does their position as waifs itself justify creation of a new constitutional branch? Probably not. So, how do we then conclude, positively, whether their existence and commonality of purpose and functions warrant this recognition as a fourth branch – whether under current constitutions or prospective ones?

4. Montesquieu revisited: locating species of governmental power

To reach a positive answer, the discussion points to a critical issue – beyond simply whether an agency or agencies have a distinct, shared purpose, and whether this requires formal, legal and institutional independence from other branches. The question becomes whether these agencies also exercise an identifiably different form of governmental power. A negative answer might not prevent justification for an additional branch – but a positive answer would seem to end the argument. Ultimately, as seen, this is what helps determine that other regulatory agencies remain part of the Executive: not simply that their independence is more malleable, but that they do not exercise any unique kind of power.

So, what is the nature of integrity agencies' power? We can see that it is not legislative; nor is it judicial, or at least not beyond the sense that any and all officials, from

---

funding, and freeing the court from the executive's internal budgetary trade-offs. This, in preference to an appropriation negotiated directly with parliament, lest this compromise the public standing of the judiciary by placing judges in the undignified position of publicly (as opposed to privately) pleading their own case.

[92] Berkovic, Nicola (2009). Razor gang's High Court caveat. *The Australian* [Canberra, A.C.T] 5 Jan 2009, p.2.; Parnell, S. (2014). Chief Justice takes on Abbott over cuts, *The Australian,* 21 February 2014.

any branch, may be required to adopt judicial and judicious processes, commensurate with the decision being made or the power performed. Certainly integrity agencies exercise a considerable amount of executive power, like other investigative and policy agencies and often more so – but is that the limit of their power? By "power", it is enough, for this section, to recall the normal dictionary definition of power as 'the capacity or ability to direct or influence the behaviour of others, or the course of events'.[93] In political science and constitutional law, the nature of the power being exercised by a public official or body, at any given time, will be determined by at least four factors: the person or body exercising the power; the laws or conventions authorising or describing what they are purporting to do; the functions and purposes purportedly or actually served; and the intended or actual effects.[94] In this analysis, the first factor is our central problem, and the second has been discussed where relevant; it is the last two which might reveal more.

In trying to characterise the shared nature of the core integrity agencies' power, in the broad, it is useful to note the parallel between our dictionary definition, as fundamentally relational – whether or how others or events are being influenced, and presumably who those others or events are – and the way we characterise our three main existing species of power. Legislative power is concerned with general, hopefully principles-based, rules, rights, obligations and policies applying to many; but the enforcement of these (other than voluntarily) is not carried out by those who make them, or at least not in that capacity; the power takes its actual effect, where necessary, through execution and enforcement by other branches. The subjects of executive power are more specific, because carrying out laws or policies requires actions, whether oriented at many or just one individual; the types of actions are unlimited, but need to be authorised by law, supported with resources (also granted by the legislature), and backed where necessary with compulsion (regulated by the judiciary). Hence the key hallmark of judicial power is even more specific again – that of supporting justice and social harmony through the fair resolution of individual disputes; and for governmental purposes, being almost the only branch with authority to conclusively determine the legal rights and obligations of any party, in any contest between the government and others, in the individual case.[95] Even more than other branches, it is dependent on others if physical or financial enforcement is needed for this to take effect. The power is defined by whom it

[93] Oxford Dictionaries Online.
[94] For one directly relevant constitutional law approach, see Tuan N. Samahon, 'Characterizing Power for Separation-of-Powers Purposes', 52 *U. Rich. L. Rev*. 569 (2018).
[95] See Linda Kirk, 'Judicial power' in Tony Blackshield, Michael Coper & George Williams (eds), *Oxford Companion to the High Court of Australia*, OUP, 2001, pp.372-3.

operates on, how, and who else is or is not involved in making it operable, more than by whatever "it" actually is.[96] Indeed, for the existing three branches, it is the subjects and relationships of power needed to affect those subjects, which can be seen as defining the branch – rather than the branch, *per se*, defining the power.[97]

Since this threefold configuration of power has become increasingly popular over the last 300 years, it is easy to look back and see three types of power – and even three branches – wherever we care to look. For example, we can reconstruct it from Aristotle's ancient description of three main governmental agencies (the general assembly, deliberating upon public affairs; the public officials; and the judiciary).[98] But in the here and now, and especially for Anglo-Australian and American traditions, it is best to start from 1689, when John Locke and contemporaries supported and sought to interpret the separation of absolute power into two main types – legislative and executive – to define the roles of Parliament and Crown after the English Civil War and 'Glorious Revolution' of 1688. Indeed, Locke described 'the legislative power and the judicial execution of that power' not only as best made 'distinct', but placed 'in several hands'[99] – not just two, nor even three, but *several*. The phrase 'judicial execution' recognised not only that monarchs should act judiciously, but that in practice, much of the executive power was exercised by judges and the justices of the peace, who in addition to "judicial" duties controlled almost the whole of local administration. As is well known, it was only in 1701 that the functional specialisation of "judicial power" was separated from the executive in England, and developed as a discernible branch.

Thus, we arrive at the context in which Montesquieu wrote his *Esprit des Lois* (published in 1748), interpreting English developments against the backdrop of European

---

[96] This is only more true when considering integrity relationships: see Hugh Breakey (2014), 'Dividing to conquer: using the separation of powers to structure institutional inter-relations', *Research in Ethical Issues in Organizations*, Volume 12, 29-58, at p.31: 'whether an institution will fulfil its task effectively, and stay within the limits of its authority as it does so, is fundamentally a function of its relationship to other institutions'; p.56: It is precisely because of the manner in which the institutions are made distinct from one another with different personnel, interests, procedures and powers that those institutions are fit for reconnection.' Similarly, O'Donnell points out that the liberal democratic separation of powers is 'not separation of powers but the partial interpenetration of relatively autonomous and balanced powers', following US founders' convictions that rather than 'sheer separation of powers… these powers would better control each other if each of them had some jurisdiction over important decisions of the others': O'Donnell, G. (2003). Horizontal accountability. The legal institutionalization of mistrust. In Mainwaring, S., & Welna, C. (Eds.). *Democratic accountability in Latin America*: 34–54. Oxford: Oxford University Press, p.41.

[97] For a previous foray into characterisation of judicial and executive power, see A J Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48.

[98] See John A. Fairlie, 'The Separation of Powers', *Michigan Law Review*, Vol. 21, No. 4 (Feb., 1923), pp. 393-436 at p.393.

[99] John Locke, *Two Treatises of Government* (1689), ch. 6, p. 104; as quoted by Fairlie (1923), p.395-6. While Locke did write of three powers overall -- legislative, executive, and 'federative' – the last concerned external affairs ('war and peace, leagues and alliances') and was placed under the same control as the executive.

history, and in relation to his native, pre-revolution France. But contrary to assumptions, when he wrote that 'in every government there are three sorts of power', he did not immediately class these as legislative, executive and judicial, but rather followed Locke, and others, in describing 'the legislative; the executive in respect to things dependent on the law of nations [Locke's 'federative']; and the executive in regard to matters that depend on the civil law.'[100] Despite this language, Montesquieu immediately proceeded to recast these categories in terms that better reflected the English system of the time – collapsing the international and civil dimensions of executive power, and converting the remnants of the latter into 'the judiciary power', or the means by which 'the prince or magistrate… punishes criminals, or determines the disputes that arise between individuals.'[101]

The purpose here is not to suggest that Montesquieu was necessarily accurate in his descriptions, nor to analyse his debts to other thinkers,[102] nor to take sides in debates over the extent to which his ideas were consistent with later strands of republicanism.[103] If anything, what follows points to his deep trust of hereditary aristocracy, supporting the view that of the various branches and estates that made up government, he saw this as holding special promise for preventing the decay of the *ancien regime* into either despotism or republicanism, 'the two directions in which monarchy has a propensity to collapse'.[104] Montesquieu asserted that liberty would only be present 'when power is not abused', for which 'power must check power by the arrangement of things'[105], but did not see political liberty as defined either by living in a republic, or by popular sovereignty.[106]

Of special interest here are two passages from Montesquieu, in which he brings out key nuances of, or exceptions to, what he otherwise advocated as a strict functional separation between the legislative, executive and judicial powers. The first was a reference to the great

---

[100] Montesquieu, *The Spirit of Laws*, 1748; Book XI, Chapter 6, p.173.
[101] Ibid.
[102] See Robert Shackleton, 'Montesquieu and Machiavelli: A Reappraisal', *Comparative Literature Studies*, Vol. 1, No. 1 (1964), pp. 1-13; Paul A. Rahe (2011), 'Montesquieu's anti-Machiavellian Machiavellianism', *History of European Ideas*, Volume 37, Issue 2, pages 128-136.
[103] On the competing, indeed irreconcilable interpretations of Montesquieu over the years, see Melvin Richter, 'Montesquieu: A Critical Biography by Robert Shackleton', *History and Theory*, Vol. 3, No. 2 (1963), pp. 266-274 at p.270; Annelien de Dijn (2014), 'Was Montesquieu a Liberal Republican?', *The Review of Politics*, Volume 76, Issue 1, 21-41.
[104] Michael Oakeshott, 'Montesquieu: A Critical Biography by Robert Shackleton', *Modern Language Review*, Vol. 57, No. 3 (Jul., 1962), pp. 442-444 at p.444. See more recently, Robin Douglass (2012) 'Montesquieu and Modern Republicanism', *Political Studies* 60(3): 702-719, at 704; Christopher Brooke (2018), 'Arsehole aristocracy (or: Montesquieu on honour, revisited)', *European Journal of Political Theory* DOI: 10.1177/1474885118783603, at p.2.
[105] Montesquieu, *The Spirit of Laws*, 1748; Book XI, Chapter 4.
[106] Robin Douglass, (2012) Montesquieu and Modern Republicanism, *Political Studies* 60(3): 702-719, at 708.

power of both the legislature and the Executive, relative to the judiciary, in which he suggested there were not just three powers, but also at least one more:

> The legislative power is therefore committed to the body of the nobles, and to that which represents the people, each having their assemblies and deliberations apart, each their separate views and interests. Of the three powers above mentioned, the judiciary is in some measure next to nothing: there remain, therefore, only two; and as these have need of *a regulating power to moderate them*, the part of the legislative body composed of the nobility is extremely proper for this purpose.[107]

In the second passage, Montesquieu outlined three exceptions to the principle that 'in general, the judiciary power ought not to be united with any part of the legislative', with each exception 'founded on the particular interest of the party accused'. His third exception was:

> It might also happen that *a subject entrusted with the administration of public affairs* may infringe the rights of the people, and be guilty of crimes *which the ordinary magistrates either could not or would not punish*. But, in general, the legislative power cannot try causes: and much less can it try this particular case, where it represents the party aggrieved, which is the people. It can only, therefore, impeach. But before what court shall it bring its impeachment? Must it go and demean itself before the ordinary tribunals, which are its inferiors, and, being composed, moreover, of men who are chosen from the people as well as itself, will naturally be swayed by the authority of so powerful an accuser? No: in order to preserve the dignity of the people, and the security of the subject, the legislative part which represents the people must bring in its charge before the legislative part which represents the nobility, who have neither the same interests nor the same passions.[108]

In both cases, Montesquieu entrusted these special roles to the nobility, as represented in, and comprising, the "upper" house of parliament, or in the English system, the Lords Spiritual and Temporal. And thus he marks himself out as an aristocrat, while also recognising that like any other branch, part of the function of the nobility would lie in its own 'considerable interest to preserve its privileges — privileges that in themselves are obnoxious to popular envy'. This in turn necessitated why, as an anti-corruption measure, the Lords' own powers should be limited when it came to laws of "supply".[109] But the key lesson is not to whom he granted these roles, but the fact that he identified two circumstances in which a fourth, different power and/or process was needed to manage an issue – in a manner beyond the arrangements based on the central three powers.

---

[107] Book XI, chapter 6, p.177 (emphasis added).
[108] Book XI, chapter 6, p.180-181 (emphasis added).
[109] Book XI, chapter 6, p.177: 'The body of the nobility ought to be hereditary.... But as a hereditary power might be tempted to pursue its own particular interests, and forget those of the people, it is proper that where a singular advantage may be gained by corrupting the nobility, as in the laws relating to the supplies, they should have no other share in the legislation than the power of rejecting, and not that of resolving.'

Plainly, Montesquieu envisaged the Lords as quite independent of the Commons ('each having their assemblies and deliberations apart, each their separate views and interests'). For both these purposes (regulating to moderate the power of the executive and legislature; and trying abuses of power by public officials), this fourth component of the governmental system was therefore clearly expected to act independently of the others. These purposes may not correspond fully with the forces and concepts included in our definitions of "integrity", at the outset, but they certainly land in the same territory. It is this combination of a fundamental purpose additional to and unsuitable for the existing three branches in their normal roles, and recognition that a fourth institution was needed to exercise it, which becomes so suggestive of an answer to our question. The common purpose between the two examples, is an independent part of the system capable of holding the other parts of the legislature, executive and individual officials to account in their exercise of power, specifically for the purpose of guarding against overreach or misuse.

Of course, Montesquieu's decision to prioritise this function, and suggest specific arrangements to serve it, may just have been a product of the time. Perhaps, underlying his advocacy of a strict separation between legislative and executive power, long before the idea of responsible government, lurked a recognition that it was nevertheless best if the legislature could somehow exert more direct control over the executive – and plainly, he was not going to entrust that role to the Commons. Yet on both occasions, his references to the limitations of the judiciary for these accountability roles suggest that he had a more specific function in mind than general executive oversight – it was to 'regulate' and 'moderate' its power, not direct it. So, what if Montesquieu could see the more powerful and entrenched judicial role of the modern day: would he simply entrust these intra-governmental regulatory functions instead to William Gummow's judiciary? In the first instance, this seems unlikely, given the confinement of the judicial role to settling individual disputes and penalising crimes. It is more plausible for the second, to the extent that in many democracies today, the rule of law is strong enough to see many officials brought to justice in the conventional courts. But it might depend where Montesquieu looked – in many countries, even with healthy tripartite constitutions and otherwise strong legal systems, it continues not to be case; and even in the theoretically advanced, like Australia and the United States, it can be difficult.

Indeed, the history of all the major anti-corruption agencies in Australia lies in the inability, or perceived inability of existing systems of justice to do the *entirety* of the job needed to bring corruption to light, or see through its consequences. On Montesquieu's logic, if any 'subject entrusted with the administration of public affairs' infringes the rights of the

people by abusing that trust, then it should not surprise us that more than the existing three powers are needed to respond. This is why there is a fourth "integrity" power.

We are now many generations past the time when anyone in a Western democracy would suggest that such an integrity power should reside with hereditary nobles. More plausible is that it could remain rooted in an elected parliament. Indeed, in present day Australia and elsewhere, it is when integrity agencies are formally constituted as officers of parliament, exercising independent executive power from that position and with that oversight, that their constitutional position is most coherent. But of course, there are members of the executive in the parliament as well, and parliamentary and electoral integrity are part of the problem, so while this resolves the difficulty of having an Executive body exercising oversight of the Legislature,[110] it emphasises all the challenges of how the legislature polices itself. But our focus here is not on the body, but on the power – a different and specific need generated by the evolving pursuit of public good through the limitation and division of public authority. This is what makes it more strange than innovative to hear constitutional scholars suggest that a 'modern constitution' should devote special articles to creating separate institutions to check and balance 'corrosive tendencies' in government – as if such tendencies are new.[111] Irrespective of his preferred solution, Montesquieu's analysis reminds us that this question has always been central to constitutional thinking, or for Europeans at least since the Enlightenment. As Spigelman reminded us, it was the 13th century Mongol Emperor, Kublai Khan, who once said of his governmental structure: 'The Secretariat is my left hand, the Bureau of Military Affairs is my right hand, and the Censorate is the means for my keeping both hands healthy.'[112]

Locke's remark that the two forms of political power were well placed among 'several hands', and this expanded view of Montesquieu recognising that neither power nor the specific institutions handling it were strictly limited to the number "three", do much to help explain why our attempts to shoehorn the integrity branch into one of the others has been so unproductive, and caused so much consternation. For constitutional lawyers seeking to make sense of constitutions expressed in "strict" terms of legislative, executive and judicial power, this analysis should help provide some relief, by confirming that while our established

---

[110] An arrangement sitting 'somewhat uncomfortably' with 'the principle of Parliamentary sovereignty upon which the Westminster system of Parliamentary democracy... is based': Bruce McClintock QC, 'Independent review of the Independent Commission Against Corruption Act 1988: Final Report' (2005) para 5.7; see Callinan and Aroney, above, p.25.

[111] Ackerman (2000), p.694.

[112] See Charles O Hucker, *The Censorial System of Ming China*, Stanford Uni P, Stanford, California (1966) p6; as quoted by Spigelman (2004), n.3.

ideas about these powers are sound, they are not necessarily the only powers that exist. Nor should the exercise of those powers be confined to only three branches.

So, how many powers and branches may there be? For those who appreciate power relationships in their infinite complexity (let's call ourselves hippies, rather than 'arseholes'[113]), it may be a case of the more, the better. According to Hugh Breakey, the 'informal messiness in the metaphors used to capture integrity systems', from webs of accountability to ecological conceptions of legitimacy, opens a wide realm of possibility:

> The complexity of the myriad inter-relations and governance strategies… has hopefully buried any notions of the simplistic tripartite separation of powers. Indeed, it is arguable that messiness – in the sense of a complex and unsystematic tangle of checks and balances, divisions and overlaps – can itself be a virtue for an integrity system. The skeins of overlapping responsibilities, fickle public attention, unclear jurisdictions, murky rivalries, shifting memberships and so on can create an ethical melange where corrupt agents cannot be confident their abuses will go undetected and unpunished. They cannot be certain who they need to hide their actions from, and who they must fool, bribe or threaten. If Machiavelli was right that few are corrupted by few, it might in an analogous spirit be posited that simple regimes can be corrupted simply.[114]

In fact, in the Michigan Law Review as far back as 1923, John Fairlie pointed out that the attempt to represent government as 'a triangle of equal and opposing forces, or as any other simple geometrical figure' was inadequate and misleading: 'If any such mechanical analogy could be worked out in the governmental machine, there would be a perpetual deadlock.' Instead, analogies might be better drawn with 'the present-day theories of molecular and atomic structure, which suggest an indefinite variety of complex combinations rather than a simple rule of three.'[115] In all our language of branches, we seem to have forgotten that the tree, itself, is an ecological metaphor; and that it is likely to be a rare or unhealthy type of tree that has such a limited number of branches.

However, it is not the consequence here to suggest that we throw away the existing understandings of governmental power, or that confirmation of a fourth power, or branch, should lead us to search for thousands more. It is enough, 270 years after the *Spirit of Laws*, to confirm that good government depends not only on the recognition and separation of general legislative, executive and judicial power, applying to all – but on an integrity power,

---

[113] See Brooke (2018), 'Arsehole aristocracy (or: Montesquieu on honour, revisited)', *European Journal of Political Theory* DOI: 10.1177/1474885118783603, at p.2.
[114] Breakey, Hugh (2014), 'Dividing to conquer: using the separation of powers to structure institutional inter-relations', *Research in Ethical Issues in Organizations*, Volume 12, 29-58, at p.55-56. One such ecological metaphor is the integrity system 'bird's nest', as against Greek temple: see Sampford, Smith & Brown (2005)…
[115] See John A. Fairlie, 'The Separation of Powers', *Michigan Law Review*, Vol. 21, No. 4 (Feb., 1923), pp. 393-436 at pp.434-435.

exercised on itself. It makes sense to see this power as partly diffused and exercised among the three existing branches, just as they share the different existing forms of power; but the existence, position and needs of core integrity agencies confirms that this power also has its own, unique institutional repositories, capable of acting together. The reality of this branch is that it does not and cannot subsist as part of the Executive, if it is to do its job, even though the bulk of the integrity power is executive by nature; nor does it sit as part of the Judiciary, notwithstanding its comparability and close relationships. While it might subsist as an offshoot of parliament, and is certainly subject to parliamentary as well as judicial oversight, it does not exercise legislative power nor administrative tasks relating to directly to the making or quality of legislation (or of public policy); and its power may also be directed at individual legislators. Therefore, functional and operational independence from the day-to-day politics of the parliament is also a prerequisite. Analysing power this way, the purpose and justification for recognising a fourth branch becomes complete. The real questions become, not whether that is possible, desirable or happening, but what steps need to be taken to better define, enable, interpret and regulate its power.

Conclusion: let integrity thrive?

This paper has explored what the constitutional position of integrity agencies *currently* is, and what it *should* be recognised to be. In both cases, in broad terms, the answer is the same – whether explicit in constitutions as is the growing case around the world, in part or whole, or simply recognised sub-constitutionally, from historical practice. If 90 per cent of the world's most recent or recently revised written constitutions are including at least one type of permanent integrity agency, above and beyond the tripartite mix, then there is a lesson to be learned. The integrity branch is real. Even more importantly, on top of the use of existing executive and administrative power to do its job, the branch exercises discernible functions that no other can undertake in the same way or with the same confidence. The justification for these has been apparent, if we cared to look, at least since the time of Montesquieu's *Spirit of Laws*. While the agencies making up the integrity branch may have all their own challenges of efficiency, sustainability, performance and accountability, none of these things change the reasons for its existence, nor the reality that these reasons have stood as long as government itself.

By examining Australian institutions and debates in international context, we can also see that Australia's own unique trajectory has much to offer in terms of clarity regarding these developments – at least for nations in common law and post-Westminster traditions. Whether there is a case for identifying further species of governmental power, or corresponding branches, is an issue for another day – the conclusion here is that, unlike the integrity branch, at least some arguments for additional branches are not fully thought through.[116] Hopefully, a clearer understanding of not only the constitutional legitimacy, but the necessity of the integrity branch, will lead to more focused debate on how integrity agencies' performance, impact and accountability can be enhanced, as well as more productive debate around proper and effective autonomy of the judiciary. Closer scrutiny of how executive and parliamentary accountability might be bolstered and achieved, using this branch, is also obviously a fundamental objective. In legal and political debate, at least in Australia, the integrity branch sometimes feels like one close to the ground, too thick and flexible to snap, but thin enough to be bent and whipped by the winds of political fortune or by opportunistic passersby. As the tree matures, perhaps it will rise in stature, strength and reliability, playing its full part in ensuring the health of the tree as a whole.

[116] Ackerman (2000), pp.696-7.

Appendix 1. 100 of the world's most recent or most recently revised national constitutions (by date of creation)

Source: constituteproject.org

	Year	Revised	Legislature	Executive	Judiciary	Total	Total	Total	Audit	Ombuds-man / Defender	Anti-corruption	Electoral Authority/s	Human Rights Commission	Judicial &/or Civil Service Commission
Thailand	2017	2017	1	1	1	1	1	1	1	1	1	1	1	1
Côte d'Ivoire	2016	2016	1	1	1	1	1	1	1	1		1		
Nepal	2015	2016	1	1	1	1	1	1	1		1	1	1	1
Tunisia	2014	2014	1	1	1	1	1	1	1		1	1	1	
Egypt	2014	2014	1	1	1	1	1	1	1		1	1	1	
Zimbabwe	2013	2013	1	1	1	1	1	1	1		1	1		
Fiji	2013	2013	1	1	1	1	1	1	1		1	1	1	
Somalia	2012	2012	1	1	1	1	1	1	1	1	1	1	1	
Hungary	2011	2016	1	1	1	1	1	1	1	1			1	
South Sudan	2011	2013	1	1	1	1	1	1	1	1	1	1	1	
Libya	2011	2012	1	1	1	1	1	1	1			1		
Morocco	2011	2011	1	1	1	1	1	1	1	1	1		1	1
Dominican Republic	2010	2010	1	1	1	1	1	1	1	1	1	1	1	
Niger	2010	2010	1	1	1	1	1					1	1	
Angola	2010	2010	1	1	1	1	1	1	1	1	1	1		
Madagascar	2010	2010	1	1	1	1	1	1	1	1	1		1	1
Kenya	2010	2010	1	1	1	1	1	1	1		1	1	1	
Kyrgyz Republic	2010	2010	1	1	1	1	1	1	1	1		1	1	
Bolivia	2009	2009	1	1	1	1	1	1	1	1		1		
Ecuador	2008	2015	1	1	1	1	1	1	1	1	1	1	1	
Bhutan	2008	2008	1	1	1	1	1	1	1		1	1		1
Maldives	2008	2008	1	1	1	1	1	1	1		1	1	1	1
Myanmar (Burma)	2008	2008	1	1	1	1	1	1	1			1		
Turkmenistan	2008	2008	1	1	1	1	1					1		

	Year	Revised	Legislature	Executive	Judiciary	Total	Total	Total	Audit	Ombuds-man / Defender	Anti-corruption	Electoral Authority/s	Human Rights Commission	Judicial &/or Civil Service Commission
Montenegro	2007	2013	1	1	1	1	1	1	1	1	1		1	
Serbia	2006	2006	1	1	1	1	1	1	1	1				
Congo	2005	2011	1	1	1	1	1	1	1			1		
Iraq	2005	2005	1	1	1	1	1	1	1		1	1	1	1
Sudan	2005	2005	1	1	1	1	1	1	1	1	1	1	1	
Burundi	2005	2005	1	1	1	1	1	1	1	1		1	1	
Afghanistan	2004	2004	1	1	1	1	1	1			1	1	1	
Rwanda	2003	2010	1	1	1	1	1	1	1	1	1	1	1	1
Bahrain	2002	2012	1	1	1									
Timor-Leste	2002	2002	1	1	1	1	1	1	1	1		1		
Senegal	2001	2009	1	1	1	1	1	1	1					
Switzerland	1999	2014	1	1	1									
Finland	1999	2011	1	1	1	1	1	1	1	1	1	1	1	
Nigeria	1999	2011	1	1	1	1	1	1	1		1	1		1
Venezuela	1999	2009	1	1	1	1	1	1	1	1	1	1	1	
Albania	1998	2016	1	1	1	1	1	1	1	1				
Poland	1997	2009	1	1	1	1	1	1	1	1			1	
Eritrea	1997	1997	1	1	1	1	1	1	1			1		1
Ukraine	1996	2014	1	1	1	1	1	1		1		1		
South Africa	1996	2012	1	1	1	1	1	1	1	1		1	1	1
Oman	1996	2011	1	1	1	1	1	1	1					
Chad	1996	2005	1	1	1									
Gambia	1996	2004	1	1	1	1	1	1	1	1	1	1		1
Azerbaijan	1995	2016	1	1	1	1	1	1		1			1	
Georgia	1995	2013	1	1	1	1	1	1		1				1
Kazakhstan	1995	2011	1	1	1	1	1	1	1			1		
Bosnia & Herzegov	1995	2009	1	1	1	1							1	
Uganda	1995	2005	1	1	1	1	1	1	1		1	1	1	1
Armenia	1995	2005	1	1	1	1	1	1	1	1				1

	Year	Revised	Legislature	Executive	Judiciary	Total	Total	Total	Audit	Ombuds-man / Defender	Anti-corruption	Electoral Authority/s	Human Rights Commission	Judicial &/or Civil Service Commission
Moldova	1994	2006	1	1	1	1	1	1	1			1		
Belarus	1994	2004	1	1	1	1	1	1	1			1		
Tajikistan	1994	2003	1	1	1	1	1					1		
Ethiopia	1994	1994	1	1	1	1	1	1	1	1		1	1	
Russia	1993	2014	1	1	1	1	1	1	1	1				
Czech Republic	1993	2013	1	1	1	1	1	1	1					
Peru	1993	2009	1	1	1	1	1	1	1	1		1		
Andorra	1993	1993	1	1	1	1	1	1	1	1				
Estonia	1992	2015	1	1	1	1	1	1	1					
Slovakia	1992	2014	1	1	1	1	1	1	1	1				
Vietnam	1992	2013	1	1	1	1	1	1	1			1		
Paraguay	1992	2011	1	1	1	1	1	1	1	1				1
Uzbekistan	1992	2011	1	1	1	1	1	1	1			1		
Lithuania	1992	2006	1	1	1	1	1					1		
Mongolia	1992	2001	1	1	1									1
Ghana	1992	1996	1	1	1	1	1	1	1	1	1	1	1	1
Mali	1992	1992	1	1	1	1	1	1	1					
Colombia	1991	2015	1	1	1	1	1	1	1	1		1		1
Yemen	1991	2015	1	1	1	1	1	1	1			1		
Slovenia	1991	2013	1	1	1	1	1	1	1	1				
Croatia	1991	2013	1	1	1	1	1	1	1	1				1
Macedonia	1991	2011	1	1	1	1	1	1		1				1
Zambia	1991	2009	1	1	1	1	1	1	1		1		1	1
Bulgaria	1991	2007	1	1	1	1	1	1		1				
Lao	1991	2003	1	1	1									
Romania	1991	2003	1	1	1	1	1	1	1	1				
Equatorial Guinea	1991	1995	1	1	1									
Namibia	1990	2014	1	1	1	1	1	1	1	1	1			1
Benin	1990	1990	1	1	1	1	1	1	1					

	Year	Revised	Legislature	Executive	Judiciary	Total	Total	Total	Audit	Ombuds-man / Defender	Anti-corruption	Electoral Authority/s	Human Rights Commission	Judicial &/or Civil Service Commission
Brazil	1988	2014	1	1	1	1	1	1	1			1		1
Nicaragua	1987	2014	1	1	1	1	1	1	1	1		1	1	1
Haiti	1987	2012	1	1	1	1	1	1	1	1		1		
Suriname	1987	1992	1	1	1	1	1	1	1			1		
Philippines	1987	1987	1	1	1	1	1	1	1	1		1	1	1
Liberia	1986	1986	1	1	1	1	1	1	1			1		1
Guatemala	1985	1993	1	1	1	1	1	1	1				1	
El Salvador	1983	1993	1	1	1	1	1	1	1	1				1
Honduras	1982	2013	1	1	1	1	1	1	1				1	1
Turkey	1982	2011	1	1	1	1	1	1	1	1				
China	1982	2004	1	1	1	1	1	1	1					
Belize	1981	2001	1	1	1	1	1	1	1	1		1		1
Chile	1980	2014	1	1	1	1	1	1	1					
Guyana	1980	1995	1	1	1	1	1	1	1	1		1		1
Vanuatu	1980	1983	1	1	1	1	1	1	1	1		1		1
Spain	1978	2011	1	1	1	1	1	1	1	1			1	1
Cameroon	1972	2008	1	1	1	1	1	1	1					
Mauritius	1968	2011	1	1	1	1	1	1	1	1		1		1
			100	100	100	94	93	89	83	52	29	58	37	34
			100%	100%	100%	94%	93%	89%	83%	52%	29%	58%	37%	34%