

## ***What's 'ordinary' about corruption?***

by Associate Professor Bruce Buchan.

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The High Court of Australia recently decided [ICAC v Cunneen, HCA 14, 15 April 2015] that to adversely affect the exercise of public office did not correspond with the 'ordinary understanding of corruption'. Apparently worried by the potential broadening of what constitutes corruption if the exercise of public office were to be the chief criterion, the High Court (with the exception of Justice Gageler), reasoned that only adverse effects on the 'probity' or 'honesty and impartiality' of public administration could be consistent with the 'ordinary understanding of corruption'. What actually is the 'ordinary understanding of corruption', and is it as narrow as the High Court thinks?

In what does corruption consist? There is a profound ambiguity attached to the concept of corruption. On the one hand, corruption is supposed to refer to a relatively discrete set of misdemeanours, if not readily observable (because of their secretive nature) then at least definable by statute. On the other hand, the term corruption carries a moral and emotive weight that defies definition. Corruption in this sense is not simply a misdemeanour, or an offence defined by statute, but a moral flaw, or a failure of character. Corruption most importantly, is more than simply a wrong, a crime, or an error of judgement because it also imbues a dynamic quality. Corruption implies a loss, or decay, or degeneracy. Corruption shapes, for the worse, the individuals, corporations, or even the whole polity complicit in or tainted by acts of corruption.

The term corruption may thus be said to have two rather different connotations. The first connotation of corruption is that with which the High Court grappled: corruption as a misdemeanour in (typically) public office usually involving the misuse of office for private (again typically pecuniary) gain. The second connotation of corruption, much broader than the first but no less influential over the course of

Western history, encompasses a more dynamic process of decay or degeneration of the moral and political character of individuals, corporations, governments or states.

The long conceptual history of corruption illustrates a series of oscillations between these two distinct but entwined understandings, one focussed narrowly on the abuse of public office, the other on moral, spiritual and physical degeneration. We would make a mistake however, to assume that just because the public office concept of corruption is more narrow in scope – because focussed on the (mis)conduct of public officials – that it is any easier to define, or that it corresponds to anything resembling an ‘ordinary understanding of corruption’.

In the 1621 impeachment of England’s Lord Chancellor, Sir Francis Bacon, corruption was linked with bribery in what appears to be a consistently narrow implication of the term encompassing the abuse of public office. Much evidence was heard of payments given to Bacon’s brokers for favourable decisions in the Court of Chancery, over which he presided. Sir Francis’ initial defence however, pointed to the potential extenuation of bribery depending on ‘the time or manner of the gift’. In other words, the gifts he took were offered and taken *after* he had made his final decisions, hence they could not have tainted the fulfilment of his office. Only gifts given *before* decisions were likely to sway opinion, Bacon argued, and he denied having taken any of these gifts. Therefore, by the then routine standards of public office emolument and prevailing patterns of patronage, he could not be deemed ‘corrupt’. His decisions remained his own, and had not been bought.

Such an extenuation was never likely to be deemed sufficient, even by the loose standards of English public office in the seventeenth century. Bacon eventually admitted his guilt, but claimed that he ‘was never noted for an avaricious man’ and that the charges (all 23 of them), were mostly old misdemeanours that had not been continued, ‘whereas those that have an habit of corruption do commonly wax worse and worse’. What Bacon here suggested was that although he was offered and received gifts, he was far from the worst of offenders, and that had he been a more

'avaricious man' he may have made much more from his office, and thus 'wax[ed] worse and worse' in the 'habit of corruption' than he had.

This sort of mitigation, let's call it mitigation by 'the ordinary understanding of corruption', remained a standard defence in similar cases. In effect, it amounted to saying that: 'what I have done is no worse, and probably much better, than any other in my place'. When Thomas Osborne, the Duke and Leeds and former Lord Treasurer and Lord President of the Privy Council was (unsuccessfully) impeached in 1695, for having taken a bribe from the East India Company, his defence was simply that giving and receiving bribes was the ordinary means of doing political business in Britain. His own conduct in office, he asserted, was entirely consistent with that practice.

Almost one hundred years later, in 1794, the question of the 'ordinary understanding of corruption' was in dispute once again in the impeachment of Warren Hastings, the former East India Company Governor in Bengal. After a monumental eight year campaign, the decision of the Lords turned on whether the many 'presents' of money and goods Hastings admitted receiving should be construed, as Edmund Burke and the other Parliamentary managers of the impeachment argued, as corruption. Hastings had notoriously claimed that the giving and receiving of 'presents' was simply the ordinary way of doing business in India, and that to govern Indians effectively (and profitably for the Company) he merely conformed with that practice.

Lord Thurlow, whose hostility to the managers of the impeachment was evident throughout, 'freely admitted... that he disliked Presents':

'...when offered as benevolences from persons of inferior stations to Princes [as Hastings was in India]... they merited the name of extortion: when tendered as Presents, they generally meant corruption. ... No distance of time, no public service, no Parliamentary appointments,

ought to screen a man from punishment, who, charged with the government of an empire, has taken bribes for official appointments.<sup>1</sup>

Here, Thurlow invoked an 'ordinary understanding of corruption' to castigate the giving to and receiving of presents by public officials. But it did not follow that this apparently 'ordinary understanding of corruption' ruled out presents entirely.

On the crucial Sixth Article of impeachment that directly charged Hastings with personal corruption, Thurlow argued that it was not the '*relative situation* of the donor and donee', but the favour actually granted by the donee to the donor that constituted the offence of corruption. In Thurlow's estimation, Burke and his fellow managers of the impeachment had only succeeded in showing that Hastings had received presents, not that he had granted favour in return. Corruption resided, Thurlow argued, in engagement in a 'corrupt consideration' or exchange of favour for the present, and the requirement at law was to prove such a 'corrupt consideration', not that presents were given by inferiors and received by a superior (Hastings).

In the event, Thurlow's reasoning won the day. On the final presentation of the report it was stated that no evidence had been provided that Hastings had 'illegally and corruptly taken' presents, and there was no evidence of 'reward or brokerage, or consideration' in return for the 'presents' Hastings had taken. In all three cases, Bacon, Leeds and Hastings, the elasticity of an 'ordinary understanding of corruption' could be used to condemn, defend and to mitigate the giving and receiving of gifts and money to public officials in return for the performance of their office. In making the 'ordinary understanding of corruption' our ultimate guide we run the risk of four failings that an attention to the intellectual history of corruption highlight.

First, to assume there is such a thing as an 'ordinary understanding of corruption' we lose sight of the perpetual contestability of the concept. Corruption has always been difficult to define, and perhaps for this reason it has continued to serve as an ever-

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<sup>1</sup> *The History of the Trial of Warren Hastings*, Part VIII, pp. 202-203.

ready tool in political debate. The point in political debate however, is not to acquiesce but to argue. Corruption, like any of the other concepts in the rhetorical toolbox (freedom, equality, justice or rights) is open to interpretation and it is vital that the citizens in any vibrant democracy are engaged in that debate. Second, the appeal to the 'ordinary' masks the perpetual oscillation in Western history between invocations of consistently narrow public office proscriptions (typically against bribery and venality), alongside much more expansive concerns about the moral and political degeneration of individuals and polities. The conceptual history of corruption illustrates how intimately these two understandings of corruption have always been entwined. Third, in appealing to the 'ordinary', we run the risk of judging corruption by the prevailing standards of conduct of office. While we may see no problem in the standards prevailing in twenty-first century Australia, many contemporaries also saw no problem in those prevailing in seventeenth century Britain either. In other words, standards of public office change, and so does the meaning of corruption. Fourth, appealing to an 'ordinary understanding of corruption' forecloses an historical understanding of how we came to be where we are. Conceptual change is not a problem so long as we are guided by an engagement with the long and varied history of the concept of corruption.

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