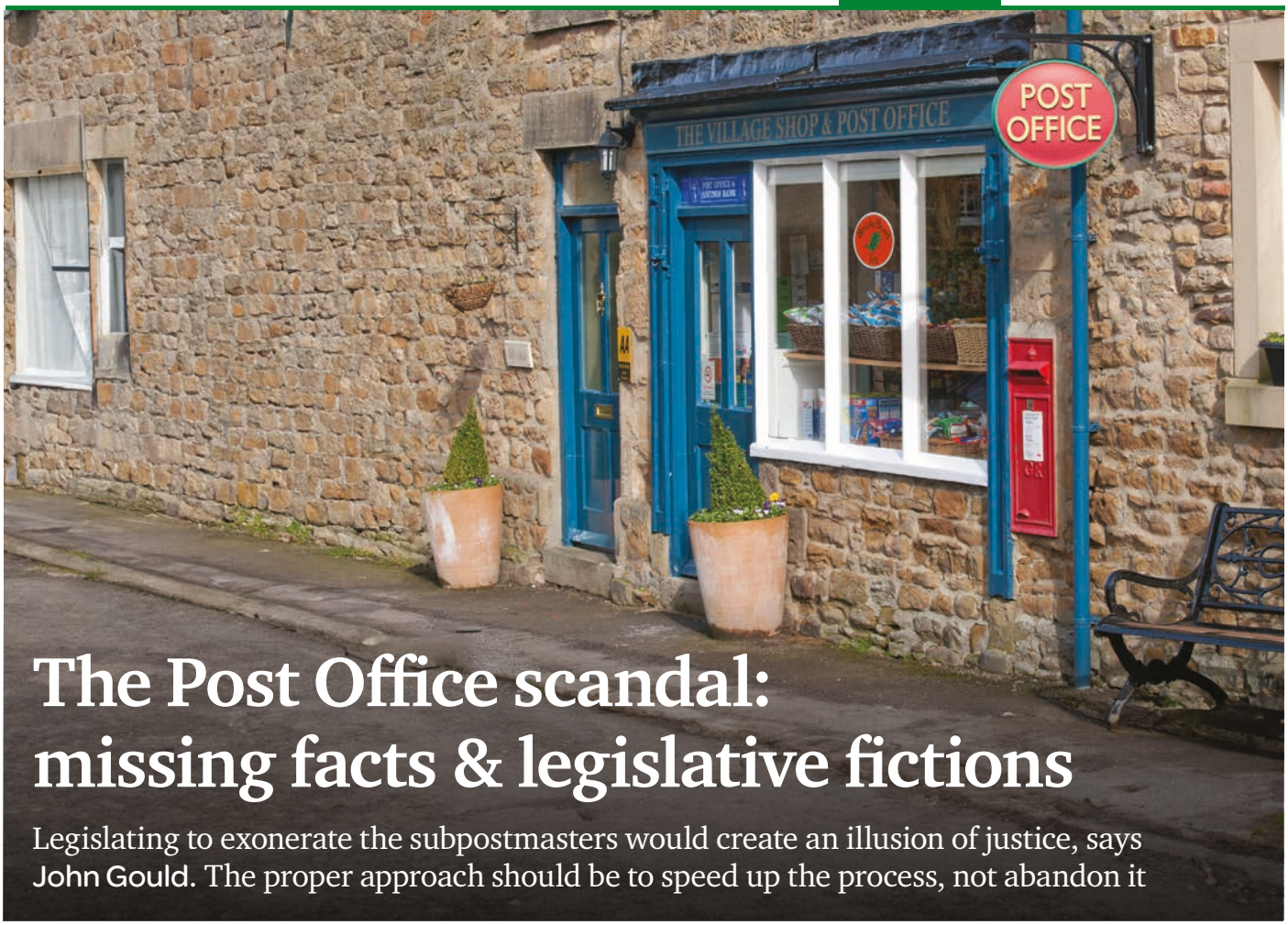

The Post Office scandal: missing facts & legislative fictions

Legislating to exonerate the subpostmasters would create an illusion of justice, says **John Gould**. The proper approach should be to speed up the process, not abandon it

There is a famous aphorism that hard cases make bad law. Hard cases are said to include those in which there is special hardship or public controversy. Hard cases, in the words of the American jurist and judge Oliver Wendell Holmes Jr, create 'hydraulic pressures', distorting the judgments of the justices. The judges' oath, to be impartial and to take only the law, the facts and the evidence in the case into account, must be upheld even under the pressure of public sentiment or the judge's own sympathy.

On the other hand, hard cases are the stock in trade of journalists and dramatists. Geoffrey Crowther, a long-serving editor of *The Economist*, is said to have advised young journalists to 'simplify, then exaggerate'. There's no point in writing if no one much reads what you have written. Dramatists and actors try to engage our feelings by a kind of emotional resonance which may come from an artistic truth but, even if based on real events, is always a compromise between facts and dramatic unreality.

Members of Parliament may share some of the attributes of journalists, actors and the authors of dramatic fiction—they are politicians after all—but displaying partiality is at the heart of what they do. Members of Parliament are not judges; they are defendants in the court of public opinion and therein lies both their strength and their weakness. It is their job to reflect the views of the electorate and to respond to their concerns. Parliamentarians must hold ministers to account for the operation of government under the law. They should object if the public's money is wasted or the administration of government is incompetent. They should scrutinise and debate the government's proposals for legislation. They should not take assumed roles which are constitutionally apolitical particularly for political reasons. We are all entitled to justice under the law, no more and no less.

Preventing unrestrained power

This separation of functions and powers may seem like an archaic or quaint custom, but actually it is neither. It prevents the concentration of unrestrained power and means that although governments and parliaments can make laws, they cannot judge any of us under them.

The fact that, in our system, Parliament is sovereign does not mean that it can or should act without restraint. The idea that difficult problems can properly be resolved by the creation of legislative fictions is wrong. It may seem attractive to cast oneself as the dynamic but distinctly undemocratic Alexander the Great, supposedly using his sword to cut the Gordian Knot to reveal himself as the prophesied future ruler of Asia by having 'untied' it; but the better analogy is Lewis Carroll's Humpty Dumpty, saying: 'When I use a word… it means just what I choose it to mean, neither more nor less.'

So, when Parliament votes in the form of legislation that Rwanda is safe, it does not actually make Rwanda safe, and when it decides that a body of people are 'exonerated', it does not mean that any individual has been proved to be blameless, even if Parliament's word is the final one so far as the law is concerned. One might say that insofar as Parliament is exceeding its constitutional role to pronounce 'facts', its vote is more like an opinion poll with legal effect than making law.

The Post Office scandal has now achieved the prominence it clearly has always deserved. On the basis of those convictions which have already been quashed by the courts, and what has emerged in the public domain, there seems no doubt that a large number of innocent people have suffered great hardship and loss, and that many injustices have taken place. It seems inevitable that many individuals share the guilt and responsibility for what happened and the appalling delay in providing remedies. However, it is not to minimise that suffering or excuse that guilt or to shrug

off that delay to believe that the legislative shortcut now proposed is wrong.

Declared exoneration by legislation is wrong in principle in the same way as it would always be wrong in principle to convict by legislation rather than by legal process. Governments should never use parliamentary majorities to declare judicial outcomes without a judicial process. It doesn't matter how convinced those voting are about guilt or innocence. As a principle, this is about as old and fundamental as any of the principles supporting the rule of law.

In the eye of the beholder

The principle should not be subject to legislators' or governments' opinion of what is or is not exceptional. Declaring that something is exceptional and not a precedent doesn't help. Exceptions are, like beauty, very much in the eye of the beholder and no two situations are identical. At the very least, it creates a precedent of declaring exceptions. Exceptions have a habit of accumulating, until taken together they become the norm.

One shouldn't overstate the short-term risk of any one erosion of constitutional protections—although both cumulative effects and the characterisation of events as exceptional or emergencies have played their part in the undermining of constitutional democracies in the past. But complacency and expedience need to be seen for what they are.

Even if there is some comfort in the 'it couldn't happen here' school of thought, liberal democracies including the UK are not as secure as they were in past decades. In many countries, 'chainsaw' politicians are on the rise and now is probably not the time to be casting doubt on our constitutional boundaries and the rule of law.

The *Post Office* case may have belatedly achieved unusual prominence, but regrettably it is not, in ways that matter, exceptional.

The roll call of injustices is very long. Although miscarriages of justice represent a small proportion of convictions, they are large as a number. Between 1997 and 2023, the Criminal Cases Review Commission (CCRC) referred 829 cases to the appeal courts, of which 567 were overturned. These referrals arose from the scrutiny of more than 31,000 applications in the same period.

The actions of corporations and government bodies have had terrible impacts on large groups of people, for which compensation has eventually been paid or still remains outstanding. The examples are too numerous to list. At any one time, there are numbers of ongoing public inquiries and group litigations with more than sufficient new scandals to replace any which are eventually resolved. In the contaminated blood scandal alone, nearly 3,000 people have died and up to 30,000 people have been infected. Bodies which answer to government through shareholdings are not immune. The HBOS Reading insolvency scandal from the early 2000s is still determining compensation for around 200 victims, whose businesses were wrecked by dishonest bank employees.

What's the right outcome?

Even if one sets aside constitutional principle, the right outcome must be that the right people are exonerated and compensated in relation to their own loss and suffering and that wrongdoers are identified, tried and punished. That remains the right outcome both for the individuals involved and the public at large.

It is the responsibility of government to prioritise the use of limited public resources between hospitals, schools and many other demands. If it pays public money to individuals, it must do so because they are individually entitled to it, not because of previous unconscionable delays in compensating them.

The practical justification for legislation is said to be that it would be unacceptable to inflict further delay on the innocent subpostmasters before they are exonerated and compensated. Although the public outrage at the situation dramatized in the recent television drama is understandable, the proper approach to slow processes is to speed them up rather than abandon them. Abandonment is particularly troubling where it could create the appearance of attempting to take the political 'heat' out of a situation by throwing public money around indiscriminately.

So what has been happening over all these years since Mr Bates first expressed doubt about the reliability of the Horizon system to the Post Office in 2000? Amazingly, even now, comprehensive, consistent and reliable facts are not as easily available as they should be.

The system for the review of convictions appears to have been working, but too slowly, with the numbers of convictions overturned representing only a small proportion of those who it is said may have been wrongly convicted because of the Horizon software. At around the time the public inquiry began in February 2022, the CCRC reported that since 2015 it had conducted 'extensive and detailed review work on a large number of Post Office cases', with much of the work being complex and detailed. Since 2011, the appeal courts have overturned around 80 Horizon convictions after 70 CCRC referrals.

The CCRC has taken credit for helping to uncover what it described as 'one of the most serious miscarriages of justice in British legal history'.

Blanket exoneration potentially removes the need for the relevant subpostmaster to agree to the CCRC investigating and for it to establish that the case is one where the conviction relied upon Horizon. These are, in fact, necessary pre-conditions for individual exoneration. The reported suggestion of some form of self-certification of innocence might itself form the basis of a drama in the style of the Theatre of the Absurd. Would armed robbers who were convicted and sentenced relying on Horizon-based information of the amount stolen be exonerated and compensated?

Even statutory 'exoneration' and generous fixed compensation for victims still require the qualification as a victim to be defined. If it is not just to be those who have been wrongly convicted on the basis of Horizon, who else? Whatever the class is, someone will have to decide whether a particular individual qualifies on the basis of facts. Very large, fixed compensation may mean that what an individual has actually lost or suffered need not be considered, but can it be right that a person who was worried by a single unpleasant letter receives the same as someone who lost their savings, their income, their reputation and went to prison? Applying the law to the facts is the paradigm of judicial activity. Justice is personal.

The role of the courts

So what has the role of the courts been? In April 2021, the Court of Appeal found in *Hamilton & others v Post Office Ltd* [2021] EWCA Crim 577 and quashed the convictions of some 39 subpostmasters, finding that the failures of the Post Office in conducting the investigations and disclosing documents relevant to the defence were so bad as to be, in accordance with the long-established legal test, an affront to the conscience of the court. The convictions in question occurred between 2003 and 2013. The convictions were unsafe because there was no evidence in those cases, other than Horizon, that money was actually missing. A handful of other cases were not overturned because the convictions were safe.

Previously, in March 2019 in *Bates and others v Post Office Ltd* [2019] EWHC 3408 (QB), Fraser J described the long-standing defects in Horizon in detail, finding that the Post Office had shown a 'pattern of

defensiveness' and 'a lack of transparency'. The judge invited the Director of Public Prosecutions to investigate the actions of Fujitsu.

The Post Office scandal cried out for investigation and accountability. The Post Office Horizon IT Inquiry was established as a non-statutory inquiry on 29 September 2020 and converted to a statutory inquiry in June 2021 under the retired High Court judge Sir Wyn Williams. Its primary task is to ensure that there is a public summary of the failings of the Horizon system over a 20-year period and consider whether the lessons have been learned and the culture of the Post Office changed. Importantly, it is also required to ensure that the compensation arrangements to which the Post Office had committed have been properly delivered.

In July 2023, the inquiry issued an interim report on compensation. It noted that over a period of nearly three years, representatives of the Post Office and ministers on behalf of the government had asserted on many occasions that subpostmasters who had wrongfully suffered losses and harm as a consequence of the Horizon system should receive compensation which was full and fair and prompt. Three compensation schemes had been established: the Historical Shortfall Scheme (HSS); the Overturned Historic Convictions Scheme (OHCS) and the Group Litigation Order Scheme (GLOS).

The Post Office was responsible for HSS but underestimated the number of claims and their complexity, and therefore the time it would take to make payments. In July 2021, the relevant minister announced funding to allow interim compensation of up to £100,000 (which was subsequently increased to £163,000) to be paid to those whose convictions had been quashed through OHCS. In March 2022, the relevant minister announced further funding through GLOS to equalise the treatment of those who had been in the group litigation determined by Fraser J with those who had not.

The result of this appears to be that approximately 460 applications will have been processed through GLOS by August 2024, and of the 2,417 applications received by HSS, offers had been made to 2,396 by April 2023, of which 1,979 had been accepted and paid. This left 438 difficult cases to be resolved by the dispute resolution process, which means that they have not been resolved within three years of the applications. There may be more than 200 applications made after the scheme deadline which have yet to be dealt with. By April 2023, the schemes together had paid out a fraction under £100m.

Horizon prosecutions seem to have continued until 2013. By 2015, the CCRC was investigating cases. By 2019, a damning judgment in the group litigation had been handed down. The requirement for compensation arrangements for victims generally should have been clear. By early 2021, convictions were being quashed and a public inquiry had been established. Yet it appears that there are still victims whose convictions have not been quashed and who have not received, in the words of ministers, full fair and prompt compensation. The question is why not? The solution is not to play fast and loose with the rules of our constitution, nor is the answer to make free with the public's money. The solution is now, at last, to get a grip. What continues to be required are resources and determination, not legislation to create an illusion of justice. **NLJ**

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