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Did activating Article 50 constitute an indictable offence?

Was the prime minister's triggering of Art 50 wilfully unconstitutional, and did it therefore amount to misconduct in public office? David Wolchover puts forward the case

The European Referendum of 2016

DURING THE YEARS of the coalition government Prime Minister David Cameron was much exercised by his desire to reverse the growing popularity of the United Kingdom Independence Party (UKIP), to achieve some degree of harmony and peace within the Conservative Party over the issue of the UK's membership of the European Union and to consolidate his own position. The solution was to give pride of place in the party's 2015 Election Manifesto to the promise of a referendum on continued EU membership.

Having won the Election the new Conservative government immediately set about making legislative provision for the referendum, enacting the European Union (Referendum) Act 2015 (EURA). The poll was held on June 23, 2016, and of those who cast a vote 51.89% opted for leave while 48.11% chose remain. Although the turnout was a relatively high 72% the leave vote represented only 37% of the registered electorate.[1]

The Manifesto declared on page 1 that the Conservatives would 'respect' the outcome of the referendum, an elastic verb which could either have meant no more than that it would be given due, if not serious, consideration by the government in formulating a policy decision, or that it would be slavishly followed. That the result would, however, be implemented as the UK's decision seems to have been the sense of the commitment made on page 2 of the manifesto to 'honour' the result, that is to adopt it.[2] In the event the Bill which became EURA provided little guidance on the effect of the poll. Section 1(1) merely provided: 'A referendum is to be held on whether the United Kingdom should remain a member of the European Union.' Subsection (4) stated: 'The question that is to appear on the ballot papers is — "Should the United Kingdom remain a member of the European Union or leave the European Union?"' Subsection (5) provided that the alternative answers were to appear on the ballot papers were— 'Remain a member of the European Union' and 'Leave the European Union.' Nothing was stipulated as to the outcome and there was no provision for a threshold vote requiring implementation of the result.

Statutory purpose of the EU Referendum

However, a key avowal of the constitutional purpose of the referendum was explained in a House of Commons Briefing Paper:

> 'This Bill requires a referendum on the question of the UK's continued membership of the European Union. It does not contain any requirement for the UK Government to implement the results of the referendum, nor set any time limit by which a vote to leave the EU should be implemented. Instead, this is a type of referendum known as pre-legislative or consultative which enables the electorate to voice an opinion which then influences the Government in its policy decisions.'[3]

That explanation was endorsed by David Liddington, Minister for Europe, during Commons Committee consideration of the Bill:

> 'The legislation is about holding a vote; it makes no provision for what follows. The referendum is advisory, as was the case for both the 1975 referendum on Europe and the Scottish independence vote last year. In neither of those

[1] For a detailed break-down of the voting figures, see https://www.Electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information. For an informative comparison with the voting figures in the 1975 European Referendum, see Jon Danzig, 'The EU Referendum was divisive, not decisive,' *Reason2Remain*, https://www.facebook.com/Reasons2Remain/posts/466853563674018, 28 July 2017.

[2] Thanks are due to Sandra Dunn for drawing attention to this apparent contrast of language.

[3] No. 07212, June 2, 2015.

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cases was there a threshold for the interpretation of the result.'[4]

In short, the Briefing Paper and Liddington's statement were together asserting that the result was incapable by itself of standing as a legally binding constitutional decision by the United Kingdom to leave the EU. This clearly left matters in a state of uncertain limbo and following the referendum the government controversially claimed that they were constitutionally empowered under the royal prerogative to determine Britain's relationship with the EU and could activate – or 'trigger' – Article 50 of the Treaty of European Union without the imprimatur of Parliament. As is very well known Article 50(1) declares that 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.' The first sentence of Article 50(2) states that 'A member State which decides to withdraw shall notify the European Council of its intention.'

Miller

The Government's claim was successfully challenged in the celebrated action brought by Ms Gina Miller and others. In *Miller*[5] the Supreme Court held that where the fundamental rights of citizens were at stake the phrase 'in accordance with its own constitutional requirements' referred to in Article 50(1) meant exclusively by Act of Parliament. Since the referendum was advisory and non-binding with no determinative force, the Article 50 decision had to be made by an Act of Parliament either ratifying the referendum result as the UK's decision, or otherwise by delegating the decision-making power to the government.

Webster

In response to *Miller* Parliament passed the European Union (Notification of Withdrawal) Act 2017, which enacted that 'The Prime Minister may notify, under Article 50(2) of the [TEU], the United Kingdom's intention to withdraw from the [EU].' In shepherding the Bill which became the Act through the Commons David Davis, the Secretary of State for Exiting the EU, stressed that the Bill was not about making the withdrawal decision, but was merely procedural, authorising the Prime Minister to implement a decision already made by the electorate.[6] Since the Supreme Court had already said that the referendum result could not of itself stand as the constitutional withdrawal decision, Davis seems to have been confusing what the government chose to regard as the political decision with that which was required to be made by statute, a misunderstanding doubtless passed on by government lawyers who may well have been misled by ambiguities in the *Miller* judgment.[7]

In a crowd-funded action for judicial review brought by Ms Elizabeth Webster and others it was contended that on a clear exposition of its language the 2017 Act did not enact ratification of the referendum result and that consequently there had been no Article 50(1) decision requiring notification under Article 50(2). That proposition was rejected at a permission hearing on 12 June 2018, when it was effectively held that although the statutory wording referred only to Art 50(2) the Act implicitly delegated to the Prime Minister the power to make the Art 50(1) decision; otherwise the Act would have had no meaningful purpose.[8]

Very curiously the government had persisted through the pleadings and into the very hearing itself in asserting that the decision had been made by the electorate and chose to avoid adopting the implied delegation argument in spite of a steer from the court which could not have been more pointed.[9] This is significant because in spite of the *Webster* decision the government still seem to be labouring under the illusion that the Prime Minister did not make the Article 50 decision.

Significantly, the rationale of the judgment in *Webster* was that in giving the decision to the Prime Minister Parliament did not command her to make the withdrawal decision, as is clear from the wording the 2017 Act. Statutes do not normally employ the courtly usage of the permissive as a polite disguise of the imperative. Parliament is not the pregnant Queen Victoria addressing the disagreeable Duchess of Buccleuch with the admonishment, 'You have a cold, Duchess. You may retire.'[10]

Although the purpose of the referendum was very clearly non-binding and no more than advisory David Cameron and his ministers had almost unswervingly insisted on stating before, during and after the passage of the Bill which became EURA that the government would honour, or respect, the outcome; that is to say, they would regard themselves as politically bound to implement a withdrawal preference indicated by the

[4] *Hansard*, vol 597, col 231, 16 June, 2015, *bit.ly/2RCZ6MI*.

[5] *R. (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5, https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf.

[6] https://hansard.parliament.uk/Commons/2017-01-31/debates/C2852E15-21D3-4F03-B8C3-F7E05F2276B0/EuropeanUnion(NotificationOfWithdrawal)Act#contribution-4E407196-E047-424D-8243-C533B5E3647F.

[7] See Wolchover, D., 'Could Brexit still be halted as Wednesbury Unreasonable?' *New Law Journal*, online, 15 January, 2018, addendum 31 January, 2018.

[8] *R. (on the application of Ms Elizabeth Webster) v Secretary of State for Exiting The European Union*, [2018] EWHC 1543 (Admin), per Gross LJ and Green J, judgment, paras 13 and 14. Although the court was only sitting on a permission hearing it gave authority for the judgment to be cited: para 25.

[9] It had originally been canvassed by the present author: see 'Could Brexit still be halted as *Wednesbury* Unreasonable?' *New Law Journal*, online, 15 January 2018).

[10] See Wolchover, D., Litigating Brexit at the eleventh hour,' *New Law Journal*, online, 18 October, 2018.

referendum result. (It was an undertaking doubtless made in the overweeningly confident belief – at least on David Cameron's part – that it would never need to be honoured.) That the result would be implemented continued to be the government's position during and after the referendum.

In *Miller* the Supreme Court noted that although the 1975 referendum on whether the UK should stay in the European Economic Community was very similar to the 2016 Referendum the way in which the two procedures were characterised by ministers differed.[11] Thus, they pointed out, whereas the 1975 referendum was described by Ministers at the time as advisory, the 2016 referendum was described as advisory by some ministers but decisive by others. In fact it seems that it was only David Liddington who, briefly, got it right and, at the highest level, Foreign Secretary Phillip Hammond actually contradicted himself in the course of one Commons debate. Opening the Second Reading on the Bill on June 9, 2015, he stated that the bill had "one clear purpose: to deliver on our promise to give the British people the final say on our EU membership."[12] Yet perhaps no more than minutes later he said that "the Referendum is about delivering a pledge to the British people *to consult them* about the future of their country,[13] before asserting once again that "the decision must be for the common sense of the British people."[14]

If there had been any doubts or ambiguity about the government's approach to the Referendum result they were dispelled by David Cameron on January 5, 2016, when he announced to the Commons:

> "Ultimately, it will be for the British people to decide this country's future by voting in or out of a reformed European Union in the referendum that only we promised and that only a Conservative-majority government was able to deliver."[15]

That Cameron's statement had no legal significance was made very clear by the Supreme Court when they stressed that nothing material hung on statements by ministers that the Referendum result would be legally binding:[16]

> "Whether or not they are clear and consistent, such public observations, wherever they are made, are not law; they are statements of political intention. Further, such statements are, at least normally, made by ministers on behalf of the UK government, not on behalf of Parliament."

In his statement Mr Cameron was addressing the Commons, not speaking on their behalf; he was on a 'frolic of his own' (as lawyers would say) in turning his back on the essentially advisory character of the Referendum as statutorily defined. He had no mandate for moving the goalposts and the advisory status of the slender majority outcome almost certainly stands to this day.

Mrs May's Article 50 notification letter

Armed with Parliament's authority to invoke Article 50 Prime Minister Theresa May made her decision on behalf of the United Kingdom to withdraw the realm from the EU and despatched her historic letter to European Council President Donald Tusk on March 29, 2017 giving notice under Art 50(2). In her letter she explicitly stated that she was 'writing to give effect to the democratic decision of the people of the United Kingdom.' No reference was made in the letter to any other consideration.

Democratic imperative determined by constitutional imperative

An absolutely key question is whether the PM's Article 50(1) decision was exclusively predicated on the outcome of the referendum and by reference to no other factors. Her unwavering public resort to the 'will of the people' as the apparently sole rationale for having exercised her delegated power to make the withdrawal decision speaks volumes as to her ignoring of any other considerations. This has been in the face of clarion calls from a host of informed opinion as to the serious adverse political, economic and security consequences of Britain's departure from the Union. The now seemingly intractable issue over the border between Eire and Northern Ireland is but one problem among many which have been trumped by the overarching mantra of the 'people's will' (that is the 37 per cent of the registered electorate who by an absurdity of arithmetic doublethink have been preposterously conjured into a majority). All the available evidence therefore seems to point to the fact that her original decision flew in the face of EURA and the expectation arising from it that the result would be considered as one of a number of relevant factors in determining the policy on withdrawal.

In following her predecessor's commitment to implement the referendum result Theresa May has acted entirely consistently with her party's policy from at least as early as the 2015 Manifesto, that a Leave vote would be treated as decisive.

However, acting consistently is not necessarily acting constitutionally or reasonably. The fundamental rationale of the referendum was to give the electorate an opportunity to 'voice an opinion which then influences the government in its policy decisions,' not to dictate

[11] Para. 119.
[12] HC deb., col. 1047; https://publications.parliament.uk/pa/cm201516/cmhansrd/cm150609/debtext/150609-0004.htm.
[13] Col. 1053.
[14] Col. 1056.
[15] https://www.theguardian.com/politics/2016/jan/05/eu-referendum-david-cameron-confirms-ministers-campaign-brexit.
[16] Para 119.

policy. Since the poll was not statutorily determinative of the issue and no more than influential, the key principle to note here is that the normal decision-making process ought to have applied, as in any process of rational policy formation. Indeed rational people making personal decisions affecting their own everyday lives will sensibly take account of all relevant factors as they see it. Thus the PM's Article 50 decision required a review of the full range of relevant factors, not simply the one factor, the poll result, even if that was regarded as paramount. To have failed to do so not only violated the declared constitutional purpose of EURA but general principles of good governance.

The power to activate Article 50 which Parliament delegated to the Prime Minister through the EU (Notification of Withdrawal) Act 2017 was by no means unconditional. It implicitly required observance of the conventional and reasonable government decision-making process: review of all reasonably identifiable relevant factors.

Yet the Government seem to have made a virtue of silence, of not claiming to have taken account of any of the almost universally negative impact assessments made by their own departments. This is the crunch point, the fundamental defect which negates the legitimacy of the whole Brexit story. It was particularly necessary to take those factors into account given (a) that as a sampling exercise the Leave/Remain difference was statistically insignificant, negating the oft-repeated characterisation of the majority as 'clear,' and (b) that the Leave vote was significantly short of amounting to a majority of the electorate.

The democratic imperative is not satisfied simply by implementing the slight tilt of the ballot towards leaving the EU. Comparisons with a football match are puerile. The democratic imperative is contingent on the constitutional imperative, the obligation to observe the conventions of the constitution, predicated here on dictates of reasonable decision-making requiring the scrutiny of relevant factors. The constitutional imperative is synonymous with the rule of law. That which is not reasonable is not lawful and there can be no democracy without law. The Prime Minister (on behalf of the government) failed to apply the constitutional obligations of scrutinising the whole discernible picture. The result was that she deliberately acted unconstitutionally and that the Article 50 decision was therefore by definition undemocratic.

Leave decision made in spite of general negative impact predictions or blindly without assessments

If a range of impact assessments had been undertaken and in the main showed negative consequences it might have been difficult for the government to establish that their exercise of a leave decision was justifiable. Equally, embarking on a leave decision without having first obtained substantial assessments might be regarded as wholly reckless and irresponsible.

'Wednesbury' unreasonable

Either way, the decision would arguably have been open to challenge on the basis of the administrative law principle that a person or body having authority or discretion to take a certain course of action or to act in a certain way must, in exercising that discretion, act reasonably within the meaning of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[17] A court would have needed to ask whether, notwithstanding the Referendum outcome, the decision to leave the EU in the face of the host of negative assessments was manifestly so unreasonable an assumption that no reasonable person acting reasonably could have made it.[18] It is of course far too late to contemplate judicial review proceedings by way of challenging the decision. Any such action would be certain to be held to be time-barred under the regime of the Civil Procedure Rules.

A second referendum or going straight for repeal of the EU Withdrawal Act 2018?

The impending and widely predicted economic disaster underlines the government's original folly in violating the constitution. Parliament was wrong to ratify the Article 50 decision when it passed the EU Withdrawal Act 2018. Remainer politicians would be wise to put their efforts not into pressing for a second referendum but in repealing the Act and revoking Article 50. However the question we need to address is whether the Prime Minister, on behalf of the government, did fail to take account of relevant issues, in particular their departmental generated impact assessments and we now turn to the evidence.

The '58 studies'

In September 2016 David Davis, the then Secretary of State for Departing the European Union, told the Commons that there were sectoral analyses for 'about 50 cross-cutting sectors' of the UK economy, predicting what would happen to them after Brexit. Initially little media attention seems to have been paid to his statement but during the second half of 2017 the media began to ask about the predictive studies, which were now being spoken of as amounting to 58 (although the figure of 57 was also mentioned). Rumours were circulating that collectively the studies demonstrated a preponderant negative impact. In October the crowd-funded 'Good Law Project' threatened legal action to force release of the

[17] (1948) 1 KB 223).

[18] It may additionally be submitted that the Prime Minister failed to comply with the principle of proportionality, an issue separate from *Wednesbury* reasonableness which applies to cases of alleged breach of the European Convention on Human Rights and EU law.

studies but in the face of continued government resistance based on a claim that full disclosure would weaken the UK's negotiating position the House of Commons used a humble address on November 1 to order release of the 58 studies in full 'unredacted' form.

The next day ministers provoked accusations of prevarication and a lack of transparency when they told the Commons that there would be some delay while the government considered how the material might be released to the Commons Select Committee on Exiting the EU without harming the UK position in the negotiations. They did not deny the existence of the 58 studies, but on November 7 Steve Baker, the junior Brexit minister, told the Commons that it was not actually the case that there were 58 sectoral impact assessments examining the quantitative impact of Brexit on those sectors. Explaining that the sectoral analysis was 'a wide mix of qualitative and quantitative analysis contained in a range of documents developed at different times since the referendum' he stated that this meant 'looking at 58 sectors to inform [the UK's] negotiating positions.' He added that it would take the government some time to collate and bring together the information in a way that was accessible and informative to the committee.

In response Matthew Pennycook, Opposition Brexit spokesman, rejoined that if the impact assessment papers did not exist as billed, a clear impression had been allowed to develop over many months that they did and he castigated ministers for using 'semantics and double-speak' to avoid the clear instruction of the House of Commons. The outspoken Conservative member Anna Soubry pointed out that in the debate a week earlier on the humble address ministers had been talking about redaction without making any claim that the documents did not exist.

The delivering up of 850 pages of redacted material in two lever arch files to the Brexit Committee was seen as an inadequate response. Under the threat of contempt proceedings David Davis was duly summoned to appear before the Committee and caused consternation with the claim that the government had produced no economic forecasts as to the likely impact of Brexit on various sectors of the UK economy, that there had been no formal systematic impact assessment and that there was nothing extraordinary about this as there were a 'phenomenal number of variables.' When reminded by Committee chair Hilary Benn of what he had said in September 2016 about the 'sectoral analyses' in 50 sectors he cautioned – it may be thought somewhat obscurely – that use of the word impact did not mean that an impact assessment had been written. He added that there had been a 'misunder-standing' and that the sectoral analyses which had begun in 2016 were 'essentially looking at what the industries consist of, looking at the size of them in terms of revenue and capital and employment, and so on.' However, he said, it was 'not a forecast of the outcome of leaving the [EU] or indeed various options thereof.'[19]

After a period of quiet the vexed issue of government sponsored negative impact assessments was raised again on January 29, 2018 when the news website *BuzzFeed* published leaked government analyses of the economic consequences of various Brexit options. These predicted, for example, that even retention of full access to the single market through membership of the European Economic Area would result in a reduction of growth by 2 per cent over 15 years. With a comprehensive free trade agreement the reduction would be 5 per cent over that period but a 'no deal' Brexit with reversion to World Trade Organisation (WTO) rules would see the reduction up to 8 per cent. It was predicted that a trade deal with the United States would be likely to claw back no more than 0.2 per cent. It was reported that the documents had been considered so sensitive that individual ministers to whom they might be shown would not be permitted to keep copies.

The day following the leak to *BuzzFeed* Brexit Minister of State Steve Baker told the Commons that even his department's ministerial team had only just been consulted on the paper, that they had made it clear that it required 'significant further work,' was a 'selective interpretation of a preliminary analysis' and, he ventured to suggest provocatively, that it constituted an attempt by Treasury officials to 'undermine our exit' from the EU. Probably with half-facetious intent Baker volunteered that civil service predictions were 'usually wrong.'

On January 31, 2018, *The Times* newspaper quoted a 'senior government source' as accusing Sir Jeremy Heywood, the cabinet secretary, of conspiring with the Treasury to produce the research under the auspices of the government economic service in order to avoid criticism that it was based on previous work carried out by the department before the Referendum. Another such source was quoted as having suggested that Sir Jeremy Heywood had timed the document's release to 'soften up' ministers before a crucial cabinet meeting the following week to discuss the government's objectives for a future economic relationship with the EU.

In the Commons Baker had agreed with a prominent Conservative back-bencher that it was 'essentially correct' that they had both been told by Charles Grant, of the Centre for European Research think-tank, that the Treasury were drawing up economic modelling to make the case for remaining in the EU customs union. He was obliged to return to the Commons next day to admit that Grant had not passed on such a claim, as was revealed by an audio recording of the meeting in question, to assert that he believed the claims were 'implausible because of the long standing and well regarded impartiality of the

[19] For useful coverage over the last quarter of 2017 see *The Guardian*, October 13 and 30; November 2, 7 and 28; December 6 and 7.

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civil service,' and to make a humble apology to Grant and to the House.

Conclusion: constitutional illegitimacy of the Prime Minister's withdrawal decision

That the Prime Minister in exercising her delegated power to activate Article 50 failed either to take account of any impact assessments or peremptorily brushed them aside as of no account in the face of the 'will of the people' could alone be inferred beyond doubt from the many equivocations and inconsistencies outlined in the previous section. Either way she would have been in clear breach of her constitutional obligations to give due weight to relevant factors in exercising her discretion to activate Article 50.

However, it was very recently confirmed that she took no account of any assessments whatsoever before sending her Article 50(2) notification letter to Donald Tusk on 29 March 2017. In 2018 Richard Bird, the director of Action for Europe, made a Freedom of Information request to the Cabinet Office for details of all social and economic assessments of the effects of the UK leaving the EU whether made, instructed or considered by the Prime Minister prior to dispatch of her letter. Bird in fact itemised the impact assessments he had in mind as follows:-

A. Impact assessments or any form of assessments covering:
    1. Economic consequences within the UK.
    2. Social issues within the UK.
    3. The 2010 Equality Act and Public Sector Equality duty.
    4. Human rights and civil liberties issues.
    5. Social and family issues affecting citizens of the UK resident in other EU member states.
    6. Environmental issues within the UK, and outside the UK in so far as they might affect the UK.
    7. Food and medical supply issues.
    8. The future status of UK citizens resident in Northern Ireland.
    9. The future functioning of the devolution settlements and the Good Friday Agreement.
    10. The future status of Gibraltar and Crown dependencies.
B. Plans made for an orderly exit from membership of the European Union to avoid undue harm to the interests of the UK or of its people.
C. Records of any consultations with interested or affected parties prior to making the decision to serve the Article 50(2) Notice.

On 23 January, 2019 an unnamed member of the Cabinet Office Freedom of Information team replied to state:

> 'following a search of our paper and electronic records, I have established that the information you requested is not held by the Cabinet Office.'[20]

The official suggested that Bird might contact the Department for Exiting the European Union but as Bird aptly comments, the DexEU is irrelevant and the response confirms that there is no such information on file for the simple reason that there were no assessments or consultations. The Cabinet Office serves the cabinet and primarily the Prime Minister.[21]

Essence of the Prime Minister's indictable misconduct in invoking Article 50: deliberate breach of the constitutional imperative not to treat the referendum result as an end in itself

It has been argued here that following the referendum Mrs May was constitutionally obligated by EURA to consider a range of impact assessments with a view to determining government policy on the withdrawal issue. It may be contended that she should not have made the withdrawal decision on the basis alone of the referendum result in isolation of those assessments. Activating Article 50 by wilfully ignoring the assessments involved such a serious violation of the constitutional imperative laid down by EURA that it amounted to indictable misconduct in public office.

The offence of misconduct in public office

The Prime Minister holds the highest officer of state. She is a Privy Councillor. She is subject to the most exacting standards of propriety. For her knowingly to have deliberately flouted her constitutional obligations when she activated Article 50 must surely render her liable to prosecution for the Common Law offence of Misconduct in Public Office. The offence is triable only on indictment and carries a maximum sentence of life imprisonment.

The offence is confined to those who are public office holders and is committed when the office holder acts, or fails to act, in a way that constitutes a breach of the duties of that office. The elements of the offence were summarised in *Attorney General's Reference No 3 of 2003*.[22] The offence is committed when (a) public officers acting as such (b) wilfully neglect to perform their duty or wilfully misconduct themselves, (c) to such a degree as to amount to an abuse of the public's trust in the office holder, (d) without reasonable excuse or justification.

Public office holder Executive or ministerial officers have been held to come within the definition.[23] While

[20] FOI reference 327393.
[21] Widely disseminated email, 25 January, 2019.
[22] [2004] EWCA Crim 868.
[23] *R v Friar* (1819) 1 Chit.Rep (KB) 702.

there is no easy definition of the embrace of the term at the margins it is tolerably clear that the office of Prime Minister must come within the ambit of the definition.

Acting as such The misconduct must occur when the public officer is acting in that capacity. There must be a direct link between the misconduct and the alleged abuse. Here again the test is quite obviously met.

Wilful neglect or misconduct There must be an element of knowledge or at least recklessness about the way in which the duty is carried out or neglected. The test is a subjective one and the public office holder must be aware that his or her behaviour is capable of being misconduct. The present case would clearly come within the purview of the offence if two conditions are satisfied. First, the Prime Minister would need to have been aware of her constitutional obligations – as it is contended for the reasons set out earlier she must have been. The second condition is that she failed to take account of any of the relevant impact assessments when she used the power given to her to activate Article 50 and that that failure amounted to a deliberate circumvention of the purpose of the referendum as established by EURA and of fundamental principles of rationality and constitutional imperatives. In *Attorney General's Reference No 3 of 2003* approval was given to the definition of 'wilful' as 'deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not.' It is inconceivable that she did not appreciate full well that as the referendum was merely advisory she was constitutionally obliged to give substantive, rational and serious consideration to all relevant factors, including impact assessments, before exercising her power to activate Article 50.

Abuse of the public's trust In *R v Dytham*[24] Lord Widgery CJ said that the behaviour must be serious enough to amount to an abuse of the public's trust in the office holder. Public officers must carry out their duties for the *benefit of the public as a whole*. By deliberately ignoring factors which plainly told against the enormous risks involved in leaving the EU the PM plainly abused the public trust.

Gravity In *R v Dytham* Lord Widgery said that the element of culpability must be of such a degree that the misconduct impugned is likely to injure the public interest so as to call for condemnation and punishment. In *Attorney General's Reference No 3 of 2003* the court said that the misconduct must amount to 'an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder.' It is difficult to see how the conduct in question here could not offend such a standard if it was wilful and it is difficult to see how it could not have been wilful.

Likely consequences The likely consequences of any wilful neglect or misconduct are relevant when deciding whether the conduct falls below the standard expected. In *Attorney General's Reference No 3 of 2003* the court observed:

> 'It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it, viewed subjectively . . . will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer.'

Whilst there is no need to prove any particular consequences flowing from the misconduct, it must be proved that the defendant was reckless not just as to the legality of her behaviour, but also as to its likely consequences. The consequences must be likely ones, as viewed subjectively by the defendant. Although the authorities do not say so, it is likely that they can probably be taken to mean at the very least 'reasonably foreseeable.' It is arguable that likely may mean 'probable' in this context.

Limitation on the use of the offence In *R v Rimmington, R v Goldstein* [25] the House of Lords held that the use of the common law offence should be limited to cases where there is no breach of any relevant statutory offence but the behaviour or the circumstances are such that they should nevertheless be treated as criminal. It is difficult to see what specific statutory provision may have been breached by the government misrepresentation. It is submitted that the offence is admirably suited to cover the Prime Minister's misconduct as here alleged.

The question of motive As in all questions of criminal liability motive may be relevant in determining the gravity of a proven offence for the purposes of gauging the right sentence. However, a pious motive will not negate culpability if there was a proven intent to act in violation of the purposes of the referendum. Moreover, a court would need to be wary of confusing motive with guilty knowledge, a distinction which has not always been appreciated, as is exemplified by the following passage from the judgment of Abbott CJ in *R v Borron*:[26]

> '[T]he question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description, fear and favour may generally be included, or from mistake or error . . . . To punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom.'

[24] [1979] QB 722.

[25] [2005]UKHL 63, at para 30.

[26] [1820] 3 B&Ald 432, at p.434.

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On the other hand, the absence of an identifiable motive for engaging in an unlawful act may be an important factor in negating the existence of intent to do wrong. In the present case it may be submitted that an undoubted political motive can be demonstrated for disregarding the inconvenient existence of factors which told against her making the Article 50(1) decision. Principally this would have been the Prime Minister's perceived desire to appease the Eurosceptic wing of the Conservative Party.

Dishonesty or corruption Closely connected with the question of motive, the corrupt desire for dishonest gain is not an essential ingredient of the offence. Clearly there would be no such allegation in the present case although the offence may have sprung from a desire to cling to office.

Would they have taken such a risk? The evidence of wilfully turning a blind eye to inconvenient facts may be virtually irrefutable and yet all things considered it is not only arch sceptics who might ask whether the Prime Minister would really have taken such a risk, imagining she could so openly succeed in disregard factors which she ought to have taken into account. In response this commentator would only remark that he has been asking juries that self-same question for 45 years and still they have potted his 'innocent' clients times out of number!

Requesting the authorities to investigate or prosecute It is one thing to contend in the protective isolation of a law journal that Theresa May committed Misconduct in Public Office by taking the UK out of the European Union in the knowledge that the referendum might prove to be gravely flawed. It is quite another matter to imagine that any of our constabularies (in particular the Metropolitan Police Service) would be likely, on the strength of reading this article, to take the initiative in starting an investigation, or even to take up the cudgels of investigation on the back of a complaint by some private citizen. It seems equally fanciful to envisage that the Director of Public Prosecutions would exercise the statutory power granted by section 3(2) of the Prosecution of Offences Act 1985 to commence a prosecution without the intervention of the police.

Private prosecution However, there is another pathway. Any person may request a magistrates' court to issue a summons or an arrest warrant under section 1 of the Magistrates Courts' Act 1980 by 'laying an information' – that is, tendering a formal statement, alleging that another person has committed an offence. On being presented with the information the court may issue (a) a summons requiring the alleged offender to attend court or (b) a warrant for the alleged offender's arrest, if (i) the alleged offence must or may be tried in the Crown Court, (ii) the alleged offence is punishable with imprisonment, or (iii) the alleged offender's address cannot be established sufficiently clearly to serve a summon or requisition. Under Part 7 of the Criminal Procedure Rules 2015 a prosecutor seeking a summons must (a) serve the information in writing or (b) present it orally to the court (unless other legislation prohibits this) with a written record of the allegation that it contains.[27] Where an offence can be tried in the Crown Court a prosecutor must serve the information on the magistrates' court or present it to the court within any time limit that applies to the offence.[28] An allegation of an offence in an information must contain (a) a statement of the offence that describes the offence in ordinary language and identifies any legislation that creates it and (b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.[29] More than one incident of the commission of the offence may be included in the allegation if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission.[30] The court may issue or withdraw a summons (or warrant) without giving the parties an opportunity to make representations and without a hearing or at a hearing in public or in private.[31] A summons, warrant or requisition may be issued in respect of more than one offence.[32] A summons or requisition must (a) contain notice of when and where the defendant is required to attend the court, (b) specify each offence in respect of which it is issued, (c) in the case of a summons, identify the court that issued it, unless that is otherwise recorded by the court officer and the court office for the court that issued it, and (d) in the case of a requisition, identify the person under whose authority it is issued.[33] Where the court issues a summons (a) the prosecutor must serve it on the defendant and notify the court officer, or (b) the court officer must serve it on the defendant and notify the prosecutor.[34]

Although applying for a summons against the Prime Minister might well be treated as an eccentricity or a publicity stunt nonetheless even if (as seems likely) the application were dismissed the mere application might be enough to focus media and public attention on the gravity of the allegation that the Prime Minister deliberately and knowingly violated our constitution and that the activating of Article 50 was for that reason unconstitutional, unreasonable and unlawful.

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[27] Part 7.2(1). A prosecutor seeking a warrant must serve on the court an information in writing or present it to the court: CPR, Part 7.2(2).
[28] CPR, Part 7.2(6). No time limit applies to Misconduct in Public Office.
[29] Part 7.3(1).
[30] Part 7.3(2).
[31] Part 7.4(1).
[32] Part 7.4(2).
[33] Part 7.4(3).
[34] Part 7.4(6).