Inquiry into EU reform and the EU referendum: implications for Scotland

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I attach my response to the EU Referendum - please also include my attached article "ADR the Achillies Heel of a Democracy and accompanying Table "McDade's Paradox" as part of this substantive response.

I consider there is a need for a Regulation to impact in the whole of the EU concerning the use of Alternative Dispute Resolution (ADR)/ Informal Dispute Settlement (IDS) / Informal Justice or mediation (all the same thing) in public institutions especially the legal systems and legal professions. I consider ADR/ IDS/informal justice/mediation should be outlawed entirely in the public domain. The reason for this stance is ADR/IDS/informal justice/mediation is an "opposite" and effectively removes the dispute to the private domain. As such it has the ability to undermine the application of the rule of law in a public domain or common or civil law setting, creates a two tier structure where some are subject to the uniform application of the rule of law and others are subject to compromise of their rights contained in the rule of law. Moreover in the UK, ADR/IDS/informal justice/mediation has been packaged as a misrepresentation that is actually "access to justice". Unfortunately it is actually "access from justice" because the reality is it is "Access to Compromise". Furthermore, if ADR/IDS/informal justice/mediation clauses are contained in a statute, eg clause 9 of the Arbitration Act in the UK, then it effectively bypasses the application of the rule of law per se.

Lastly ADR/IDS/informal justice/mediation clauses in the public domain are not compatible with litigation or arbitration as they gag the party to litigation or arbitration via confidentiality clauses. Where a party chooses litigation the emphasis is on "public" application of the rule of law and freedom of expression should be paramount with reporting in the press as standard. Where a party chooses arbitration the emphasis should be on "private" application of the rule of law and privacy laws should kick in with no press intrusion unless the parties expressly consent to it. ADR/IDS/informal justice/mediation over privatises society which may become out of balance - it is necessary for a judge to "reason" via the ratio decidendi or persuasive obita dicta arguments. If too many cases don't make the route to trial then society is political and the law is statute based via the legislature, ie the "ought" (judicial) v the "is" (political). Therefore ADR/IDS/informal justice/mediation can only exist in a democracy in the private domain as a choice of service because contained within the public or private domain of the application of the rule of law is to over privatise and deprive people of access to their fundamental rights in society.

Justice and traditional equality can only be given by a judge. Compromise and contemporary equality is decided by the parties not by the mediator who is never a judge and is neutral in proceedings. There is a significant difference but currently via the Woolf Reforms in England & Wales, also in Scotland and via Europe via the Consultation Paper on the Subsidiarity Principle concerning the Directive on Mediation a juggernaut approach by Arlene McCarthy MEP and New Labour failed to do democracy at EU level by interviewing for and against the motion - only two published responses of 27 responses were interviewed, and 5 experts she called expert effectively rubber stamped the Directive on Mediation into the whole of

Europe. It is a nonsense in its current form and there is therefore a serious need to outlaw ADR/IDS/informal Justice and Mediation from the public domain institutions which in the UK are the BBC, Whitehall. Judicial Systems, the Police, Local Authorities and the NHS which had a serious issue concerning Midstaffs Hospital and gagging clauses substantively impacting on whistleblowing legislation in the UK. Moreover, there is a procedural issue in the court system that may affect article 234 preliminary requests to the European Court of Justice effectively being made at a discretionary level at the Court of Appeal or at a higher level automatically thereby in effect preventing EU case law or legislation impacting on the UK domestic courts where the parties choose or are coerced to use ADR/IDS/informal justice/mediation. Further because of the very nature of ADR/IDS/informal justice/mediation requiring the parties to decide the outcome of their dispute, the ability to compromise the application of the rule of law has the effect of lowering standards on an individualistic level with minimal impact on society. Standards contained in the application of the rule of law are therefore being lowered on an ad hoc basis. You require to maintain standards uniformally through the application of the rule of law in order to ensure you live in a safe and just society. Democracy only affords ADR/IDS/informal justice/mediation a private position in society to do otherwise and contain it in the public domain is to effect an opposite. ADR/IDS/informal justice will always remove the dispute to the private domain and is never within the public domain by its very nature and essence. It needs to be outlawed to endure societal standards are effective within public domain institutions.

I attach a copy of my article "ADR the Achillies Heel of a Democracy" which also has a table attached which is "McDade's Paradox".

Thank you for letting me participate in this Consultation.

Attached article:
ADR the Achillies Heel of a Democracy

We have all heard the terms "separation of the powers" and "Justice must be done and seen to be done". But do we really know why these axioms exist in civilised society?

Well the separation of powers is between law and politics. That is to say "natural law v posited law". Natural law is the little bit of reasoning (ratio decidendi) of a case precedent. Posited law is the rule of law contained in a Statute as made by the legislature on the back of the people (citizens/subjects of a country). Natural law is what the law "ought" to be and posited law "is" the law. Simple you might think from time immemorial.

Unfortunately, if the balance between judicial reasoning and legislature does not happen, then I argue, neither does democracy. Why, if no cases challenge or reiterate the rule of law at common law (case precedent) or as contained in a statute, then law stagnates and becomes political "is" law.

Assuming the will of the people is always adhered to then law "should" be "good" law to regulate all citizens. However, not all politicians are ultimately good and not all societies are ultimately good either.

Therefore, to unbalance democracy all you need to do is to prevent either Justice not occurring or the legislature to not occur. But it is not as simple as that. Justice is fundamental to democracy. Why, because "Justice" sets the standard of reasonableness to what the rule of law "ought" to be and this can occur objectively or subjectively via the equitable discretion of the judge.

In a democracy, the standard of reasonableness is determined to be equality, fairness, impartiality and justice. Therefore Justice is the "ultimate" and is "fundamental" to democracy. Stop "Justice" and you prevent equality, etc.
Currently in England & Wales, and America a Japanese concept called ADR (Alternative Dispute Resolution) is being contained "within" the judiciary and legal profession. It is being premised as "access to justice" and is contained in a Directive on Mediation which is going to impact on the Scottish and European legal systems, except Denmark who have abstained.

The problem with ADR is that it does the "opposite" and removes the case from the path of access to justice, where the parties may not experience equality, fairness, impartiality or justice. The difference is that the judge is never a mediator and the mediator is never a judge. As such, something is occurring to democracy that is being falsely premised, the issue remains – why? We have had "regimes", "regime change" and "change management" in the last decade within UK politics – from what to what? (Liberalisation!).

Now ADR is a Japanese concept and as such it is used culturally to "save loss of face". In Japan litigation is a "last resort" concept. Japanese culture is based on confidentiality agreements and gagging clauses covering up who knows what. Japanese society is therefore largely "hidden". This by contrast is not how Western society is, our courts are "public" and the light of day shines into its darkest reaches most of the time.

Anyway, I recently spoke to a Scottish mediator and he informed me "but 97% of cases settle without trial": therefore 3% make it to Justice and impact uniformly on society. Just 3% is necessary in order to ensure that British society exists as a democratic society where society is deemed to be civilised, safe and just. (I am surprised, maybe closer inspection needs to occur concerning this statistic!) Therefore why do ADR'sts want to have ADR "within" the judiciary and legal profession and potentially impact on 3% of cases that fundamentally must go the distance when ADR "outwith" the judiciary and legal profession and with freedom of choice and the equilibrium of the dispute market they have potential to access 97% of cases: that should be sufficient. If, 97% of disputes "settle" before trial, this presumably is why Woolf claims (1) equality and (2) access to justice. Settlement is potentially divided into judiciary ("traditional equality") and mediators ("contemporary equality").

Either the judge decides or the parties decide the outcome of the dispute. Therefore contemporary equality is 99:1; 60:40; [50:50]; 30:70; 1:99. The fact that it is possible

for traditional equality and contemporary equality to be 50:50 presupposes that mediation does have some "good" quality, howsoever, unlikely the parties will settle on this outcome may be in reality. With mediation there is disempowerment especially where psychological techniques are used: "gold will be left on the table" – there must fundamentally be a benefit to all parties – win/win rather than win/lose via the judiciary. The difference is that judicial equality provides compensation (monetary value), mediation may provide redress, ie the remedy may have a different weight.

As such, I advocate the "Competition model" for Scotland and Europe: (1) judges, lawyers and barristers NOT permitted to practice ADR – because their sole role in society is to uphold the rule of law! (2) A professional body of mediators akin to the Law Society/Bar Council, and (3) A mediation centre in every town/city where there currently exists a court. That is to say, that the competition model would separate litigators from mediators. The market would determine who got the disputes and in what percentage on the basis of freedom of choice. ADR would exist in a democracy and so would the rule of law.

However, of concern to me is how ADR is being processed in society. The English & Welsh model was processed by the Woolf Report which became the Access to Justice Act 1999 and CPR Rule 26 processed ADR "within" the judiciary. The Woolf Report stupidly in my view informed "litigation will be avoided whenever possible" ambiguously in a report entitled "Access to Justice" (Annex 1). Therefore it is clear that something intellectually was deficient concerning the processing of ADR within English/Welsh society – or was it? If we are being "change managed" to some other political state then the judicial and political elite would be acting deliberately rather than inadvertently. Furthermore, the Scottish Executive have been processing the Directive on Mediation at European level. A consultation paper on the subsidiary principle via Arlene McCarthy MEP saw 2 out of 27 published responses interviewed and as my response proposed the Competition model and was not therefore the proposed model, it was perhaps biased or prejudicial to not also interview me on the premis that you ought democratically to interview for and against your proposal. 5 further "experts"! were also interviewed, effectively rubber stamping an already settled outcome. Therefore, it would appear to me that I am making the case that "democracy" is being dispensed with politically as well as judicially. – because of ADR - Why? Surely, there is a need to take a step back and look at the models (do an evaluation) – English & Welsh, American, Japanese and for good measure the Danish before impacting on Scotland and Europe.

So to recap – ADR is the "achillies heel" of democracy because:

It is being processed as something it is not and never can be because it is "opposite" to Access to Justice, ie Access FROM Justice: compromise.

It upsets the finely balanced mechanism between natural law and posited law and if judges do not "reason" then society stagnates in a political quagmire. Even the political domain cannot process a consultation fairly proving that "standards" in society have subsequently lowered.

ADR "undermines" the rule of law because it gags society at the individual level and prevents law being uniformly applicable.

The Japanese process ADR as a cultural feature to their society, we are processing it because it is cheaper and quicker than litigation (not necessarily true) – so revamp the litigation process to the 21st Century using IT! and "improve" on a 3% statistic.

Do you want to exist in a safe and just society – with ADR contained "within" the judiciary – just what society are you expecting? What should the international symbol of "Compromise" look like?

References:http://www.dca.gov.uk/civil/final/contents.htm

Woolf Report - Access to Justice

http://www.europarl.eu.int/comparl/juri/consultations/default_en.htm

Published responses to the Consultation Paper on the Subsidiary Principle concerning the Directive on Mediation 2004 718

http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=191867

EQUALITY (THE HIGHEST FORM OF ORDER IN A DEMOCRACY) – OR NOT?

McDade's Paradox

ACCESS TO JUSTICE
Pre-Woolf Reforms: (26 April 1999)

NON-LAW	LAW		
Private	**Public**	**Private**	**Effect**
Alternative Dispute Resolution (ADR)	TRIAL (Substantive Justice) * equality, fairness, impartiality, justice	Arbitration	**DISPUTE RESOLUTION**
	Process (Procedural Justice)		**DISPUTE SETTLEMENT**

ACCESS TO JUSTICE
Post-Woolf Reforms (26 April 1999)

NON-LAW	LAW		
Private	**Public**	**Private**	**Effect**
	TRIAL (Substantive Justice) *equality, expedition, economy,	Arbitration	**DISPUTE RESOLUTION**
	Process (Procedural Justice) equality, expedition, economy, proportionality	AlternativeDispute Resolution (ADR) (MEDIATION)	**DISPUTE SETTLEMENT**

ACCESS TO MEDIATION
Post-Woolf Reforms: (26 April 1999)

NON-LAW	LAW (applies legal norms and legal principles)		
Private	**Public**	**Private**	**Effect**
	TRIAL (Substantive Justice) equality, expedition, economy,	Arbitration	**DISPUTE RESOLUTION**
	Process (Procedural Justice) equality, expedition, economy,	Alternative Dispute Resolution (ADR)	**DISPUTE SETTLEMENT** (MEDIATION)
* TRADITIONAL PRINCIPLES : equality, fairness, impartiality, justice * CONTEMPORARY PRINCIPLES : equality, expedition, economy, proportionality		NON-LAW (does not apply legal norms or legal principles)	

I am seeking Europe-wide reforms to employment law and welfare reforms on two premis below referred: "Zero Hour Contracts and a lacuna in the welfare reforms relating to volunteering

Regarding the welfare reforms, I have been thinking about zero hours contracts and I would like you to debate this issue in Parliament. The implied duty of mutual trust and confidence in a contract between employer and employee is to act in good faith. The employer's duty is to remunerate. The employee's duty is to be willing to work. I am thinking that Zero Hour Contracts could be illegal via the duty of the employer to remunerate. Remuneration requires you to pay something, not nothing. The law requires that something to be the minimum wage. Whether it can be argued that a basic plus commission on part-time and full-time contracts is a better way forward than zero hour contracts needs to be debated. That would potentially assist IDS to reduce the benefits burden/deficit and keep people out of relative poverty But the employee only requires to be willing to work, that does not necessarily mean they actually have to work - so if the employer does not have any work to do, people can feng shui the office, update websites, do blogs, create leaflets and posters, ring round the yellow pages, update proformas, archive their emails, organise a football/netball/hockey match, do volunteering, or second staff tolients etc - there is usually something that can be done which is not quite company business when there is no work - creativity and imagination. The emphasis should not be on people on benefits, the emphasis should be on the employer who is exploiting his/her employees.

In English law and the law of obligations a contract comprises three components to be legal: offer + plus acceptance + valuable consideration. That people are doing zero hours and therefore receiving no remuneration it would appear to me to be a breach of the implied duty of mutual, trust and confidence by the employer. Whether there is a special case for employment contracts is not known, but I don't think so.

I have started a Petition on 38 Degrees (so called because it is the point when an avalanche occurs). My Petition is to raise awareness of a lacuna in the welfare reforms concerning the long-term unemployed, especially those on disability benefits.

People on disabled benefits often recover. A change in their circumstances means that they potentially lose their DLA/PIP and Severe Disability Allowance which can amount to about £500 per month. Some people are not quite "job ready" or there may be insufficient employment opportunity in their locality. Also people on long-term welfare benefits may lack skills, training and education and there is a lack of jobs stating "junior" or "trainee" where people who need to upskill to get back into the job market can join a workforce at a lesser degree of preparation with the employer investing in their staff. However, my issue is about people engaging in the welfare reforms and doing volunteering. They have not received any benefit whatsoever and the lacuna means that there is no increased benefit for doing unpaid work to replace lost benefits which is potentially discriminatory for disabled people. If you go back to "paid" work, you receive an increment of £40 a week for a year, you receive a tax free threshold of £10,500 per year and if you are on a low income you are entitled to

working tax credit. Perhaps you can now see my argument - volunteering is still work but should not be for altruistic reward only. It is possible to do "permitted work" to the value of £100 and still claim benefits. My Petition proposes that if you do 4 hours voluntary work, you should receive £25; if you do 8 hours - £50; 12 hours - £75 and if you do 16 hours plus - £100. The maximum replacement benefit would be £100 with the potential to earn £400 per month to replace lost benefit with the Government saving £100 as austerity measures. This would keep people especially disabled people out of relative poverty and let them engage in the job market at their level of ability. Something for something. The DWP collect information on volunteers as the charity has to notify this fact. A simple form perhaps online to your social security number is all that is required and if you really are altruistic then a cross in the box would enable you to receive nothing. This issue is a serious issue as it is a lacuna in current thinking on welfare reforms which are going to disadvantage many people and put them into relative poverty. his campaign means a lot to me and the more support we can get behind it, the better chance we have of succeeding.

Thank you for letting me participate in this Consultation.

August 2015

Herewith a substantive issue which needs to impact in the whole of the EU and whilst it can be deduced from the Right to Private and Family like contained in the Human Rights Act 1998 in the UK may require further impact in the EU.

"The human right to a private and family life - does it extend to the subject in an unofficial photo

I had an opportunity to think on whether the Human Rights Act 1998 and specifically article 8 the right to respect for private and family life can extend to an unofficial photograph. Human Rights derived from the Act start at day 1 and minute 1. So it appears to me that the article 8 clause is "subject" specific.The first clause states "1 Everyone has the right to respect for his private and family life, his home and his correspondence" - the subject element being "his". Therefore ruminating I asked the question who owns the intellectual property right in a photo - the person who takes the photo or the person who is the subject. It would appear to me that the clear answer via the 1998 Act is the subject. This got me thinking, most people in public life make an effort to afford the public access via official opportunies for photos to be taken, the Royal Family are a prime example. But the Human Rights Act 1998 does not differentiate between a person with a public life profile or a private person. It applies to everyone in the UK uniformly. Therefore, if an "unofficial" photo is taken by someone to include the Paperazzi and the HRA protects the "subject", does it follow that in order for the photo to be published that express consent is necessary from the subject of the photo.This issue appears to me to be most pertinent where it concerns children. Children are called minors in the law and deemed not to have legal capacity to give express consent or make a legally binding contract. A guardian, parent, official representative must act on their behalf. It therefore follows that all children in the UK who are subjects in unofficial photos are protected by the HRA 1998 and article 8 and that it means that NO photo can be published in a newspaper or magazine taken by the Paperazzi or anyone without the express consent of the Guardian, parent or official representative. I reminated further, is it possible that if the person or child is a UK citizen then as subject in an unofficial photo the legal jurisdiction is the UK regardless of whether the unofficial photo was taken in Europe or anywhere else in the world. The HRA and article 8 could potentially create a blanket ban on unofficial photos especially of children without express consent being requested and granted before publication. There is a serious issue because the young Prince George is being targeted "unofficially" by paparazzi photographers, he is legally a minor, and the paparazzi are using methods that may entice him away from the care and protection of his guardian, parent or official representative. All children from a very early age are told about "stranger danger", but a puppy dog or a rabbit might not be perceived as threatening or a danger to a child. Most ordinary parents would be appalled if their child was enticed away from their care and protection perceived or otherwise, so if ordinary children can be covered by the HRA and article 8, so also should young Prince George and his sister Charlotte too specific to unofficial photos. But there is a further issue - social media. Guardians, parents, relatives, friends of friends, official representatives post "unofficial" photos on social media - Facebook for example. Facebook and other social media provide a contractual right to privacy, but you have no control over who sees your unofficial photos. And here is the crux: if you publish unofficial photographs on Facebook can they then appear in a newspaper or magazine without your express consent? Is consent implied - they are (a) published and (b) circulated

so as to be seen by many? But social media provides a contractual right to privacy as well as your having a statutory right to privacy via the HRA 1998. It could be argued that just because an unofficial photo has been "seen", it does not extend a right without express consent to be published in a newspaper or magazine. The Facebook contractual right extends to circulation of an unofficial photo only so far as it is published on Facebook, but the HRA is subject specific and provides a right to privacy in the intellectual ownership of the photo as a subject specific right and extends to publication beyond Facebook or any social media source so it follows that if an unofficial photo is sourced from a facebook or social media source that express consent is necessary and that there is no implied consent given by being engaged with Facebook or other social media source. This is because when you sign up to Facebook or any other social media site, you are contained within the four corners of that agreement and the right to privacy via the contract is restricted by the boundary of the four corners. So you can publish unofficial photos on Facebook but no further and if you then want to publish further the HRA article 8 kicks in and express consent is necessary because it is subject specific. That is my reasoning and logic on the matter and I would hope that it could afford privacy to people especially children immediately as well as to people who are in the public eye who are decent enough to give official photograph opportunities but who should be protected from Paparazzi intrusion and publication of unofficial photographs. If the Paparazzi continue to take unofficial photographs then the responsibility should lie with the newspaper or magazine to secure official express consent to publish further or at all. No one should therefore have an unofficial photograph published without first having the ability to make it official per se. An interesting article on what is occurring concerning Prince George and the seriousness of the issue concerning children is available (click here) http://www.bbc.co.uk/news/uk-33927354"

Thank you for letting me participate in this Consultation.