Adrian Zuckerman

Professor of Civil Procedure at the University of Oxford

Comment on:

The principle of effective judicial protection in EU law

Anthony Arnull, University of Birmingham, 18 June 2010

1.

Professor Arnull's excellent paper draws attention to the practical consequences of the European Community principle of effective judicial protection in domestic national procedures. As a non EU lawyer, What strikes me about this account is the focus on the need to provide meaningful implementation of community rights. Art 10 of the EC Treaty places national courts under a duty to ensure "full effectiveness of Community law". Article 19(1) TEU, spells out that that this must be achieved through 'effective legal protection in the fields covered by Union law.' Thus Community law makes clear that it is the function of national judicial institutions to provide effective means of enforcing community rights.

2.

As Professor Arnull explains, the theme that runs through ECJ judgments is that the imperative of judicial enforcement of rights, albeit Community rights, is not a peculiar notion of Community law. Rather it is merely 'a general principle of law which underlies the constitutional traditions common to the Member States'. That rights must be enforced is indeed a general principle of law embedded in the very foundation of any system ruled by law. Law enforcement, whether civil or criminal, transcends the interests of the immediate parties. In a society governed by the rule of law we all have an interest in rights being respected and in wrongs being remedied. For in the absence of redress for wrong there is no value to rights and no reason to behave according to the law.

3.

It is precisely because the enforcement of rights is in the interest of the community as a whole that we have a judicial process that underwrites rights with compulsory state process. Judicial enforcement of rights is therefore a peculiarly state monopoly which cannot be left to private enterprise. It follows the requirement that Community member states provide effective enforcement through their judicial authorities states the obvious. Yet, during the last decade this otherwise

obvious assumption, that courts are there to enforce rights, has been challenged by a perception that the adjudication of civil disputes is not so much a law enforcement service as it is a dispute resolution process. Since disputes predominantly concern private rights, this line of thinking suggests, their resolution is essentially a private matter of no great public interest. This explains why it has become fashionable to regard ADR as an adequate and cheaper substitute for court adjudication. And why courts, particularly in England, are so insistent that litigants avail themselves of ADR instead of seeking court adjudication.

4.

To regard court adjudication as simply one of many forms of private dispute resolution, I believe, is to debase the court's constitutional function in a system governed by the rule of law. A person who complains of breach of Community directive on equal treatment for men and women does not just ask the court to resolve a dispute. Such a person demands the enforcement of his entitlement under Community law. This is equally true where a claimant seeks redress under national law. A pedestrian injured by a speeding car does not go to court asking the judge: “Please resolve my dispute with the speeding driver”. Rather, the pedestrian demands what is due to him under the law. Court adjudication is the process which enforces the rights that persons have, and not just a mediation service. No one thinks of the criminal trial as merely a dispute resolution process. And nor should one regard the civil adjudication in this way. The civil process is just as much a law enforcement process as is its criminal counterpart. It is this perception of court adjudication which forms the backdrop that ECJ jurisprudence establishes that national procedures must not make it ‘practically impossible or excessively difficult’ to exercise rights conferred by Union law.

5.

Once we focus on the need to deliver effective remedies for wrongs, attention turns to the practical measures that need to be put in place to ensure that court enforcement is no mere theoretical possibility but a practical facility. For court enforcement of rights to be of practical utility three conditions must met:

(1) there must be a judicial process of capable of determining the true facts and applying the relevant Community law to them;

(2) judicial decisions must be obtainable within a reasonable time; for delay may rob the judgment of its ability to remedy the wrong; and,

(3) enforcement must be obtainable at proportionate cost; for disproportionate cost will have a chilling effect on access to court enforcement.

6.

As far as I am aware, the ECJ has been mainly concerned with condition (1), the availability of a judicial process, while conditions (2) and (3) have received little attention. The only decision mentioned by Professor Arnull which is relevant to my concern is *Impact v Minister for Agriculture and Food*, where the European court determined that individuals should be able to seek protection of Community rights before the same court, if splitting their action into separate claims would lead to unacceptable procedural complications. Procedural complications become unacceptable when they give rise to unreasonable delay or to excessive cost. On this score the ability to seek redress in the English court may well be found wanting.

7.

Litigation costs in England are high, unpredictable and quite often are disproportionate. This is due to the combined effect of two factors. The first is the indemnity principle, whereby the unsuccessful party has to pay the successful party's litigation costs. The second is that legal services are paid for on an hourly basis, regardless of outcome and without an upper limit. Since involvement in legal proceedings carries a financial risk of unknowable proportion, litigation could well turn out to be financially ruinous for all but the very rich. The question therefore arises whether the disproportionality of the cost of enforcing Community rights in the English court undermines the effectiveness principle mandated by Community law.

8.

This question would need to be resolved, in the first place, by the English court since the ECJ ruled in the *Impact* case that it was for the national court to assess whether the domestic process would lead to unacceptable procedural complications. However, it cannot be the case that the national court has unfettered liberty to decide this question, for it would then be very easy for national courts to undermine the principle of effectiveness. It follows that while a decision of this kind is for the national court, the national court cannot have more than a margin of appreciation. That is to say, the national court decisions on the point cannot immune from a test of reasonableness in determining whether a procedural complication is unacceptable, or whether excessive costs represent an unacceptable obstacle to the enforcement of Community rights.

9.

Whether unpredictable and disproportionate costs do undermine the principle of effectiveness has not been tested in the Community court. But if the ECJ were to find that the English costs system does impede effectiveness, then English litigants may wish to invoke the twin principle of effectiveness, the principle of equivalence, though in the opposite direction. They would be able to make a morally compelling argument that those seeking enforcement of rights under domestic law should be in no worse position than those seeking enforcement of Community rights.