



**CONGRÉS MUNDIAL SOBRE POLÍTICAS LINGÜÍSTIQUES**  
**CONGRÈS MONDIAL SUR LES POLITIQUES LINGUISTIQUES**  
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**WORLD CONGRESS ON LANGUAGE POLICIES** Barcelona, 16-20 d'abril de 2002

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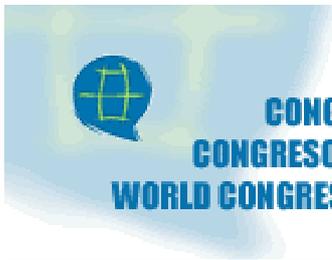
**“MINORITY LANGUAGE LEGISLATION AND RIGHTS REGIMES:  
A TYPOLOGY OF ENFORCEMENT MECHANISMS”**

**Robert Dunbar,**  
**<rdunbar@udcf.gla.ac.uk>**  
**Lecturer in Law,**  
**The School of Law,**  
**The University of Glasgow**

While there is an ever-growing literature on the content of minority language legislation and minority language rights regimes, less attention has been focussed on the manner in which such legislation and rights regimes are to be enforced. This is unfortunate, because enforcement issues are perhaps as critical to the success of the minority language maintenance and promotion effort as the content of legislation, language policies and rights regimes themselves. What happens, for example, when a public body (or a private sector body, where the language policy or language legislation imposes obligations on such a body) which is obliged to provide minority language services under minority language legislation or a minority language rights regime fails to satisfactorily discharge such obligations?

Minority language activists know that failures to discharge obligations can happen, and there may be any number of reasons, legitimate and otherwise, as to why: outright hostility or simple indifference amongst politicians, civil servants or both; an unwillingness amongst policy-makers and service-providers to consider issues relating to the minority language as serious ones or as priorities; shortages of funding, of human resources and of other essential inputs, which serve to limit the effectiveness of even a supportive regime, and so on.

In this paper, I will consider a range of enforcement mechanisms which are available, making reference to practice at national and sub-national levels; at the end of the paper--time and space permitting--I will also briefly consider international enforcement mechanisms (though I do not do so here). I will demonstrate that the nature of the model of enforcement will depend in part on the nature and degree of the obligations imposed on public bodies (and private sector bodies). In particular, where the nature of the obligation is weak--as is the case in respect of language policies which are not based on some statutory obligation or rights regime, and which are left largely to the discretion of the public body in question--the range of models of enforcement is necessarily limited. Where, however, a minority language policy is statutorily-based or is driven by a minority language rights regime, the range of models is much greater.



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Among the issues which differing models must address is effectiveness of enforcement, consistency of enforcement, and responsiveness of enforcement mechanisms to community needs and desires. Implicit in this matrix of issues are fundamental questions relating to the appropriate role of professional language policymakers and planners, elected politicians, civil servants and the public (both the minority language community itself, and the wider public). All of these issues will be considered.

#### Private Models of Implementation and Enforcement:

By "private" models of enforcement, reference is made to models which empower individuals and/or communities to prosecute the enforcement of rights and obligations through the courts; essentially, therefore, these are private litigation models. Such models have much to recommend them. First, to the extent that legislation has imposed obligations on governments or created rights for individuals and/or communities, private models put the power of enforcement in the hands of the individuals and communities who are the beneficiaries of the rights and obligations; enforcement is not left to politicians and/or civil servants. This has many benefits, not least in the sense of empowerment and ownership that it can engender in the minority language community; where successfully utilised, private methods of enforcement can create greater confidence, self-esteem and awareness of language issues and can engender a sense of activism and energy in the community, and these qualities are sometimes as important to minority language revitalisation as the receipt of minority language services themselves.

On the other hand, such methods are not without their drawbacks. First, litigation can be expensive. Minority language communities are often ones which are also economically and socially marginalised, and these are the very sorts of communities which can often least afford or are often least willing to pursue their rights through the courts. Even where finances are not an issue, protracted litigation against intransigent public bodies can create a sense of "battle fatigue". Second, litigation can be risky; a poorly prepared case, a weak factual situation or an unsympathetic judiciary could result in defeat for the community (possibly entailing further expensive litigation in appeal courts), and, in legal systems where court decisions have value as precedents for other courts, could result in the creation of legal principles which could limit the scope of the right or duty with respect to the minority language, to the disadvantage not only of the litigant or litigants but to the community as a whole. Third, the litigation process can be something like a lottery, in terms of advancing a sensible language revitalisation policy. Local dynamics in one area may result in one community having the resources and determination to go to court, but that local success may not be replicated in other areas in which the local community faces a recalcitrant public authority or lacks the combination of resources and determination that was present in the first area. The minority language right or obligation becomes one that is enjoyed by minority language speakers in some areas and not in others.

Not all of these problems need to be insurmountable ones. For example, financial barriers to the effective use of such remedies can be addressed through some form of special legal aid. An example is Canada's federal court challenge programme, under



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which minority language litigants could obtain financial assistance with court costs in respect of challenges based on constitutionally-protected minority language rights. Barriers in the form of inexperience with the legal system, uncertainty as to the content of rights or obligations, and a general lack of confidence can be assisted by state-funded clinics, advocacy programmes, and public education programmes, perhaps operated by the sorts of institutions described in the next part of the paper.

Finally, to the extent that a private enforcement model is to be relied upon to enforce minority language legislation, policies or rights regimes, some consideration must be given to the form of remedy available. Statutorily- or constitutionally-mandated rights tend to be easier to enforce, as potential litigants can rely on special statutory or constitutional remedies provided for in the relevant enactment. Minority language regimes which are made effective through the imposition of statutory duties on public (and other) bodies can be more difficult to enforce than those made effective through rights, primarily because litigants may have to rely on administrative or public law remedies such as judicial review. In the UK, Canada, and other similar jurisdictions, judicial review actions may not always be the most desirable mechanisms of enforcement: depending on how the obligation is imposed under the statute, the degree to which the public body is compelled to act may be limited; and the judicial review remedy may often be simply limited to a requirement for the public body to retake its decision, not necessarily to deliver unequivocally on the obligation.

#### Public Models of Enforcement:

Minority language policies or language rights regimes can also be enforced through the agency of a public body or bodies specifically charged with the task; models include the Canadian federal Official Languages Commissioner or the Quebec Office de la Langue Française. While Language Boards can themselves be given this task, it is probably more sensible to separate the enforcement function from the research, policy and planning function that is normally performed by such boards. This is because enforcement often entails an adversarial approach, and this could damage the goodwill with which Language Boards often have to function in relation to the public and private sector bodies they are dealing with.

The powers of such public enforcement bodies can take many different forms. In some cases, the role of the body could essentially be that of an “ombudsperson”; the body is charged with taking complaints from members of the minority language community and investigating them. In some cases, the body may have independent powers of investigation which do not need to be activated by complaints. Where the form of the body is that of an ombudsperson, the outcome of the investigation may be reported to the public body in question, or perhaps to the legislature or executive, but implementation of the findings of the investigation are often left to these other bodies. Where the public enforcement body acts as an ombudsperson, it will generally have powers to make broader policy recommendations to the public body in question, public bodies generally, the legislature and the executive, and will often render an annual report which highlights its work and the outcomes of investigations, campaigns and so forth. Finally, the body can have an educational role; it can facilitate public education, particular education of the minority language communities with respect to their rights or

state obligations to them, and with respect to strategies for implementing such rights and obligations, and education of public bodies themselves of good practice, community needs and perceptions, and so forth.

Public enforcement bodies which act as minority language ombudspersons have much to recommend them. By investigating complaints, they are able to relieve members of the minority language community of the costs and other burdens involved in trying to enforce state obligations. By being able to initiate investigations of their own accord, they are able to provide assistance to minority language communities in locales where such communities lack the resources and/or determination to initiate enforcement actions themselves, and can therefore ensure a more effective and consistent implementation of minority language legislation, policies or rights regimes across different locales. By being a mechanism for investigations of complaints, the body can build considerable expertise, which can make future enforcement more effective, can feed back into the policy process, and can proactively detect and remedy problems.

If, however, such bodies are not given independent powers of enforcement, or a power to engage in litigation on behalf of minority language communities, their output is merely persuasive, rather than coercive, with the result that recalcitrant public bodies may be able to evade their obligations. If the body has the power to make recommendations to the legislature and/or the executive, the legislature and/or executive could take steps to enforce such obligations, but cannot always be counted on to do so, for political or other reasons. In democracies, legislatures and executives tend to reflect the interests and perspectives of majorities, rather than minorities, and if such bodies could be completely trusted to implement measures of sufficient support for minority language communities, special minority language measures--whether legislated policies or rights regimes--would not be necessary. If the body does have independent powers of enforcement, or can engage in litigation against recalcitrant public bodies, this may increase their effectiveness in ensuring that obligations are fulfilled, but it also raises other issues. The most important of these is whether such powers would replace or merely supplement any private methods of enforcement of the nature described above. If such powers replace private methods of enforcement, this may place the minority language community in a position of considerable reliance on the enforcement body, leading to loss of control at the local level. This could result in cases in which the body may decide not to take on cases which a community may have been willing to, or in the body arriving at settlements that may not have been acceptable to the community had they retained control over the enforcement mechanism. Reliance on a body to enforce obligations or rights may also lead to some degree of apathy in the community, to a sense that the community does not have to be as vigilant in the defence of their language, and this can endanger the language maintenance and revitalisation project.

In addition to these issues, a number of different relationships involving the body must be considered. First, what is its relationship to the legislature and/or executive which has created it? In order to be effective, either as an investigatory ombudsperson-type body or as a body with independent enforcement powers, some degree of autonomy from the legislature and executive will be necessary. Reasonably secure funding sources must be identified. Appointment of personnel must be made based on merit, and once appointed, personnel must have a significant measure of autonomy in



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decision-making. Second, what is the relationship between the body and the minority language community itself? Optimally, there would be at least some degree of real participation of the community in the appointment process. This would increase the legitimacy of the body in the eyes of the community, enhance a sense of "ownership" by the community of the body, and encourage greater acceptance of and participation in the body's work by the community.