Language Rights and Immigrants: Exploring the notion of language-based discrimination

Sonia Boulos

This article reevaluates the international law principle of non-discrimination based on language, and its application to persons belonging to immigrant communities. The article criticizes the dichotomy between tolerance-oriented language rights and promotion-oriented language rights. As an alternative, the article suggests that a substantive approach to equality in the enjoyment of basic human rights could give rise to a duty to accommodate the language of immigrants, when the absence of accommodations results in the denial or impairment of human rights.

Keywords: Language rights, minority rights, immigrants, non-discrimination, reasonable accommodations.

Derechos lingüísticos e inmigrantes: explorando la noción de discriminación basada en el idioma.

Este artículo reevalúa el principio de derecho internacional de no discriminación basada en el idioma, y su aplicación a las personas pertenecientes a comunidades de inmigrantes. El artículo critica la dicotomía Klentre los derechos lingüísticos orientados a la tolerancia y los derechos lingüísticos orientados a la promoción. Como alternativa, el artículo sugiere que un enfoque sustantivo de la igualdad en el disfrute de los derechos humanos podría dar lugar a un deber de acomodar el idioma de los inmigrantes, cuando la ausencia de acomodaciones resulte en la negación o el menoscabo de los derechos humanos.

Palabras clave: derechos lingüísticos, derechos de las minorías, inmigrantes, no discriminación, ajustes razonables.

1. Introduction

An immigrant is a person who moves into a country other than that of her nationality or usual residence, so that the country of destina-

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

tion effectively becomes her new country (UN 1998).[1] Language claims of immigrants have received less attention compared to other rights pertaining to them. This is not surprising since the notion of 'linguistic rights' itself gained official status in politics only in 1990s (Bruthiaux 2009). Even within the rich literature on multicultural citizenship and minority rights, reference to language diversity and language policies was introduced to the debate later on (Peled 2011; Rubio-Marín 2003a; Rubio-Marín 2003b; Patten and Kymlicka 2003). Language rights can be defined as "a series of obligations on state authorities to either use certain languages in a number of contexts, or not interfere with the linguistic choices and expressions of private parties. These might extend to an obligation to recognize or support the use of languages by minorities or indigenous peoples" (Office of the High Commissioner for Human Rights 2017:5).

Historically, the protection of autochthonous minority languages aimed at stabilizing relations between ethnic groups, so that States can enjoy a higher degree of stability (Kibbee 2004). Even today, the UN Independent Expert on minority issues, Rita. Izsák, argues that "[m]inority language rights and language use have frequently been a source of tensions, both between and within States […] Fulfilling the rights of minorities, including their language rights, is an essential means to prevent tensions from emerging and is a key element of good governance and conflict prevention" (Human Rights Council 2012: Para 24). More recently, arguments in favor of language rights have depended largely on the notion of linguistic ecology. According to this approach, the preservation of minority languages is analogous to the preservation of biological species, and the diversity of languages is analogous to biodiversity (Kibbee 2004).

In the past, immigrants were expected to learn the official or national language of the new country and to renounce any language claims in relation to the recognition of their own. Immigrants themselves did not challenge this expectation, nor did it give rise to conflicts (Patten and Kymlicka 2003). Even today, in a country like the United States (US), most first-generation immigrants remain monolingual in their first language while others acquire some knowledge of the new language and become incipient bilinguals. By the second and third generations, the new language becomes the dominant language even if some members continue to use the old one to communicate with other family members. However, by the fourth generation the old language is usually lost (Valdés 2014).

Among the early works exploring language rights of immigrants is the work of Kloss on "Language Rights and Immigrant Groups". There, Kloss (1971: 254-258) outlined four typical theories behind the lack of recognition of language rights of immigrant groups:

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

(a) According to the tacit compact theory, by seeking to move to a new country, immigrants agree to adapt to its language and culture, and they agree to waive any claim to language rights in return for being allowed to settle in the new country. Kloss criticizes this theory for its historical inaccuracy. He brings examples of countries such as Argentina, Chile, Brazil, and the United States, where immigrants were allowed to establish schools conducted in their mother tongues or bilingually. Restrictions on the right of immigrants to operate such schools were introduced later. For example, the State of Ohio was partially bilingual between 1840 and 1889. During that period, schools, the local government, the local authorities, and courts took cognizance of the immigrants' languages. Kloss further argued that even if some immigrant groups acted as if such a compact existed, most immigrants struggled to maintain their own language. More so, some minorities fled Europe due to linguistic persecution, believing that the chances for linguistic survival were higher in the new country.

(b) According to the take-and-give theory, most immigrants will be better off economically in the new country. Therefore, they should give themselves over completely to the host country, without any reservation to its language and culture. Kloss argued that this assumption is arbitrary. While many immigrants improved their economic situation without making a specific economic contribution to the new country, such as the case of unskilled workers, their limited contribution still created more opportunities among the second and third generations, enabling some of their members to pursue more prestigious occupations and higher income jobs. Additionally, some groups of immigrants added new dimensions to the national economy soon after their arrival to the new country. Today, the fact remains that in a country like the US, almost 30 per cent of all entrepreneurs are immigrants, even though they constitute 13 per cent of the population (International Migration Organization 2019).

(c) According to the anti-ghettoization theory, immigrants who maintain their previous culture are isolating themselves and their children from the cultural life in the new country, while being also disconnected from the cultural life of their country of origin. This could have serious negative implications for their ability to integrate in the labor market. While Kloss was willing to recognize that there is some truth to this theory, he maintained that it does not constitute the whole truth. Kloss insisted that the apparent "lagging behind" of immigrant communities could also be attributed to language policies that disregard their basic needs and deepen their marginalization.

(d) According to the national unity theory, immigrant groups that maintain their language could become a disruptive force in national pol-

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

itics, making host countries unstable. However, according to Kloss, many times, it is precisely the denial of language rights for minority groups that triggers instability.

Nevertheless, Kloss (1971) created a clear distinction between the linguistic rights of immigrants and the linguistic rights of autochthonous minorities by introducing two sets of linguistic rights: promotion-oriented language rights and tolerance-oriented language rights. Language policies are promotion-oriented:

> Whenever the public authorities, whether at the national, provincial or local (municipal) level, make use of a language in their own activities, they thereby promote it. This includes the use of a non- dominant language in (e.g.) the printing of the session laws and statute books, the publication of public notices and advertisements, the use or teaching of the language in the public schools, the purchasing by the public libraries of minority language books, the use of the language in street signs, its use in the oral proceedings and the dockets of the courts of justice, etc (Kloss 1971: 259)

In comparison, tolerance-oriented rights:

> give the minorities leeway to use their language in those domains where not the authorities, but the citizens themselves become active by (e.g.) founding newspapers and periodicals, printing books, setting up private schools and private libraries, uniting in associations of a secular or a denominational character, holding meetings, running business establishments, using their languages over the phone and in the streets etc. (Kloss 1971: 259-260).

Kloss (1971) argued that immigrants have an entitlement only to tolerance-oriented linguistic rights but not to promotion-oriented linguistic rights. By contrast, national minority groups should enjoy both tolerance and promotion rights.

Today, the assumption that immigrants should settle with tolerance-oriented language rights seems less plausible. As early as 2003, Patten and Kymlicka (2003) highlighted two factors that transformed the linguistic expectations of immigrants. First, the rise of immigrant "transnationalism", that is the tendency of immigrants to maintain regular connections with the old country. This has been facilitated by advancements in communication technologies and transportation. This factor is even more relevant today with the rise of social media, which allows immigrants to "maintain remote relations typical of relations of proximity" (Diminescu 2009: 567; De Schutter 2021).

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

The second factor is the rise of the ideology of "multiculturalism", according to which immigrants are not expected to abandon their ethnic identity to integrate. Instead, they should be allowed "to visibly express their ethnic identity in public, and have public institutions accommodate this" (Patten and Kymlicka 2003: 8). However, as Lavrau (2019: 78) puts it, "multiculturalism found itself in cloudy water" at the dawn of the new Millennium, especially in Europe, where multiculturalism is seen as "having fostered communal segregation and mutual incomprehension" (COE 2008: 19). This has led to the emergence of an intercultural approach, which attempts to avoid the failures of assimilation and conversely multiculturalism. Instead, it combines aspects of both policies by recognizing diversity while insisting on universal values (Lavrau 2019).

Today, with the increase of migration flows and the creation of 'immigrant enclaves or ghettos', it is possible for immigrants to function in the new country inside these enclaves without acquiring the new language. This has led to a political backlash exemplified in requiring stronger state policies to compel language shifts among immigrants. The English-Only movement in the US, which has tried to remove rights previously enjoyed by linguistic minorities is one example (Crawford 2000; Lawton 2013). This backlash is also reflected in imposing harsher language tests for naturalization. This new reality also prompted more moderate proposals to encourage language shifts among immigrants, such as greater public support for language training programs or reforming transitional bilingual education for immigrant children (Patten and Kymlicka 2003: 8).

This article explores the scope of the protection offered by international human rights law to members of immigrant linguistic minorities in connection to their right to their own language beyond the minimal protection offered by the tolerance-oriented approach. The article argues that the dichotomy between tolerating languages and promoting languages is outdated and could potentially violate the international law principle on non-discrimination based on language. It further suggests that a deeper understanding of how language mediates the enjoyment of human rights leads to the conclusion that international human rights standards on non-discrimination have more to offer when debating language rights of immigrant minorities.

The article is composed of three main parts. The first part discusses the place of language in international human rights norms and addresses international obligations imposed on States in relation to language. The second part explores the scope of the international legal norm on non-discrimination based on language, by addressing the different facets of language-based discrimination. The third part argues that the

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

notion of substantive equality could give rise to an obligation to accommodate the language(s) of immigrants, under certain circumstances, and gives rise to other positive duties of a general character.

The research carried out for the purpose of writing this article forms part of a research project on the linguistic integration of immigrants in the community of Madrid. The project focuses specifically on legal (and other) conflicts involving immigrants that might arise due to the latter's lack of proficiency in Spanish, or because of immigrants' use of their own native language in public spaces. The article provides a general legal framework that attempts to answer the question to what type of positive obligations states have in relation to language rights of immigrants.

2. International Human Rights Norms and Language

International human rights instruments recognized as early as 1948 that language can be a ground for discrimination in the enjoyment of human rights. The Universal Declaration of Human Rights (UN General Assemby1948) was the first instrument to recognize the connection between language and the enjoyment of human rights. Its Article 2 states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, *language*, religion, political or other opinion, national or social origin, property, birth or other status". Likewise, Article 2 of International Covenant on Civil and Political Rights (ICCPR) (UN General Assembly 1966a) requires States to respect and to ensure to all individuals within their territories and subject to their jurisdiction the rights recognized in the covenant, without distinction of any kind, including language. Article 2 of the International Covenant on Social, Economic and Cultural Rights (ICESCR) (UN General Assembly 1966b) reiterates the same language in relation to the enjoyment of economic, social and cultural rights. These articles do not recognize a stand-alone right to language, they simply affirm that language could be a (prohibited) ground for discrimination in the enjoyment of rights.

Not all constitutions or domestic equality clauses explicitly recognize language as a basis for discrimination. For example, Article 14 of the Spanish Constitution States "Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance". However, reference to language is found in Article 3.1 of the Constitution, which declares Castilian Spanish as the official

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

language of the State and establishes the duty to know it and the right to use it. Additionally, Article 3.2 recognizes the official status of some (but not all) Spanish languages at the regional level. In jurisdictions where language is not recognized as a ground for discrimination, such as the case of the US, discrimination based on language has to be pursued on the basis of other grounds, such as national origin (Kibbee 2004).

The only article of the ICCPR that recognizes the right to language as a stand-alone right is Article 27. This article states "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". The Human Rights Committee (HRC), the body which monitors the implementation of the ICCPR by member States, stated that "[t]he terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party" (CCPR 1994: Para. 5.1). Furthermore, the HRC specifically stated that migrant workers or even visitors cannot be denied of the right to use their own language (CCPR 1994: Para. 5.2).

The HRC also clarified that the rights enshrined in Article 27 pertain to individuals belonging to such minorities and not the minority group itself. It is the members of such minorities that are entitled to use their language among themselves both in private and in public. This includes the right to use the minority language in private correspondence or communications, in private business or commercial activities, in the private display of commercial signs and posters, in the freedom to print in a minority language, and the freedom to operate private schools that teach in a minority language (De Varennes 2017).

The HRC's interpretation of Article 27 clarifies that the article imposes legal obligation of a positive character on member States. A positive legal obligation is an 'obligation to do something'. It requires national authorities to adopt reasonable and suitable measures to safeguard a right (Akandji-Kombe 2007). This is reflected in the HRC's view that even though Article 27 is expressed in negative terms, it could also entail positive measures that are "necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group" (CCPR 1994: Para. 6.2). Positive obligations of the State include the duty to protect the rights of the beneficiaries against the acts of private actors.

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

However, international instruments that reflect a promotion-oriented stance on minority languages tend to exclude immigrant groups from their scope. In a study on the rights of persons belonging to ethnic, religious and linguistic minorities (UN 1979a), the UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Francesco Capotorti, maintained that the term minority applies only to citizens of the state. The Study documents the opposition of various governments to the application of minority rights to immigrants "because of their voluntary assimilation" (UN 1979:10), emphasizing that minority rights should not be interpreted "as permitting a group settled in the territory of a State as a result of immigration to form within that State separate communities which might impair its national unity or its security" (UN 1979:33).

An explicit exclusion of immigrants' languages is found in the European Charter for Regional or Minority Languages (the Charter), adopted by the Council of Europe (COE) (COE 1992). Article 1 of the Charter defines minority languages as languages "traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and different from the official language(s) of that State". Article 1 also clarifies that this definition does not include the languages of migrants. However, the use of the term "traditionally used in a given territory" could blur the rigid distinction between languages "traditionally" spoken in a member State, and languages that are the product of recent immigration. This could be the case of countries with a colonial past and a history of movement from the colonized territories to the metropolitan State, such as France. Historically, France extended its citizenship far beyond its territorial borders. When colonized people from former French colonies came to France, their language became *de facto* "traditionally spoken in France", since many second-generation immigrants, who are French citizens, still retained the language of their parents. Arabic and Tamazight (Berber) spoken by people originating from North Africa are a typical example. France refrained from ratifying the Charter, fearing that its ratification would give rise to a legal obligation to recognize these languages as minority languages (Kibbee 2004). A similar debate is found in Spain. Whether the languages spoken by citizens of North African origin in the autonomous cities of Ceuta and Melilla constitute languages traditionally spoken in Spain is controversial. This is due to the historical but discontinuous presence of Arabic and Berber in both enclaves, located in mainland Africa (Erdocia 2020).

Even the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) (UN General Assembly 1990) contains no innovations regarding the protection

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

of the language rights of immigrants. It only protects the language rights of immigrants in two areas: in the criminal justice system (Articles 16 and 18) and in relation to the right to be educated in the language of the host country (Article 45). The ICMW adopted existing international standards on due process rights of individuals at risk of losing their liberty, who do not speak the language used by the court hearing their case. For example, the right of all persons charged with a criminal offence to be informed promptly, in a language which they understand, of the nature and cause of criminal charges brought against them is enshrined in Article 14(3)(a) of the ICCPR. The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court is also enshrined in Article 14(3)(f) of the ICCPR. This right arises at all stages of the oral proceedings. It applies to aliens as well as to nationals (CCPR 2007:9).

An important soft law instrument that could have implications for language rights of immigrant minorities is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (the Minority Rights Declaration) (UN 1992). The Minority Rights Declaration is inspired by Article 27 of the ICCPR. Article 1 of the Minority Rights Declaration adopts the language of positive obligations by stating that States "*shall protect* the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity". In addressing the rights of persons belonging to linguistic minorities, the Minority Rights Declaration states in its Article 4.3 that "States should take *appropriate measures* so that, *wherever possible*, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue". However, whether this Declaration is applicable to migrant communities remains a contentious issue (Ortega Velázquez 2017). The UN Working Group on Minorities seems to reject a strict distinction between autochthonous minorities and immigrant groups, while at the same time recognizing that the former have more legitimate claims to minority rights:

> The best approach appears to be to avoid making an absolute distinction between "new" and "old" minorities by excluding the former and including the latter, but to recognize that in the application of the Declaration the "old" minorities have stronger entitlements than the "new" (UN 2005: para. 11).

Multiculturalism and linguistic justice literature can shed some light on the origins of this distinction. In his book *Multicultural Citizenship*,

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

Kymlicka (1995) relied on the 'consent theory' to create a distinction between cultural and linguistic claims of autochthonous minorities and those of immigrant communities. Kymlicka argued that autochthonous minorities were incorporated to the State involuntary, either through conquest or annexation, or they willingly joined a confederation with the explicit or implicit understanding that their culture and language would be respected. In all of such cases, members of national minority groups did not waive their right to have their culture and their language recognized by the State. But in the case of immigrants, they freely choose to leave their culture and language, waiving hence their right to live and work in their own culture. While Kymlicka acknowledged that some immigrants, such as refugees, including economic refugees, did not leave their own cultures voluntarily, still, he maintained that granting such groups the same rights that ought to be granted to national minorities is not the adequate remedy to their plight. The injustices that forced them to leave their country "must ultimately be solved in the original homeland" (Kymlicka 1995: 100). Iris Young (1997) criticizes Kymlicka's dichotomy between autochthonous groups and immigrants and argues that various contemporary minority groups, such as descendants of slaves, guest workers, colonial subjects, are anomalies on Kymlicka's classification. Instead, she views cultural minorities as a fluid continuum. Others question the 'voluntary' nature of the cultural immersion of immigrants (Rubio-Marín 2003a; Carens 2000). Ruth Rubio-Marín argues that beyond the instrumental value of language, people enjoy a "sense of intimacy, trust, and shared identity that ties them to their citizen peers through the use of common language, and they long for the feeling of cultural continuity they get from receiving the language of their ancestors" (2003a: 137). While immigrants might implicitly choose to assimilate by moving to the new country, it is doubtful that their children have expressed a free and an informed consent to their cultural uprooting. Even in relation to first generations of immigrants, given the substantial economic inequality and the existence of volatile political situations on the global scale, it is hard to generalize the claim that immigration reflects a free consent to cultural uprooting. Therefore, the consent theory should not be the only key factor in discussing language rights of immigrants (Rubio-Marín 2003a).

However, proponents of promotion-oriented linguistic rights in general have to face another hurdle, which is the budgetary and pragmatic implications of recognizing minority languages. This obstacle is reflected, *inter alia*, in the use of vague terms such as "appropriate measures" and "wherever possible" in referring to the provision of education in minority languages. Such terminology allows reluctant States to adopt a minimalist approach to education in minority lan-

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

guages without much accountability (Skutnabb-Kangas & May 2016). Practical and economic considerations were recognized by the UN Independent Expert on minority issues, Rita Izsák (Human Rights Council 2012). According to Izsák, in implementing the linguistic rights of minorities:

> [E]ach State must take into account numerous factors relevant to linguistic minorities, including the number of language users and their distribution within the country … it is reasonable to consider that greater attention and resources will be dedicated to certain traditionally present, commonly spoken, or geographically concentrated languages, for example, than are given to relatively newly established languages with few or dispersed users (Human Rights Council 2012: Para 74).

More recently, the UN Special Rapporteur on minority issues stated that official langue preferences related to administration of public services must be reasonable. To determine reasonableness of the State's preferences, the principle of proportionality must be accounted for. The latter principle is "based largely but not exclusively on a number of practical factors: the number and concentration of speakers of the language, the level of demand, prior use of the language as a medium of instruction and therefore availability of resource" (Office of the High Commissioner of Human Rights 2017: 19).

Even if these criteria were to be applied to immigrant minorities, the excessive focus on numbers, demand, and geographical concentration could result in the further exclusion of vulnerable small immigrant communities who do not meet any of these criteria. Additionally, focusing the debate on "promotion-oriented" policies overshadows the fact that language related claims are intimately tied to the realization of basic human rights. As de Varennes (2017: 116) reminds us:

> There is often the mistaken view that the rights of minorities, or language rights, are part of a new generation of rights, or are collective in nature. This perception is both unfortunate and erroneous: unfortunate because it tends to consider language rights as less deserving than "real" human rights, and wrong because it fails to understand the actual sources of these rights.

For de Varennes, 'language rights' derive from general human rights standards, mainly non-discrimination, freedom of expression, right to private life, and the right of members of a linguistic minority to use their language with other members of their community (de Varennes 2001: 16). A similar argument was put forward by United Nations Special

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

Rapporteur on minority issues, who emphasized that portraying language rights as something "exceptional, special or unusual" (Office of the High Commissioner for Human Rights 2017:11) could lead to their rejection. Instead, we should be highlighting their position within the human rights paradigm "to respond effectively to language issues by working within the context of international human rights law, as well as domestic legislation" (Office of the High Commissioner for Human Rights 2017:11).

3. What is language-based discrimination?

Language-based discrimination is one of the most elusive forms of discrimination. As Ng (2007: 106-107) points out, language-based discrimination "may be practiced despite legal or human rights proscription or, ironically, with the blessing of the law". Ng (2007: 108) further emphasizes that:

> Competence in the privileged language provides the linguistic justification for legalized discrimination, making it seemingly rational on the grounds that a particular language competence is necessary for becoming a bona fide citizen, for performing well in the job, or for benefiting from university education

To put it differently, many forms of language-based discrimination "are, deeper down, legal camouflage for other forms of discrimination that are in themselves unjustifiable in law or in terms of human rights" (Ng 2007: 108). The following subsection illustrate the different and at times illusive facets of language-based discrimination.

3.1. Arbitrary language standards as a tool for exclusion

The use of arbitrary language standards to exclude marginalized groups has been sanctioned and reproduced, even by courts. An early example is the case of *Frontera v. Sindell* (1975), decided by the Sixth Circuit of the US Court of Appeals. In this case, the plaintiff instituted a class action on behalf of himself and all Spanish speaking persons against the Civil Service Commission of the City of Cleveland and the Commissioner of Airports. Frontera had been employed as a carpenter at the Cleveland Hopkins Airport under temporary appointment. He had to take a carpentry test in English to get a permanent position and become a civil servant. Frontera failed the test. Born in Puerto Rico, Frontera spoke English poorly and his reading skills were basic. He was

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

a member of the Carpenter's Union in the city, having been admitted based on an oral test and an inspection of his carpentry work. Frontera performed his job at the airport competently under the temporary appointment. Frontera claimed that he failed the test because it was conducted in English and not in Spanish. While the court acknowledged that there was a discriminatory effect on the Spanish-speaking population of the city, it applied a lower standard of review, the "rational basis test" as opposed to "compelling interest" test to review the case. A lower threshold was used because the case did not involve a suspect nationality or race, while refusing to see language as a proxy of such affiliations. The court accepted the Civil Service Commission's claim that administering the test in English maintains the successful operation of the Civil Service system and found a reasonable fit between the English-only examination and the state's purpose of maintaining a successful Civil Service system and ascertaining competent carpenters. The court disregarded the rights of all those who possess the necessary skills to obtain the certification but failed because of the language of the examination. In later cases, some courts struck down English-only tests for issuing a driving license, for example, since the State failed to prove that non-English-speaking drivers were more because since they lacked fluency in English (Sandoval v. Hagan 1999). However, such decisions did not invalidate the assumptions of the *Frontera* case, according to which the successful operation of the Civil Service system justifies English only testing, even for positions such as the one sought by Frontera.

Another example of arbitrary language standards is the imposition of one language rule in the workplace. In *Garcia v. Spun Steak Co.* (1993), the plaintiffs worked at Spun Steak Company, a California-based corporation that produced poultry and meat products. More than seventy percent of Spun Steak's employees spoke Spanish. The company introduced a new policy requiring its bilingual workers to speak only in English while working on the job. Prior to the adoption of this policy, employees were free to speak in Spanish to their co-workers during work time. The plaintiffs in the case received warning letters for speaking in Spanish during work hours. As a result, they decided to sue the company for discrimination, arguing, inter alia, that the English-only rule denies them a privilege of employment that is enjoyed by monolingual speakers of English and creates an atmosphere of inferiority, isolation, and intimidation (Garcia v. Spun Steak Co. 1993: 1486-1487). While the court recognized that English-only policy could cause adverse effects, it concluded that employees fluent in both English and Spanish are not adversely impacted by the policy. It is worth noticing that prior to the *Gracia* case, in 1980, the US Equal Employment Opportunity Commission (EEOC) passed regulations under Title VII

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

of the Civil Rights Act of 1964 to combat discrimination resulting from English-only rules. These regulations recognize that an individual's primary language is closely tied to her cultural and ethnic identity. Therefore, the mere existence of an English-only policy is sufficient to establish a *prima facie* case of discrimination. For the English-only rule to be permissible, the employer must establish that the rule is consistent with a business necessity. It is not sufficient that the policy merely promotes business convenience (Robinson 2008). However, some courts rejected the EEOC guidelines and continued to reject the claim that English-only rules could have an adverse impact on bilingual employees (Robinson 2008; Stein 2017).

3.2. Language and access to human rights

Language mediates access to human rights, with health services being a typical example. 'Health literacy' is understood as "[t]he ability to access, understand, evaluate and communicate information as a way to promote, maintain and improve health in a variety of settings across the life-course" (Rootman & Gordon-El-Bihbety 2008: 11). A study conducted in Canada demonstrated that being an immigrant with a mother tongue other than English or French is correlated with lower health literacy (Rootman & Gordon-El-Bihbety 2008).

Another study conducted in the United Kingdom by Celia Roberts et al. (2005) analyzed 232 recordings of consultations between patients and general practitioners. Twenty percent of the patients had a limited proficiency in English. Thirty languages other than English were reported as the patients' first or dominant language. The consultations reflected significant and extensive misunderstandings. The researchers identified four factors that led to misunderstandings: "(1) pronunciation and word stress; (2) intonation and speech delivery; (3) grammar, vocabulary and lack of contextual information; and (4) style of presentation. The importance of different styles of self-presentation by patients as the reason for misunderstandings is highlighted" (Roberts *et al.* 2005: 465).

3.2. Accent-based discrimination

Another aspect of language-based discriminations is accent-based discrimination. Accent is seen as a proxy for social status (Cantone *et al.* 2019: 4). It plays "a central role in the way individuals categorize speakers into social groups, especially in relation to ethnic categorization" (de Souza *et al.* 2016: 609). An accent can potentially stigmatize people as not being native born or not being native speakers (de Souza *et al.* 2016: 609).

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

A study conducted in Portugal demonstrates how job applicants with a Brazilian Portuguese accent were less likely to be hired compared to candidates with European Portuguese accent. The study also demonstrated that when managers openly justified favoring candidates with European Portuguese accent for the vacant position based on accent considerations (it is easier for clients to understand European Portuguese), the participants of the study viewed this discrimination as justified (de Souza *et al.* 2016).

3.4. Pragmatic and strategic competencies

Language proficiency *per se* is not a sufficient guarantee for non-discrimination. The lack of pragmatic and strategic competencies could still produce language-based discrimination. Pragmatic and strategic competencies are "very much associated with the speaker's culture, and they change from country to country, region to region and ethnicity to ethnicity. These two types of competencies consist of knowledge of contextual clues including speech acts of the interlocutors" (Suraweera 2015: 353-354).

Diana Eades (2006) conducted a study on the encounter of Aboriginal Australians with the legal system. Eades analyzed the cross-examination of three aboriginal boys who served as the prosecutor's witnesses in a criminal case brought against six police officers for unlawfully depriving the boys of their personal liberty.

All boys had a limited interaction with non-aboriginal society. Although they spoke Aboriginal English, according to Eades (2006: 157), "they had had little chance to develop bicultural competence, which is essential to successful participation in the legal system". The boys used Aboriginal ways of communication, that were significantly different from mainstream ways of communication in non-aboriginal English. The deep cultural differences disadvantaged the boys in cross-examination. This was evident in the continuous attempt of the defense team to exploit the Aboriginal tendency to use 'gratuitous concurrence', i.e., the tendency to answer a question with a 'yes' regardless of whether or not the speaker actually agrees with the proposition of the question.

Her analysis shows that when the boys lacked familiarity with the cultural connotation of a word in English, they were less active in resisting the attempts of the defense to manipulate their words. For example, when one defense lawyer used the term 'gang' to refer to the witness's friends, the latter resisted the use of the term gang and insisted that he was with a 'group of friends'. However, when the defense lawyer substituted the term 'friends' with the term 'louts', which is not used in contemporary teenage talk or in Aboriginal English, the witness kept

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá

silent for a moment but did not object to the use of this word. According to Eades, the lack of resistance in relation to the use of the term lout, was the result of lack of familiarity with the cultural connotations of the term in the dominant non-aboriginal society, and of 'gratuitous concurrence'.

4. Expanding the notion of language-based discrimination

4.1. Non-discrimination and language accommodations

The HRC has adopted a substantive approach to the term equality by defining discrimination as:

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language … and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (CCPR 1989: Para. 7).

This definition of equality acknowledges the notion of indirect discrimination, which occurs when laws or policies appear to be neutral, but when applied they have a discriminatory effect on certain groups.

International human rights institutions have interpreted the notion of substantive equality as also requiring *deferential* treatment of certain marginalized groups. For example, the UN Committee on the Elimination of Discrimination against Women stated that "identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face" (CEDAW 2010: Para. 5). The European Court of Human Rights (ECtHR) recognized that the principle of non-discrimination could be violated when State laws or policies are formulated in a neutral fashion, but *de facto*, have disproportionately prejudicial effects on a particular group (Rubio-Marín & Möschel 2015; ECtHR 2001a). The ECtHR has also recognized that treating different situations similarly could also amount to discrimination, acknowledging that the principle of non-discrimination could also require the contemplation of special accommodation measures for the realization of the right to equality (Rubio-Marín & Möschel 2015; ECtHR 2000).

Lengua y migración / Language and Migration 14:1 (2022) Monográfico, 13-37
https://doi.org/10.37536/LYM.14.1.2022.1598 / Edición en línea: ISSN 2660-7166
© Universidad de Alcalá