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New Directions For European Race Equality Law: Chez Razpredelenie Bulgaria Ad v. Komisia Za Zashtita Ot Diskriminatsia, Anelia Nikolova

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ESSAY

NEW DIRECTIONS FOR EUROPEAN RACE EQUALITY LAW: CHEZ RAZPREDELENIE BULGARIA AD V. KOMISIA ZA ZASHTITA OT DISKRIMINATSIA, ANELIA NIKOLOVA

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The Court of Justice of the European Union ("CJEU" or "The Court") has decided very few cases construing the scope of racial or ethnic discrimination. The cases that have provided opportunities to define discrimination and the frameworks for proving it have largely arisen in the context of Equal Treatment case law prior to the antidiscrimination directives of 2000,[1] and subsequently, in age discrimination decisions construing Directive 2000/78/EC.[2] Despite continued political contestation around ethnic, racial, and/or religious discrimination against Roma and Arab and North African Muslims in various member states, few discrimination cases challenging such discrimination have been referred to the CJEU.[3] Nonetheless, in recent years, a handful of decisions suggest the Court's willingness to define ethnic and racial discrimination under EU law in innovative and far-reaching directions.[4]

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1. *See* Regina v. Sec'y of State for Emp't, *ex parte* Seymour-Smith and Perez, Case C-167/97, [1999] E.C.R. I-666; Enderby v. Frenchay Health Auth. and Sec'y of State for Health, Case C-127/92, [1993] E.C.R. I-5535; Jenkins v. Kingsgate (Clothing Prods.) Ltd., Case 96/80, [1981] E.C.R. 912.

2. *See, e.g.*, Incorporated Trs. of the Nat'l Council for Ageing (Age Concern England) v. Sec'y of State for Bus., Enter., and Regulatory Reform, Case C-388/07, [2009] E.C.R. I-1569.

3. *See* European Commission, Commission Staff Working Document, Annexes to the Joint Report on the Application of Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC), SWD (2014) 5 Final (Jan. 17, 2014), Annex II (noting that case-law on the grounds of racial or ethnic origin is less developed).

4. *See* CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia, and Anelia Nikolava, and Darzhavna Komisia za energiyno i vodno regulirane, Case C-83/14, 2015, http://curia.europa.eu/juris/document/document.jsf?docid=165912&doclang=EN; Belov v. CHEZ Elektro Balgaria AD, Case C-394/11, 2013, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0394; Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES), Case C-571/10, 2012, http://eur-

This Essay identifies the Court's antidiscrimination innovations in its July 2015 decision, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia, Anelia Nikolova* ("*CHEZ*"). In a decision addressing discrimination against Roma in the provision of public services, the CJEU put forth an expansive definition of indirect discrimination. The decision, in recognizing a non-Roma plaintiff as a proper party to complain of discrimination against Roma, also innovates with regard to standing to enforce EU antidiscrimination norms. Both the articulation of the indirect discrimination framework in the direction of scrutinizing the defendant's justifications, as well as the expansion of standing to enforce antidiscrimination norms, are justified by reference to the Directive's stated purposes. The prohibition of race discrimination in employment aims not merely to provide remedies to individuals who are humiliated, but to bring about democratic and tolerant societies that operate with an ethos of inclusion.

CHEZ was referred to the CJEU by the Administrativen sad Sofia-grad, a Bulgarian administrative court that had affirmed a decision against it by the Komisia za zashtita ot diskriminatsia ("KZD"), the Commission for Protection Against Discrimination. The proceedings had been initiated by Ms. Nikolova, an operator of a grocery store in a predominantly Roma neighborhood. Nikolova is not herself of Roma origin, but she lodged a complaint with the KZD against CHEZ, claiming anti-Roma discrimination. CHEZ, an electrical power provider, installed electricity meters for all consumers in the district encompassing Nikolova's store at a height of six to seven meters. In other districts, CHEZ installed electricity meters at a height of 1.7 meters. Because the electricity meters were too high for Nikolova to read, she was unable to monitor her consumption and unable to confirm whether CHEZ was overcharging her for consumption on her invoices. In ruling on her complaint, KZD determined that CHEZ's practice of placing the electricity meters at six or seven meters in Nikolova's neighborhood constituted indirect discrimination on grounds of nationality under a Bulgarian statute that had implemented Directive 2000/43/EC.

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lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0571; Meister v. Speech Design Carrier Sys. GmbH, Case C-415/10, 2012, http://curia.europa.eu/juris/document/document.jsf?docid=121741&doclang=EN; Runevič-Vardyn v. Vilniaus miesto savivaldybės administracija, Case C-391/09, [2011] E.C.R. I-3787; Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, Case C-54/07, [2008] E.C.R. I-5187.

An administrative court annulled the KZD's decision, because Nikolova was a Bulgarian national, and therefore could not claim nationality discrimination based on the experience of Roma persons, many of whom may have also held Bulgarian nationality. On remand, KZD concluded that Nikolova had been directly discriminated against, on grounds of her "personal situation." Under the Bulgarian antidiscrimination statute implementing the EU race directive, "personal situation" is a prohibited ground of discrimination. KZD, without referencing race or ethnicity, concluded that Nikolova was discriminated against based on the location of her business, by comparison to CHEZ's customers in other locations whose meters were placed at an accessible height. CHEZ sought judicial review of KZD's decision in the Administrative Court of Sofia. The administrative court referred ten questions concerning various provisions of Directive 2000/43/EC to the CJEU.

The referred questions took up issues that had previously been raised and discussed in the *Belov* litigation before the CJEU a few years earlier.[5] In *Belov*, a Roma resident of a predominantly Roma district in Bulgaria had challenged the same practice of placing electricity meters at six or seven meters, carried out by a different electric power company. There, the KZD had concluded that the practice was discriminatory in violation of the Bulgarian statute implementing Directive 2000/43/EC, and referred several questions regarding the construction of direct and indirect discrimination, as well as the compatibility of some provisions of the Bulgarian statute with EU law, to the CJEU. In *Belov*, contrary to Advocate General Kokott's opinion,[6] the CJEU deemed the case inadmissible, on the grounds that KZD, the administrative agency tasked with enforcing antidiscrimination law, was not a court or tribunal and therefore incompetent to refer questions to the CJEU.[7] In *CHEZ*, by contrast, it was the administrative courts, not the antidiscrimination agency, that referred the same questions to the CJEU.

Several of the questions were clustered around the problem of defining "ethnic origin" for the purposes of enforcing an antidiscrimination norm. Ms. Nikolova, the complainant here, never claimed to be of Roma origin, but she sought a remedy for an injury that she characterized as a form of anti-Roma discrimination. Is it

5. *See Belov*, C-394/11.
6. *See generally* Opinion of Advocate General Kokott, *Belov*, C-394/11.
7. *See Belov*, C-394/11, ¶ 51.

coherent for antidiscrimination law to treat such a person as a victim of ethnic discrimination, to recognize her standing to enforce an antidiscrimination norm, to conceptualize the injury she complained of as ethnic discrimination? Doctrinally, the fundamental philosophical puzzle as to whether a non-Roma person could be a victim of discrimination against Roma focused not only on the definition of "ethnic origin," but also on whether the six to seven meter height of electric meters required comparison to the height of electric meters in other districts to state a claim of discrimination, and the nexus of any disadvantage stemming from the greater height of the electric meters to ethnic origin.[8]

It is by no means obvious that a court enforcing, construing, and interpreting a prohibition of discrimination should recognize a nonmember of a disadvantaged ethnic group as a victim of discrimination against that group. Consider, for example, a US court's approach to an analogous situation. White male police officers brought a lawsuit complaining about a racially and sexually hostile work environment when their white male supervisor harassed their black and female co-workers and made racist and misogynistic remarks. Even though the white male plaintiffs were not the targets of this discrimination, they claimed that the racist and sexist work environment injured their ability to perform their jobs together with black and female co-workers. The Fourth Circuit held that the male plaintiffs had failed to state a claim of sex discrimination, and refused to recognize their alleged injury as sex discrimination for which they would have standing to complain.[9] At the same time, the US Supreme Court, in the context of interpreting the antidiscrimination mandate of the federal fair housing statute a quarter century earlier, allowed white tenants to sue under the statute to challenge their landlord's exclusion of black rental applicants. The white tenants claimed that they were harmed by discrimination against black rental applicants because they were deprived of the social benefits of living in an integrated community.[10] These different approaches over the last several decades in the United States suggest that it is a difficult and controversial question as to whether a non-member of an ethnic or racial group

8. *See* Request for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria) lodged on 17 February 2014, *CHEZ*, C-83/14, Questions 1-4; *see also CHEZ*, C-83/14, ¶ 37.

9. *See* Childress v. City of Richmond, 134 F.3d 1205, 1207-08 (4th Cir. 1998).

10. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 206-07 (1972).

should be recognized as a party injured by discrimination against that ethnic or racial group.

Of course, it has always been a fixed feature of antidiscrimination law since the latter half of the twentieth century that antidiscrimination laws are written in race-neutral terms. Antidiscrimination laws protect everyone, not only members of oppressed minority races or ethnicities, from race-based discrimination, just as sex discrimination law protects both men and women from sex-based discrimination. This is why, from the beginning, whites have been able to invoke legal nondiscrimination norms to challenge race-based affirmative action programs, claiming what is sometimes known as "reverse" discrimination.[11] Similarly, men invoke legal nondiscrimination norms to challenge laws that favor mothers rather than fathers and wives rather than husbands, in the context of family or social benefits policy.[12] Yet, when Ms. Nikolova, a non-Roma Bulgarian claimed that she was injured by discrimination on grounds of ethnicity in the circumstances of this case, the structure of her claim is quite different from a claim of "reverse" discrimination. She is not saying that a policy that works to the advantage of an ethnic minority is working to her disadvantage. She is claiming, to the contrary, that a policy that works to the disadvantage of a minority to which she does not belong also works to her disadvantage. As the CJEU puts it, Ms. Nikolova "suffer[s] together" [13] with her Roma neighbors when they are subject to discrimination on grounds of ethnicity.

In justifying the conclusion that Ms. Nikolova is a proper complainant, the CJEU painted in broad brushstrokes the "fundamental principles" underlying its approach. It points to recitals in the preamble of the race directive that articulate the ambitious social goals of the directive, to justify a generally expansive approach.[14] It states:

> As the Court has already held in the light of the objective of Directive 2000/43 and the nature of the rights which it seeks to safeguard, and in view of the fact that that directive is merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of EU law, as

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11. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 293-300 (1978).

12. For United States examples, *see* Weinberger v. Wiesenfeld, 420 U.S 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973). Men have also invoked antidiscrimination norms to challenge special protections for mothers before the CJEU. *See* Roca Álvarez v. Sesa Start España ETT SA, Case C-104/09, [2010] E.C.R. I-8661; Hofmann v. Barmer Ersatzkasse, Case 184/83, [1984] E.C.R. 3047.

13. *CHEZ*, C-83/14, ¶ 60.

14. *Id.* ¶ 40.

> recognized in Article 21 of the Charter, the scope of that directive cannot be defined restrictively.[15]

Thus, the Court urges that the prohibition of discrimination, read in conjunction with Article 21 of the Charter, "must be interpreted as being intended to apply in circumstances such as those at issue in the main proceedings irrespective of whether the measure at issue in those proceedings affects persons who have a certain ethnic origin or persons who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure."[16]

The Court invokes the notion, frequently associated with justifying challenges to positive action, that Directive 2000/43 is concerned not with groups, but with grounds for discrimination: "the principle of equal treatment to which that directive refers applies not to a particular category of person but by reference to the grounds . . . so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favorable treatment or a particular disadvantage on one of those grounds."[17] The Court notes, citing recital 16 of the preamble to the directive, that "the protection against discrimination on grounds of racial or ethnic origin which the directive is designed to guarantee is to benefit 'all' persons."[18]

The Court justifies this expansive approach on the understanding that the race discrimination directive is "intended to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, and it is to this end that 'any' direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by the directive should be prohibited throughout the European Union."[19] Non-discrimination is a principle that promotes a democracy in which persons of various origins participate together. The court's decision enables persons belonging to majority ethnicities to challenge discriminatory practices against ethnic minorities when they suffer the discriminatory practice together. Instead of pitting majority against minority,

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15. *Id.* ¶ 43 (citations omitted).
16. *Id.* ¶ 50.
17. *Id.* ¶ 56.
18. *Id.* ¶ 57.
19. *Id.* ¶ 65.

antidiscrimination law can be made to promote solidarity and integration in democratic participation.

The idea that nonmembers of the disadvantaged group can suffer together is also acknowledged in the CJEU's decision in *Coleman v. Attridge Law*. In that case, referred by a London Employment Tribunal, the claimant alleged that she was subject to adverse treatment by her employer because she was the primary carer of a disabled child.[20] The Court held that Directive 2000/78, which prohibits discrimination on the basis of disability, was not limited only to people who are themselves disabled. The prohibition of discrimination on the basis of disability covered a worker who was the primary carer of a disabled child, due to the purpose of the directive to combat all forms of disability discrimination.[21]

The theory of diverse democracy underlying the Court's recognition of Ms. Nikolova as a proper complainant also animates the Court's skepticism of the relationship between non-discrimination principles and rights. Here, CHEZ had claimed that its practice of placing much taller electrical meters in this predominantly Roma district could not possibly amount to discrimination because there existed no substantive individual right to electrical meters of any particular height. The Bulgarian statute implementing the race directive had stipulated that "unfavourable treatment" constituting direct or indirect discrimination was "any act, action, or omission which directly or indirectly prejudices rights or legitimate interests."[22] If no person has a right or legitimate interest to begin with in electrical meters at an accessible height, CHEZ's provision of short meters in some districts and tall meters in other districts has no effect on any rights or legitimate interests and would not register as "unfavorable treatment." The structure of this argument is that, when a decision-maker has discretion (for example, an employer who employs all employees "at will"), it makes little sense to say that the person has discriminated when he is exercising the discretion that the law gives him. The Court took the view, however, that "unfavourable treatment" under the directive did not require any negative effect on a legitimate interest or right. Rather, "unfavorable treatment" could include any adverse treatment, even of a minimally serious nature.[23] What matters is that there is treatment that

20. *See* Coleman v. Attridge Law, Case C-303/06, [2008] E.C.R. I-5603.
21. *Id.* ¶ 38.
22. *CHEZ*, C-83/14, ¶ 14.
23. *See id.* ¶¶ 65-67.

is "unfavorable" compared to another identifiable person who is not subject to that adverse treatment or effect.

The Court goes so far as to suggest that, in defining "unfavourable treatment" as an injury to an existing right or legitimate interest, the Bulgarian statute is in conflict with the directive.[24] The directive precludes a national provision that makes a prejudice to rights a necessary condition of a finding of direct or indirect discrimination. In so pronouncing, the Court is essentially suggesting that coherent, legally actionable discrimination could occur even without a significant harm to any particular person's rights. The main problem of discrimination as a subject for EU law is not the harm to any individual's rights or legitimate interests, but rather, the undermining of democratic and tolerant societies based on participation on equal terms. To limit discrimination to prejudice to rights or legitimate interests would be to define the scope of protection guaranteed by the directive "restrictively."[25]

This approach is consistent with the Court's prior decisions, which recognize the possibility of victimless discrimination. In the case of *Firma Feryn*, decided in 2008, the CJEU determined that employers could be held liable for discriminating if they made racially exclusionary announcements with regard to their intention not to hire members of certain ethnic groups, even in the absence of a concrete person complaining about their rejection in a hiring process.[26] The Court embraced the fundamental goals of the Directive: "The objective of fostering conditions for a socially inclusive labour market would be hard to achieve if the scope of Directive 2000/43 were to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer."[27]

As this statement from *Firma Feryn* illustrates, this normative outlook informs the Court's approach to how the norms should be enforced. In *CHEZ*, bold doctrinal innovations emerge with regard to the concepts of direct and indirect discrimination to enforce and promote a socially inclusive labor market. In introducing the doctrinal framework, the Court again emphasizes how the principle of non-discrimination furthers the goals of the European Union:

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24. *Id.* ¶ 68.
25. *Id.* ¶¶ 66-68.
26. Firma Feryn, [2008] E.C.R. I-5187, ¶ 25.
27. *Id.* ¶ 24.

> [A]s is apparent from recitals 9, 12, and 13 in the preamble to Directive 2000/43, the EU legislature also sought to make clear (i) that discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity, and may also undermine the objective of developing the European Union as an area of freedom, security, and justice and (ii) that the prohibition of any discrimination of that type which the directive imposes as regards the areas covered by it is intended, in particular, to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin.[28]

With the understanding that discrimination on grounds of race or ethnic origin undermines the shared EU social policies, including employment, social protection, solidarity, and inclusive democratic participation, the Court sets out the proof framework by which direct and indirect discrimination can be established in litigation.

The starting point is Article 8(1) of Directive 2000/43, which provides for the shifting of the burden of proof once a complainant has established facts from which discrimination can be inferred. On the one hand, the Court's jurisprudence has authorized national courts and other bodies to determine the facts from which discrimination may be inferred. On the other hand, in this decision, the Court explicitly determines that indirect discrimination can be inferred as an initial matter from the facts presented in this case, thereby requiring the respondent to articulate justifications for the practices that are being challenged as indirectly discriminatory.

In this case, the referring court asked for guidance on what constituted an "apparently neutral practice" within the meaning of Article 2(2)(b) of the Directive. That article defines indirect discrimination as an "apparently neutral provision, criterion, or practice" that "would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion, or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary." In this case, the respondent suggested that the practice of placing the electricity meters at a height of six or seven meters was *not* an "apparently neutral . . . practice" that put Roma persons at a

28. *Id.* ¶ 74.

particular disadvantage. The reasoning behind this position is that, if it is alleged that the practice is directly discriminatory against the Roma, as it was here, that practice is not "apparently" neutral; it is only allegedly or "ostensibly" neutral. Under this approach, a practice that could plausibly be directly discriminatory (i.e. motivated by pernicious ethnic stereotypes of Roma as criminals stealing electricity) should not be analyzed under the "indirect discrimination" provision of Article 2(2)(b) because its neutrality is not "apparent." Without explicit discussion or justification, the Court rejects this construction of "apparently neutral," referencing Advocate General Kokott's explanation in her opinion. As Kokott explained:

> The term "apparently" in Article 2(2)(b) of Directive 2000/43 can only be interpreted as referring to an *ostensibly* or prima facie neutral provision, criterion, or practice. On the other hand, that term cannot simply mean that the provision, criterion or practice in question must be manifestly neutral, as the referring court seems to think. This would have the highly illogical consequence that no finding of discrimination could be made wherever the provision, criterion, or practice in question transpires to be "less neutral" than it may appear at first sight. This would possibly create a gap in the protection against discrimination which cannot under any circumstances be intended.[29]

If "apparently" in Article 2(2)(b) were construed to mean "manifestly," the gap in protection against discrimination imagined by Kokott would consist of the mutual exclusivity between direct and indirect theories of discrimination for any set of facts. In the instant case, a complainant would have to choose between arguing that the meters were installed at an inaccessible height because of hostile ethnic stereotypes of the Roma and arguing that the meters' height put Roma persons at a disadvantage that could not be justified by reference to the proportionate pursuit of a legitimate purpose.

The Court breaks down the analysis in the following way: if a measure gives rise to a difference in treatment that has been introduced for reasons relating to racial or ethnic origin, that measure must be classified as "direct discrimination" under Article 2(2)(a). If a measure uses "neutral criteria not based on the protected characteristic," and "it has the effect of placing particularly persons possessing that characteristic at a disadvantage," it may constitute indirect

29. Opinion of Advocate General Kokott, *CHEZ*, C-83/14, ¶ 92.

discrimination. "Neutral" cannot mean "nondiscriminatory;" it simply means not openly based on or obviously motivated by the protected characteristics of the persons involved. Such "neutral" practices still constitute "discrimination" when they do not meet the justification required under Article 2(2)(b).

The Bulgarian statute, by contrast, in effect treated indirect discrimination no differently from direct discrimination. Although the statute prohibited indirect discrimination in language similar to that of Article 2(2)(b) of the directive, it read as follows:

> Indirect discrimination shall be taken to occur where, on the basis of characteristics mentioned in paragraph 1, one person is placed in a less favourable position compared with other persons by an apparently neutral provision, criterion or practice, unless that provision, criterion or practice is objectively justified having regard to a legitimate aim and the means of achieving that aim are appropriate and necessary.[30]

The key difference between the Bulgarian statutory prohibition and the Directive's definition of indirect discrimination is that the Bulgarian statute imagines indirect discrimination as occurring "on the basis of" the protected characteristics. Supplementary provisions to the statute attempted to define the language, "on the basis of characteristics mentioned." Point 8 noted, "'on the basis of characteristics mentioned in Article 4(1)' means: on the basis of the actual—present or past—or the presumed existence of one or more such characteristics possessed by the person discriminated against or a person connected with or assumed to be connected with that person, if such connection is the basis for the discrimination."[31]

This language led the Bulgarian administrative court to conclude that indirect discrimination could only occur under the statute if the "apparently neutral provision" caused disadvantage "on the basis of" ethnic origin. On this interpretation, the "apparently neutral" practice of installing electricity meters that were six to seven meters high would only trigger indirect discrimination analysis if the practice caused disadvantage "on the basis of" Roma ethnic origin. To say that an apparently neutral provision causes disadvantage "on the basis of" ethnic origin imports the direct discrimination framework into the

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30. *CHEZ*, C-83/14, ¶ 13 (quoting Article 4 of the Law on protection against discrimination (Zakon za zashtita ot diskriminatsia; "the ZZD")).

31. *Id.* ¶ 14 (quoting Point 8 of Paragraph 1 of the Supplementary Provisions of the ZZD).

construction of indirect discrimination. Indeed, the core of the indirect discrimination concept is precisely that it can be established with no direct or conscious targeting of the protected characteristics. Thus, CJEU notes that the Bulgarian provision goes against the Directive by defining indirect discrimination in such a manner that "the measure in question is required to have been adopted for reasons of racial or ethnic origin."[32]

In addition, the Court rejected the suggestion that the "particular disadvantage" caused by the apparently neutral practice had to be a serious, obvious, or particularly significant case of inequality in order to be cognizable under an indirect discrimination theory. The words "particular disadvantage" do not necessitate any particular degree of seriousness. Rather, the facts from which indirect discrimination can be inferred simply require a specific disadvantage resulting from the apparently neutral practice.

Finally, the Court's clarification of proportionality analysis in evaluating a respondent's justification for the apparently neutral provision suggests an extremely stringent approach to potential justifications put forth by alleged discriminators in response to the plaintiff's prima facie case. Instead of rejecting CHEZ's justification as illegitimate, the Court acknowledged the legitimacy of CHEZ's purported aim of ensuring the security of the electricity transmission network, and left it to the national court to determine whether CHEZ could raise the height of electricity meters in areas where it deemed fraud or damage to be more likely in pursuit of this legitimate aim. Nonetheless, CJEU's guidance to national courts makes it extremely difficult to conclude that this particular method is appropriate or necessary in achieving the aim of ensuring security. The Court first raises doubts about the nexus between this legitimate aim and the practice at issue in this case, namely placing the meters at an inaccessible height in certain districts that happened to be heavily populated by Roma. CHEZ did not produce any evidence, but rather claimed it was "common knowledge," that there were numerous instances of damage and unlawful connections to electricity meters in those districts. The Court declared, "In order to discharge the burden of proof borne by it in this regard, CHEZ RB cannot merely contend that such conduct and risks are 'common knowledge', as it seems to

32. *Id.* ¶ 97.

have done before the referring court."[33] Thus, even when a discrimination defendant can name a legitimate aim in the abstract in response to the prima facie case of indirect discrimination, that defendant must still prove with evidence that the legitimate aim is one that is worth pursuing in the specific context. Here, it means that CHEZ has to show that there was a real problem with regard to property damage and unlawful connections in those districts.

Furthermore, even if CHEZ is able to establish with evidence that there was real likelihood of unlawful activity on the electricity meters in these districts, additional elements of the burden of proof remain. The defendant must prove not only that the legitimate aim is in need of pursuit in this case, but also that the method chosen (placing meters at excessively high inaccessible height) is the least restrictive means of pursuing that aim.[34] Here, the Court points to the fact that other electricity distribution companies have combated damage and tampering by utilizing new technologies which can monitor instances of tampering.[35] Thus, incorporating new technologies that use surveillance rather than deterrence seems less restrictive, although perhaps more costly, and the ultimate determination was left to the national court.

In this proportionality analysis of whether the means chosen is necessary and appropriate to achieve the legitimate aim, CJEU instructs the national court not only to consider the costs and benefits of the allegedly less restrictive methods of pursuing the legitimate aim; national courts are also to consider the interests of the people inhabiting the district. It is interesting to see this consideration pop up at this stage of the analysis; one could argue that the prima facie case, wherein the disadvantaging effect of an apparently neutral practice is established, already speaks to the interests of those disadvantaged. Nonetheless, the Court notes that the "disadvantages caused by the practice appear disproportionate to the objectives pursued." The disadvantages include not only the inability of the consumer to check and monitor their own electricity consumption—a problem which not only affects Nikolova herself, but also the stigma experienced by those who are disadvantaged because of their Roma ethnicity. The stigma is not something that Nikolova could be said to experience; nonetheless it seems to be doing a lot of work in making the proportionality analysis

33. *Id.* ¶ 117.
34. *Id.* ¶ 120.
35. *Id.* ¶ 121.

lean towards a finding of indirect discrimination. The referring court is encouraged to consider the extent to which the practice being challenged "prejudices excessively the legitimate interest of the final consumers of electricity inhabiting . . . the district concerned, mainly lived in by inhabitants of Roma origin, in having access to the supply of electricity in conditions which are not of an offensive or stigmatizing nature and which enable them to monitor their electricity consumption regularly."[36]

CONCLUSION

CHEZ is an extension of the CJEU's project of re-conceptualizing discrimination and what makes it wrong. By diminishing the role of concrete injuries in creating opportunities for norm articulation by courts, CJEU also reaffirms why norms against discrimination are important to the European project. By recognizing the standing of a non-Roma person to challenge ethnic discrimination against the Roma, and by refining the indirect discrimination analysis, the Court reaffirms the maintenance of democratic and tolerant societies as a goal of Directive 2000/43 and the European Union itself.

36. *Id.* ¶ 128.