

**GOVERNMENTALITY, RIGHTS AND  
EU LEGAL SCHOLARSHIP:  
A FOUCAULDIAN ANALYSIS**

**Bal Sokhi-Bulley, LL.B., LL.M.**

**Thesis submitted to the University of  
Nottingham  
for the degree of Doctor of Philosophy**

**July 2009**

## *Abstract*

The Fundamental Rights Agency (FRA) of the European Union came into being on 1 March 2007 and represents a new institution for human rights protection in the EU. This thesis undertakes a critical analysis of the FRA from a *governmentality* perspective. Governmentality refers to a particular critical standpoint, inspired by the work of Michel Foucault, which is concerned with power relations as processes of government. The features of the FRA, its structure and functions, are framed using ‘governance talk’. The particular features which this thesis is interested in analysing are: the multiplicity of *actors* which make up the network structure of the Agency, their classification as *experts*, and the collection of information and data as *statistics*. The thesis demonstrates that these features, conceptualised as *governance* in institutional discourse, are actually features of *governmentality*. I therefore suggest that the rights discourse of the FRA is a discourse of governmentality. Moreover, I show how governmentality necessarily involves self-government: the actors and experts in the FRA’s rights discourse govern themselves. This has significant implications for rights discourse: it reveals processes of governing (through) rights. On the one hand, we witness processes of the *government of* rights through experts and statistics. On the other, we are alerted to *government in the name of* rights. The thesis therefore intervenes within the EU’s rights and governance discourses: it exposes the relations of power (as governmentality) that conventional ‘governance talk’ tries to hide. It highlights the elusive novelty of theorising, and of critique, in EU legal scholarship on rights. By presenting a new perspective on the rights discourse of the FRA using governmentality, this thesis seeks to contribute to EU legal scholarship on rights, filling a glaring and significant gap in the literature.

## *Acknowledgements*

There are two people in particular who have made this thesis possible and I owe them my biggest thanks. My supervisor, Thérèse Murphy, who agreed to supervise me in spite of my LLM dissertation and whose guidance and patience have been invaluable, especially when I moved to Belfast in my final year. Also my husband, Dan Bulley, for listening to my complaints, ideas, worries and general ranting about my work for the last four years, and especially for his cooking *and* his washing up in the final months! I know I could not have done it without you.

My thanks must go to my mother, Rani Sokhi, for her love, encouragement and unwavering faith in my ability to achieve anything. I am extremely grateful to Carol Shergold, not only for her constant support but for her time, care and ‘nit-picking’ as she expertly proof-read the entire thesis.

I also thank my friends and staff at Nottingham: Emilie Cloatre and Róisín Mulgrew for helping me survive ‘the dungeon’, and Nell Munro for being an exemplary peer. For grilling me in my peer reviews and making me a better scholar for it, I thank Paul Roberts. I learnt a great deal working with Tamara Hervey and Rob Cryer on our research project and I thank them for the opportunity. I much appreciate the assistance of Carolyn Przybylla in the Human Rights Law Centre on all FRA-related matters. In this respect, I also thank David Harris for the chance to work with the Centre on their FRA projects. Without the support of a scholarship from the School of Law at Nottingham this thesis would not have been possible and I am grateful.

A huge thank you, finally, to my friends and colleagues at Queen’s: to my ‘ad hoc committee’, especially Dimitrios Doukas, for their guidance and support. Thanks to ‘the gang’ – Susan McManus, Debbie Lisle, Tarik Kochi and Andrew Pepper – for welcoming me to Belfast, throwing fabulous (dinner) parties and going shoe-shopping. For letting me be a part of PhD-life at Queen’s, including ‘Friday Drinks’, I must thank the lovely Marian Duggan, Claire McCann and Yassin M’Boge. I thank the School of Law at Queen’s for not only for providing me with my first lectureship but also for a friendly and positive environment in which to complete my thesis.

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## *Abbreviations*

The Charter	Charter of Fundamental Rights of the European Union
EC Treaty	Treaty Establishing the European Community (Treaty of Rome, as amended)
The White Paper	Commission (EC), ‘European Governance: A White Paper’
CLS	Critical Legal Studies
DIHR	Danish Institute for Human Rights
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
EUMC	European Monitoring Centre for Racism and Xenophobia
EU-MIDIS	European Union Minorities and Discrimination Survey
FRA	Fundamental Rights Agency
FRALEX	FRA group of legal experts
FRP	Fundamental Rights Platform
INGO	International non-governmental organisation
LGBT	Lesbian, gay, bisexual and transgender
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
MAF	Multi-annual Framework
NFP	National Focal Points
NGO	Non-governmental organisation
NHRI	National human rights institution
NIE	Network of Independent Experts
OMC	Open method of coordination
OSCE	Organisation for Security and Cooperation in Europe
RAXEN	European Racism and Xenophobia Network
SVS	Savage-victim-savour
TEU	Treaty on European Union (Maastricht Treaty, as amended)
UN	United Nations
UNDP	United Nations Development Programme

# ***1***

## ***Introduction***

I like the word [*curiosity*] ... It evokes ‘care’; it evokes the care one takes of what exists and what might exist; a sharpened sense of reality, but one that is never immobilised before it; a readiness to find what surrounds us strange and odd; a certain determination to *throw off familiar ways of thought and to look at the same things in a different way*; a passion for seizing what is happening now and what is disappearing; a lack of respect for the traditional hierarchies of what is important and fundamental.

Michel Foucault<sup>1</sup>

At the inception of the European Union’s (EU) most comprehensive document on human rights, the Charter of Fundamental Rights of the European Union (the Charter),<sup>2</sup> in 2000 one commentator made this remark: ‘The Common Market is exhausted as a vision for further integration ... human rights, by contrast, provides a most intriguing prospect.’<sup>3</sup> The observation was prescient, since the years coming up to but particularly following the Charter have seen a multiplication of the discourse on human rights in the EU at both the academic and institutional levels.

The proliferation of rights discourse at the institutional level began in the late 1960s with the burgeoning of the jurisprudence of the European Court of

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<sup>1</sup> M Foucault, ‘The Masked Philosopher’ in M Foucault, *Ethics: Volume 1: Subjectivity and Truth: Essential Works of Foucault 1954-1984* (P Rabinow, ed; R Hurley, trs) (Penguin, London 2000) 321, 325. Emphasis added.

<sup>2</sup> Charter of Fundamental Rights of the European Union, OJ C 364/1. The Charter is now also part of the Lisbon Treaty (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community).

<sup>3</sup> A Von Bogdandy, ‘The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union’ (2000) 37 *Common Market Law Review* 1307.

Justice (ECJ).<sup>4</sup> The Court gave a number of monumental judgments in which it began to establish that the EU is a rights-based Union. A codification of the ECJ's case law happened in 1992 with the Treaty on European Union (TEU), which confirmed in Article 6(1) the norm that the Union '*respects the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law*'.<sup>5</sup> A significant change to the norm came with the Treaty of Amsterdam in 1997, which amended the wording of Article 6(1) so that it now reads: 'the Union is *founded on* the principles of liberty, democracy, respect for *human rights and fundamental freedoms*, and the rule of law'. There is more to this than word play. Interestingly, while the original treaties made no reference to human rights as foundational principles they are now not only the new vision of the EU but, according to the treaties, always have been.<sup>6</sup>

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<sup>4</sup> Note in particular the following cases: Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 4/73 *Nold v Commission* [1974] ECR 491; Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219.

<sup>5</sup> Treaty on European Union (Maastricht Treaty, as amended). Note that this provision has been amended by the Lisbon Treaty (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community). The new Article 6 refers to the Union *recognising* the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (Article 6(1)), that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (6(2)), and acknowledges fundamental rights as shall constitute general principles of the Union's law (6(3)).

<sup>6</sup> There has been extensive comment on the historical construction of human rights. See for example P Alston and J Weiler, 'An "Ever-Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' (1998) 9 *European Journal of International Law* 658; G de Búrca, 'The Language of Rights in European Integration' in J Shaw and G More (eds) *New Legal Dynamics of European Union* (Clarendon, Oxford 1995) 29; A Clapham, *Human Rights and the European Community: A Critical Overview* (Nomos, Baden-Baden 1991); M Daus, 'The Protection of Fundamental Rights in the Community Legal Order' (1985) 10 *European Law Review* 398; L Hancock and C O'Brien (eds), *Rewriting Rights in Europe* (Ashgate, Aldershot 2000); N Neuwahl and A Rosas (eds), *The European Union and Human Rights* (Martinus Nijhoff, The Hague 1995); A Toth, 'The European Union and Human Rights: The Way Forward' (1997) 34 *Common Market Law Review* 491; P Twomey, 'The European Union: Three Pillars without a Human Rights Foundation', in D O'Keefe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, Chichester 1994); Von Bogdandy (n 3); A Williams, *EU Human Rights Policy: A Study in Irony* (OUP, Oxford 2004).

The incitement to rights discourse has recently manifested itself in a less traditional way than through case law and treaty amendments. On 1 March 2007, the EU officially recognised its first human rights agency: the Fundamental Rights Agency of the European Union (FRA).<sup>7</sup> The FRA is a new institution for human rights protection that exhibits novel, twenty-first century features. Its role and structure can be characterised as part of the (new modes of) governance trend that has swept across the EU in recent years. Needless to say, it is the first institution of its kind ever to be seen by the Union.

This thesis is interested in how the FRA has come about and how it functions. In other words, it is concerned with the processes of the Agency. More specifically, it wants to know what this new institution for human rights protection says about *rights discourse*. This thesis therefore aims to critically analyse the rights discourse of the FRA.<sup>8</sup> The critical analysis takes the form of a governmentality perspective. This thesis is thus inspired by the work of Michel Foucault, by whom the term ‘governmentality’ has been coined. Foucault’s work is typically associated with power. His better known studies focus on the sites at which power operates to produce subjectivity. Foucault described his objective in the following way: ‘to create a history of the

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<sup>7</sup> Pursuant to Council Regulation 168/2007/EC of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1.

<sup>8</sup> I should point out the time frame of this study. I use material dating from October 1998 – April 2009, with the exception of reference only to important FRA documents released after this time. April 2009 was taken as an end point since it allowed for a reasonable period over which to observe the FRA. The Agency had been operational for just over 2 years and had by then produced its two biggest publications: (1) its first complete comparative report, the 2-part ‘Homophobia Report’ – European Union Agency for Fundamental Rights (FRA), ‘Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part I: Legal Analysis’, 30 June 2008 and European Union Agency for Fundamental Rights (FRA), ‘Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part II: The Social Situation’, 31 March 2009 and (2) the results of its first EU-wide survey, ‘EU-MIDIS European Union Minorities and Discrimination Survey’ <[http://fra.europa.eu/fraWebsite/products/publications\\_reports/publications\\_reports\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/publications_reports_en.htm)> (accessed 24 April 2009).

different modes by which, in our culture, human beings are made subjects'.<sup>9</sup> The sites he examined were madness (or the clinic)<sup>10</sup>, sexuality (in modern society)<sup>11</sup> and delinquency (or the prison),<sup>12</sup> and how they created the madman, the sexual deviant and the delinquent.

Foucault's methodology involves examining events and processes using a 'radically new account of power'.<sup>13</sup> In the studies on the clinic, sexuality and the prison, he conceptualises power as discipline.<sup>14</sup> What is so 'radically new' about this type of power is that it abandons conventional and ingrained conceptions of power as something that could be possessed by one individual and exercised over another. Power is, rather, a process that simply *happens*:

Power is everywhere; not because it embraces everything, but because it comes from everywhere ... it is permanent, repetitious, inert, and self-reproducing ... power is not an institution, and not a structure; neither is it a certain strength we are endowed it; it is the name that one attributes to a complex strategical situation in a particular society.<sup>15</sup>

Power, Foucault suggests, happens and creates subjectivities. Power as discipline refers to a disciplinary power that acts on the body of the individual

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<sup>9</sup> M Foucault, 'The Subject and Power' in M Foucault, *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion, ed; R Hurley, trs) (Penguin, London 2002) 326, 326.

<sup>10</sup> M Foucault, *The Birth of the Clinic* (A Sheridan, trs) (Routledge, London 2005).

<sup>11</sup> M Foucault, *The History of Sexuality: Volume 1: The Will To Knowledge* (R Hurley, trs) (Penguin, London 1998).

<sup>12</sup> M Foucault, *Discipline and Punish: The Birth of the Prison* (A Sheridan, trs) (Penguin, London 1991).

<sup>13</sup> A Hunt and G Wickham, *Foucault and the Law: Towards a Sociology of Law as Governance* (Pluto Press, London 1994) 14.

<sup>14</sup> See especially Foucault (n 12); M Foucault, 'Two Lectures' in M Foucault, *Power/Knowledge* (C Gordon, ed; C Gordon and others, trs) (Longman, London 1980) 78.

<sup>15</sup> Foucault (n 11) 93.

to produce a particular kind of subject. For example, in *Discipline and Punish*, Foucault describes how the body of the prisoner (and he also gives the example of the soldier) was ‘subjected, used, transformed and improved’<sup>16</sup> by the processes of disciplinary power to produce a docile body.

Foucault’s later work took an extended turn and it was here, in the late 1970s, that he began to speak of power in a different way: as *governmentality*. This ‘ugly word’<sup>17</sup> was used to symbolise a new type of power in modern societies that coexists with discipline and represents *government* – where government is unconventionally understood to mean regulating the *conduct* of a person/persons. It is important to understand that governmentality refers at once to a *critique*, or methodology, and to the *process* of government.<sup>18</sup> By calling it a critique, I mean that governmentality can be called a perspective, in other words a ‘critical attitude’ or way of thinking about the practices of government – i.e., who can govern; what governing is; what or who is governed.<sup>19</sup> By calling it the process of government, I mean that governmentality refers to the process, or the result of the process, by which the object of study (here, the FRA and its rights discourse) becomes *governmentalised*.

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<sup>16</sup> Foucault (n 12) 136.

<sup>17</sup> M Foucault, *Security, Territory, Population* (M Senellart, ed; G Burchell, trs) (Palgrave Macmillan, Basingstoke 2007) 115.

<sup>18</sup> For an alternative viewpoint, see J Morison, ‘Modernising Government and the E-Government Revolution: Technologies of Government and Technologies of Democracy’ in P Leyland and N Bamforth (eds), *Public Law in a Multi-Layered Constitution* (Hart, Oxford 2003) 131. Morison describes governmentality as the ‘theory that analyses and critiques’ and governance as ‘the practice’ (141). While this distinction is neat, it is not apparent in Foucault’s work – Foucault describes governmentality as both ‘the process’ and the ‘result of the process’ by which the state gradually becomes governmentalised (see Foucault (n 17) 108-9; C Gordon, ‘Governmental Rationality: An Introduction’ in G Burchell et al (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, Chicago 1991) 1).

<sup>19</sup> Gordon, *ibid* 3.

The FRA provides an interesting site for analysis from a governmentality perspective since its features are deliberately formulated in ways that depart from government. In other words, the FRA is associated with (new modes of) *governance* in the EU. As an agency, not specifically provided for in the treaties, it has come about as a result of developments that the EU describes as (new modes of) governance.<sup>20</sup> I propose in this thesis that the governance processes associated with the FRA exhibit features of governmentality and that this has significant implications for the rights discourse of the FRA.

To find evidence to support such a proposition, this thesis is interested in asking the following questions: How are rights currently put into discourse in the Union? How does the FRA operate (i.e., through what processes, procedures and strategies)? And, what features of the FRA mean that it can be conceptualised as a site of governmentality? The hypothesis of this thesis is thus the following: that the rights discourse of the FRA is a discourse of governmentality – i.e., it is a discourse that shows characteristics of power as discipline and power as government(ality). This should be of interest because it has fascinating implications both for rights and for the identity of the FRA as a new human rights institution – *and* consequently for the identity of the EU as a promoter and protector of human rights.

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<sup>20</sup> The FRA is based on EC Treaty (Treaty of Rome, as amended) art 308 – see at recital 31 of Regulation 168/2007 (n 7). Art 308 states: ‘If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.’

## I. GOVERNMENTALITY AS RESISTANCE

This project therefore carries out a *critique* of the FRA, by taking a governmentality perspective. What exactly is critique? A critique refers to a re-reading of the subject of analysis so as to shift the available terms for understanding and defining the subject. Critical scholars read legal texts in ways that they were never meant to be read and ‘they do it knowing that they are breaking the rules of the code, knowing that they are endeavouring to challenge those rules and to effect change by making the genres “mean” differently (that is, making the genres tell a different story)’.<sup>21</sup> What I am attempting is a re-reading of the FRA and its rights discourse.

Critique can also be associated with *resistance*. The critical position taken in this study is also a form of resistance in that it resists the way in which rights are traditionally conceptualised in the EU at both an academic and institutional level. Resistance is, moreover, an inevitable feature of a Foucauldian understanding of power. Where there is power, there is always resistance: the two things are coextensive,<sup>22</sup> ‘points of resistance are thus present everywhere in the power network’.<sup>23</sup> Foucault explains this using the example of the development of the Christian pastorate, as a highly specific form of power having the objective of conducting, or ‘governing’, men. He then goes on to explain how equally specific movements of resistance appeared in correlation

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<sup>21</sup> T Threadgold, Book Review: *Law and Literature: Revised and Enlarged Edition* by Richard Posner (1999) 23 *Melbourne University Law Review* 830, 838 – quoted in A Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP, Cambridge 2003) 38.

<sup>22</sup> A Fontana and M Bertani (eds), ‘Situating the Lectures’ in M Foucault, *Society Must Be Defended* (D Macey, trs) (Penguin, London 2003) 273, 280.

<sup>23</sup> *Ibid* 280.



with this, which he calls ‘revolts of conduct’, a phrase he later abandoned in preference of ‘counter-conduct’. ‘Counter-conduct’ refers to the struggle against the processes implemented for conducting others. Its objective is ‘a different form of conduct ... wanting to be conducted differently, by other leaders (*conducteurs*) and other shepherds, towards other objectives and forms of salvation and through other procedures and methods’.<sup>24</sup> How does counter-conduct, or resistance, manifest itself? Through ‘struggle’. The relationship between power and resistance, Foucault explains, is one of struggle, using multiple, mobile and changing tactics.<sup>25</sup> This is not dissimilar to the art of critique: critique is a continuous and unending struggle to strive towards a promised perfectibility in the discourse. The critique in this thesis is a struggle against the dominant forms of scholarship on the EU and human rights. It therefore intervenes in the EU’s rights and governance discourses (i.e., how the FRA is conceptualised within a governance framework) using a different analytical frame: governmentality.

Why this particular form of critique – why governmentality? I will make two points here. First, governmentality is a useful ‘tool’ for analysing rights and the FRA. A ‘tool’ is a device that is used for a particular function and that may be used in a variety of ways for more than one purpose. Foucault describes his own work as a ‘tool-box’ of ideas, saying: ‘I would like my books to be a kind of tool-box which others can rummage through to find a tool which they can use however they wish in their own area ... I don’t write for an audience, I

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<sup>24</sup> Foucault (n 17) 194-5.

<sup>25</sup> Foucault (n 22) 281.

write for users, not readers'.<sup>26</sup> The 'tool' of governmentality is appropriate for an analysis concerning the EU for the initial reason that the EU is not a typical national or international structure. The Union is not a state, nor is it a conventional 'society'. It constitutes, rather, a *space* within which the power relation is perfectly visible.

To explain, Foucault describes 'space [as] fundamental to any exercise of power'.<sup>27</sup> He is speaking here about space in the context of architecture and the building of towns etc., and of architecture as a function of the aims and techniques of the government of societies. The concern with space signifies a concern with territory, population and government. In Foucault's analyses of power as government his concern is with the different treatment of space by sovereignty, discipline and government. The *space (milieu)* becomes the main concern, together with how this space is regulated.<sup>28</sup> The regulation happens not through establishing frontiers and limits but through ensuring *circulation* – of people, merchandise, air, and so on.<sup>29</sup> This structuring of space and territory represents a mutation in the technologies of power and a typical feature of modern societies. The EU, as a designated space or territory within which the circulation of goods, persons, services and capital occurs, is an ideal illustrative model of this type of modern society. I will analyse in this thesis how power operates within the space of the FRA.

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<sup>26</sup> M Foucault, 'Prisons et asiles dans le mécanisme de pouvoir' in *Dits et Ecrits, t II* (Gallimard, Paris 1994) 523-4.

<sup>27</sup> M Foucault, 'Space, Knowledge and Power' in M Foucault, *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion, ed; R Hurley, trs) (Penguin, London 2002) 349, 361.

<sup>28</sup> Foucault (n 17) 13.

<sup>29</sup> *Ibid* especially 29, 34. See also S Elden, 'Rethinking Governmentality' (2007) 26 *Political Geography* 29.

Space can also be analysed in terms of ‘*practices*’.<sup>30</sup> The target of a Foucauldian analysis is not institutions, theories or ideologies *per se* but the *practices* that make these acceptable at any given moment. Practices must be understood as ‘*places* where what is said and what is done, rules imposed and reasons given, the planned and the taken for granted meet and interconnect’.<sup>31</sup> I am interested in the practices of the FRA: for instance, how the Agency operates, through actors and experts; and how it collects information and data in fulfilment of its overarching task of providing ‘assistance and expertise’<sup>32</sup> to the Union institutions, its other bodies and the Member States. I seek to demonstrate the regulatory practices which operate within the space of the FRA.

Moreover, the tool-box illustration, which supports the idea that Foucault produced not *a* coherent theory but ‘theory fragments’<sup>33</sup> that can be used as and how they suit the analysis, is an appealing feature of Foucault’s work. It is in the spirit of ‘critical attitude’,<sup>34</sup> where the emphasis is on critique and not on being faithful or unfaithful to the author. The question may arise as to whether or not I have used Foucault ‘correctly’ – that is, not whether I have given an accurate account of his work (which is of course imperative) but whether, for instance, it is fair to apply Foucault’s ideas to a *political* entity, such as the FRA (and, by implication, the EU). How would he have responded to his work being used in this way? One answer to this question is that Foucault’s work

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<sup>30</sup> M Foucault, ‘Questions of Method’, in G Burchell et al (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, Chicago 1991) 73, 75.

<sup>31</sup> *Ibid.* Emphasis added.

<sup>32</sup> (n 7) art 6.

<sup>33</sup> J Halley, *Split Decisions: How and Why to Take a Break From Feminism* (Princeton University Press, Princeton 2006) 7.

<sup>34</sup> M Foucault, ‘What is Critique?’ in M Foucault, *The Politics of Truth* (S Lotringer and L Hochroth, eds) (Semiotext(e), USA 1997) 23, 24.

was itself largely political: he concerned himself with human rights,<sup>35</sup> government and resistance. He was also an activist, particularly on issues concerning prisoners, students and gay rights.<sup>36</sup> A simpler and more honest response is that it is irrelevant how Foucault would have reacted to his work being used. On this matter, my attitude is derivative of Foucault's own response to the question of how he made use of Nietzsche: 'For myself, I prefer to utilise the writers I like. The only valid tribute to thought such as Nietzsche's is precisely to use it, to deform it, to make it groan and protest. And if commentators then say that I am being faithful or unfaithful to Nietzsche, that is of absolutely no interest'.<sup>37</sup>

The second point in response to the question: 'Why governmentality?' is that a Foucauldian approach is lacking in EU legal scholarship on rights. There are definite gaps in critical approaches to rights in the EU and this area would benefit from moving in 'new directions'.<sup>38</sup> In fact, there is an 'elusive novelty [of theorising]'<sup>39</sup> in the EU legal context, with human rights scholarship being one very relevant example. Both Francis Snyder and Neil Walker have emphatically made these points. In what follows, I outline and endorse their arguments.

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<sup>35</sup> M Foucault, 'Confronting Governments: Human Rights', in M Foucault *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion, ed; R Hurley, trs) (Penguin, London 1994) 474.

<sup>36</sup> D Macy, *The Lives of Michel Foucault* (Vintage, New York 1993).

<sup>37</sup> M Foucault, 'Prison Talk' in M Foucault, *Power/Knowledge* (C Gordon, ed; C Gordon and others, trs) (Longman, London 1980) 37, 53-4.

<sup>38</sup> F Snyder, 'New Directions in European Community Law' (1987) 14 *Journal of Law and Society* 167. See further F Snyder, *New Directions in European Community Law* (Weidenfeld and Nicolson, London 1990).

<sup>39</sup> N Walker, 'Legal Theory and the European Union: A 25<sup>th</sup> Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 581. Walker refers to 'the elusive novelty of EU legal theory' (581) and I take inspiration from this.

## II. THE ELUSIVE NOVELTY OF THEORISING

The relevance of this thesis becomes apparent when one examines the extent to which EU legal scholarship has remained largely impervious to critiques of rights in non-EU contexts. Current approaches to human rights in the EU reflect the general scholarly trend in legal studies on the EU, which has remained faithful to an idea of a *sui generis* quality of EU law that is incompatible with theoretical analyses used in other areas and/or disciplines. However, there have been calls for scholarship to move away from these dominant approaches. As early as 1987, Snyder highlighted the need for scholarly attention to direct itself towards both developing a more ‘critical’ understanding of EC law and towards moving in ‘new directions’.<sup>40</sup> Snyder’s reasoning was, first, that ‘European Community Law represents, more evidently perhaps than most other subjects an intricate web of politics, economics and law’.<sup>41</sup> Second, it thus ‘virtually calls out to be understood by means of a political economy of law or an interdisciplinary, contextual or critical approach’.<sup>42</sup> Snyder suggested three guidelines as to how a critical approach to research and teaching within European Community law must develop: new areas of study must be explored – for example, legal pluralism and gender relations; new approaches ought to be developed, bringing methodologies from other social sciences to the study of EC law; and EC law should be analysed using social theory and critical theories of law.

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<sup>40</sup> F Snyder, ‘New Directions in European Community Law’ (1987) 14 *Journal of Law and Society* 167.

<sup>41</sup> *Ibid* 167.

<sup>42</sup> *Ibid*. Snyder’s paper challenged the assumptions within legal scholarship in the UK on the EU, with respect to the four themes of: (i) institutions, rules, ideologies and processes, (ii) law, economy and society, (iii) the international political economy and (iv) legal pluralism – i.e., the relationship between the Community legal order and the legal orders within the Member States.

Over two decades on from Snyder's call, there remains what Walker calls an '*elusive novelty* of EU legal theory'.<sup>43</sup> Walker's observation echoes the opinions of other earlier writers, who expressed such views as: 'the EU presents a challenge for legal theory' since it appears to be inadequately captured by existing legal theory,<sup>44</sup> the integrationist project of the EU embodies a 'tradition of critical restraint'<sup>45</sup> and suffers from a 'lack of critique'.<sup>46</sup> Walker defines 'legal theory' as:

broadly, those forms of inquiry concerned to demonstrate how some feature or features of law in general or at least of categories (as opposed to specific instances) of law inform or are informed by various key matters of human coexistence – whether in historical and social dimensions the matter of how we have and might live together or in the moral dimension the matter of how we ought to live together ...<sup>47</sup>

I take inspiration from this for the thesis and speak about an *elusive novelty of theorising* in the EU rights context, to explain how rights scholarship suffers from a lack of 'theoretical self-consciousness'.<sup>48</sup> I interpret 'theorising' to

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<sup>43</sup> Walker (n 39). Emphasis added.

<sup>44</sup> Z Bankowski and E Christodoulis, 'The European Union as an Essentially Contested Project' in Z Bankowski and A Scott (eds), *The European Union and its Order: The Legal Theory of European Integration* (Wiley-Blackwell, Oxford 2000) 17, 17.

<sup>45</sup> J Bergeron, 'An Ever Whiter Myth: The Colonization of Modernity in European Community Law', in P Fitzpatrick and J Bergeron (eds) *Europe's Other: Between Modernity and Postmodernity* (Ashgate, Aldershot 1998) 16.

<sup>46</sup> G de Búrca, 'The Language of Rights In European Integration' in J Shaw and G More (eds) *New Legal Dynamics of European Union* (Clarendon, Oxford 1995) 29, 29.

<sup>47</sup> Walker (n 39) 581.

<sup>48</sup> *Ibid* 588.

mean a concern with a theoretical perspective, approach, or methodology,<sup>49</sup> and with using insights from other ‘historical’, ‘social’ and ‘moral’ dimensions – i.e., going beyond the *sui generis* view of EU law and thinking it in abstract, wider and perhaps less familiar, terms. Theorising can take a variety of theoretical positions – for example, a natural law position, feminist or Marxist positions.

Walker was not commenting specifically on the situation with respect to human rights discourse. His focus, rather, was on the more general questions: What does the existing corpus of legal theory contribute to our understanding of the EU and does the EU provide a new point of departure for legal theory, one that requires new tools of analysis and theory building? His commentary did, nevertheless, mention rights discourse as one of the areas which the elusive novelty of theorising pervades. What has been striking, he commented, about the study of human rights development in the EU from the late 1960s onwards, is ‘the extent to which it has failed to resonate with the typical concerns of theoretically oriented human rights lawyers working in other contexts’.<sup>50</sup> Rather, ‘the most universal of legal discourses ... has remained very closely informed by the institutional distinctiveness of the EU legal order’.<sup>51</sup> In other words, the concerns of EU lawyers have traditionally been tied to concerns for legitimacy of the EU’s supranational legal order on the one hand, and overlapping legal orders on the other – for example, the Council of

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<sup>49</sup> For further discussion of the term ‘methodology’, see ahead at Chapter 3, pp. 67-8.

<sup>50</sup> Walker (n 39) 583.

<sup>51</sup> *Ibid* 584.

Europe.<sup>52</sup> Having said this, however, Walker did acknowledge that the ‘novelty’ of theorising did not amount to a complete absence of theorising. Thus, in response to the sense of novelty of the EU system itself, there *did* develop ‘a practice and culture of theoretical reflection on European law’.<sup>53</sup> He called this the ‘dynamics of EU legal theory’. I will develop Walker’s observations, provide evidence for the lack of critique in the study of human rights and the EU, and point also to the instances where critical approaches have been taken. What will become apparent are the gaps that remain in the field of critical scholarship on the EU and rights, and on the FRA and rights in particular. There thus remains a need to move in ‘new directions’ and to search for ‘new tools of analysis and theory building’.<sup>54</sup> This is precisely what this thesis aims to do, using a governmentality perspective to analyse the FRA.

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<sup>52</sup> I acknowledge the Council of Europe as an actor in the FRA’s rights discourse in this thesis but I do not examine the Council of Europe’s rights discourse in its own right (this discourse is located in the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, for instance). I have tried to stay away from precisely this concern with overlapping legal orders that Walker explains EU lawyers have traditionally been tied to, so as not to fall into the same trap. There has been extensive comment made on this relationship of overlap with the FRA and resultant debates regarding the duplication and supplementation of the Council of Europe’s work by the FRA – e.g., Memorandum to Secretariat General of the Council of Europe, Analysis of the European Commission’s legislative proposals for the establishment of a European Union Agency for Fundamental Rights, 8.9.2005. What is relevant for this thesis is the relationship of cooperation that the Council of Europe is said to have with the FRA by virtue of the FRA’s founding legislation. See further Chapter 5 (n 66).

<sup>53</sup> Walker (n 39) 586. Note that such comment with respect to legal theory and the EU was a misrepresentation in the eyes of Jo Hunt and Jo Shaw, who suggest that Walker’s problematisation is unfair. They assert that more critical questions *are* now being asked of the European legal order and the integration process. The focus in their study, J Hunt and J Shaw, ‘Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration’ in A Warleigh-Lack (ed), *Reflections on European Integration: 50 Years of the Treaty of Rome* (Palgrave Macmillan, Basingstoke 2009) 93 is the European Court of Justice (ECJ) and they review the re-tellings of the fairy tale by a range of EU legal scholars – noting that there is a move beyond conventional accounts to focus on the environment in which the Court operates, on its interlocutors and on the relationships between them.

<sup>54</sup> Walker (n 39) 581.



### III. OUTLINING THE CHAPTERS

I proceed by providing evidence for the elusive novelty of theorising in EU legal scholarship on rights in Chapter 2. This chapter outlines theoretical approaches to rights in EU legal scholarship, comparing these with critiques of rights that have been undertaken in non-EU contexts. This direct comparison supports Walker's point on the elusive novelty of theorising in the EU rights context – and consequently highlights that, given the lack of theoretical-critical approaches, there is space and a need for a governmentality perspective.

Chapter 3 focuses on governmentality. It gives a detailed account of the meaning of governmentality, focusing on how Foucault developed the concept from the late 1970s onwards and how he had problematised 'power' in earlier work. I use illustrations from scholarship that adopts a governmentality perspective to highlight the usefulness and creativity of this approach.

Chapter 4 provides an introduction to the case study of this thesis, the FRA. I describe in detail the FRA's historical development, its organisation and activities, and focus on three major publications of the FRA to date: an annual report,<sup>55</sup> a thematic report on homophobia and discrimination on grounds of sexual orientation,<sup>56</sup> and the results of an EU-wide survey on minorities and discrimination.<sup>57</sup> Specific aspects of the Agency's structure, role and output form the analysis in Chapters 5, 6 and 7. These aspects are, broadly speaking,

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<sup>55</sup> European Union Agency for Fundamental Rights (FRA), 'Annual Report 2008', 2009 <[http://fra.europa.eu/fra/material/pub/ar08/ar08\\_en.pdf](http://fra.europa.eu/fra/material/pub/ar08/ar08_en.pdf)> accessed 16 November 2008.

<sup>56</sup> (n 8).

<sup>57</sup> *Ibid.*

the presence and role of actors and experts, the collection of information and data, and the products through which this data is presented (i.e., the publications).

Chapter 5 discusses how the FRA's objective of collecting data and information was originally framed in terms of 'monitoring'. At the early stages of proposal and negotiation, monitoring was envisaged as one of the new Agency's main tasks: the FRA was in fact conceptualised as a monitoring agency. Today this role is interpreted differently, as an advisory one. I argue that this change of focus nevertheless reveals a process of monitoring, when monitoring is understood in the Foucauldian sense of 'surveillance'. Surveillance refers to a particular power relation that has the attributes of discipline and normalisation. By focusing on the monitoring role, Chapter 5 undertakes a critique of the power relations within the FRA's rights discourse as *discipline*. It therefore shows how the FRA's rights discourse is a discourse of discipline and how, consequently, the FRA's current functions are processes of surveillance which regulate actors through techniques of observation. The focus on the features of disciplinary power within the FRA's processes is the first step in analysing the FRA from a governmentality perspective.

Chapter 6 moves on to analyse the FRA's rights discourse from the perspective of power as government. Whereas Chapter 5 extended the meaning of power from 'power as sovereignty' to 'power as discipline', Chapter 6 extends this analysis further to 'power as government' – to explain a triangle that exists between sovereignty-discipline-government. The chapter situates the FRA

within the broader context of the governance discourse of the Union. The FRA is a governance structure by virtue of being an agency. As such, it is a manifestation of the governance processes that are currently in a state of proliferation in the EU. This chapter is interested in critically examining the so-called '*governance* features' of the FRA and demonstrating that, from a governmentality perspective, these are rather processes of *governmentality*. To do this, I critically examine, first, the actors that make up the Agency's structure, second the classification of these actors as experts and, third, the use of statistics in the collection of data and information. To define the FRA's processes as governmentality has significant impact for rights discourse. What I am effectively demonstrating is that the rights discourse of the FRA is a discourse not only of discipline but of government(ality). This has two wider implications. First, it means that we can identify a process of '*governing rights*' – meaning that rights discourse itself is delimited and defined by the actors, experts and statistics which form part of the FRA and its procedures. Second, it means that, alongside this process, another process is identifiable – that is, '*governing through rights*'. This, I explain, is where actors, experts and statistics govern individuals.

Whereas Chapter 6 looked at the actors and experts that make up the FRA bodies, Chapter 7 looks at 'other' actors not directly part of the FRA's EU-level and national-level structures but with whom the FRA has a relationship of 'cooperation'. I look specifically at two actors here: the individual citizen and non-governmental organisations (NGOs). The objective of this chapter is to take the governmentality analysis further. These 'other' actors, following the

‘governing through rights’ analysis made in Chapter 6, would resemble ‘the governed’ in an ordinary governor/governed dichotomy. However, this chapter shows that these actors, from a governmentality perspective, actually *govern themselves*. I thereby propose that governmentality necessarily involves *self-government*. And self-government is a further aspect of the ‘governing through rights’ and ‘governing rights’ processes. The individual and the NGO both govern themselves through rights, and their self-government further regulates and defines the rights discourse of the FRA.

Chapter 8 demonstrates how this thesis adds to the debate on rights and governance in EU legal scholarship. It focuses on the two elements of ‘governing rights’ and ‘governing through rights’ and develops the implications that this has for the rights discourse of the FRA. The chapter places emphasis on a continued interrogation of the FRA and on staying open to new possibilities with respect to its rights discourse. It reiterates the focus of the thesis as a form of resistance to dominant legal scholarship on the EU’s rights and governance discourses and thereby stresses how this thesis seeks to make a contribution towards remedying the lack of critique (in other words, the elusive novelty of theorising) in EU legal scholarship on rights.

## *EU Legal Scholarship on Rights: Identifying a Lack of Critique*

### I. INTRODUCTION

In the previous chapter, I used the phrase *elusive novelty of theorising* to describe how there is a lack of theorising in the EU legal context, including in the area of human rights. The term ‘novelty’ does not, however, indicate a total *absence* of theorising. Reviewing academic commentaries on the EU and rights reveals that there *are* contributions that can be classified as theoretical-critical in their approach to rights.<sup>1</sup> Notable examples are work by Gráinne de Búrca, Carl Stychin and Neil Walker. This chapter examines the theoretical-critical scholarship that currently exists in the EU context and reviews this alongside critical scholarship on human rights in non-EU contexts.<sup>2</sup> The objective of this chapter is, therefore, to examine how, within these two contexts, rights have been ‘put into discourse’. I emphasise that the chapter is concerned with the *approaches* of legal scholars to rights in the EU rather than with the issues that they tackle.<sup>3</sup> The comparison between EU and non-EU contexts serves to

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<sup>1</sup> I use the phrase ‘theoretical-critical’ to describe these commentaries since they cannot (all) be described as ‘critical’ – some examples that I use can be said to ‘theorise’ rights but they do not take a *critical* perspective. Other examples do take a critical perspective, in which case the phrase also works since critical approaches are also ‘theoretical’. I return to this point in Part IV.

<sup>2</sup> A delimitation should be noted: the scholarship that this chapter reviews is limited to *legal* academic commentaries in the English language. This delimitation reflects the trend that law as a discipline has been most closely associated with human rights, whilst at the same time narrowing the scope of inquiry within manageable limits.

<sup>3</sup> The range of issues covered by legal scholars writing on the EU and rights is widespread. Some examples include: rights and the ECJ (J Coppell and A O’Neil, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 12 *Legal Studies* 227; J Weiler and N Lockhart,

underline the point made in Chapter 1: namely, that there is (in contrast to scholarship outside the EU) an elusive novelty of theorising in EU legal scholarship on rights, and to highlight the absence of literature examining rights in the EU from a governmentality perspective.

I proceed by explaining why it is important in the first place to examine how rights are ‘put into discourse’ and the Foucauldian connotations of this phrase in Part II. Part III outlines critiques of rights in *non-EU* contexts under three different themes, namely: rights as ‘paradox’; the ‘dark sides’ of human rights and living in ‘dark times’; and the ‘other side’ of rights. Part IV describes the theoretical-critical approaches to human rights that exist in *EU* legal scholarship. It examines examples of literature under six separate themes: work that problematises rights as ‘values’, as ‘language’, as ‘paradox’ and as ‘irony’; literature that uses rights to define the ‘body/bodies’ applying feminist and queer theory perspectives; and scholarship that links rights to an emerging discourse on ‘governance’. I conclude that there is a gap in this literature for a critical, governmentality perspective on rights, which I seek to fill.

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“‘Taking Rights Seriously’ Seriously: The European Court and its Fundamental Rights Jurisprudence’ (1995) 32 *Common Market Law Review* 51), rights and the need for a human rights policy for the EU (P Alston and J Weiler, ‘An “Ever-Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights’ (1998) 9 *European Journal of International Law* 658; A Williams, *EU Human Rights Policies: A Study in Irony* (OUP, Oxford 2004)), the Charter of Fundamental Rights (T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart, Oxford 2003); K Lenearts and E de Smuter, ‘A Bill of Rights for the European Union’ (2001) 38 *Common Market Law Review* 273), the EU as an international human rights actor (T Ahmed and I de Jesus Butler, ‘The European Union and Human Rights: An International Law Perspective’ (2006) 17 *European Journal of International Law* 771; A Williams, ‘The (Im)possibility of the European Union as a Global Human Rights Regime’ in R Brownsword (ed), *Global Governance and the Quest for Justice, Vol. 4: Human Rights* (Hart, Oxford 2004) 69) and human rights and external relations (M Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (Intersentia-Hart, Oxford 2001); A Williams, ‘Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?’ (2000) 25 *European Law Review* 471).

## II. PUTTING INTO DISCOURSE

I have explained that the objective of this chapter is to demonstrate the way in which rights are ‘put into discourse’ by scholars writing in an EU and a non-EU context. The phrase ‘put into discourse’ is taken from Foucault. Most notably in *The History of Sexuality*, Foucault talks about the way in which, from the seventeenth century onwards, sex was ‘put into discourse’.<sup>4</sup> He explains how, far from being the beginnings of an age of repression, the seventeenth century revealed a multiplication of discourses on sex. A particularly interesting discovery was that there existed, at the level of discourses on sex and in the face of censorship and the policing of statements, an incitement to speak about it until the discourse on sex became *essential*. The discourse was useful, in that it separated the ‘sexual deviant’ from the rest of the population. The deviant was the ‘other’ against which to define a ‘norm’ in society. There are lessons in Foucault’s methodology that can be applied to this thesis and indeed to other studies on rights. Specifically, there has been an ‘incitement to discourse’ concerning human rights in the EU: beginning in the 1970s with the jurisprudence of the ECJ and continuing to the present day in the form of talk about the FRA and rights, rights discourse has now become essential and politically useful. The discourse both promotes the identity of the EU as a protector of rights and maintains the identity of its citizens as rights holders.

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<sup>4</sup> M Foucault, *The History of Sexuality: Volume 1: The Will To Knowledge* (R Hurley, trs) (Penguin, London 1998) 11.

It is appropriate at this stage to clarify the meaning of ‘discourse’. Discourse is, according to Foucault, the site at which power and knowledge are joined together.<sup>5</sup> As such, discourse articulates a vocabulary by which we come to know and define a socially constructed ‘reality’ – it ‘delineates the terms of intelligibility whereby a particular reality can be known and acted upon’.<sup>6</sup> This reality becomes what we recognise as the ‘truth’ about, for instance, (homo)sexuality – or, as in this thesis, human rights. Moreover, discourse is both an instrument and effect of power – transmitting, producing, reinforcing and undermining power relations. There is no one discourse ‘of power’ but rather different discourses circulate within the field of observation at any one time. A discourse is, furthermore, open, incomplete and evolving, as opposed to closed, fixed and static. The human rights discourse of the EU is continually evolving, as the example of the new human rights agency illustrates.

What is interesting from Foucault’s perspective is the ‘discursive fact’ – i.e., the way in which, in his study, sex is ‘put into discourse’ or, in other words, how we are ‘to account for the fact that it is spoken about, to discover who does the speaking, the positions and viewpoints from which they speak, the institutions which prompt people to speak about it and which store and distribute the things that are said’.<sup>7</sup> This chapter is interested in recounting *how* human rights have been put into discourse in EU legal scholarship, beginning with a comparison to how rights have been put into discourse in non-EU contexts.

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<sup>5</sup> *Ibid* 100.

<sup>6</sup> RL Doty, *Imperial Encounters* (University of Minnesota Press, Minneapolis 1996) 6.

<sup>7</sup> *Ibid* 11.



### III. CRITIQUES OF RIGHTS: NON-EU CONTEXTS

There are of course a variety of critiques that have been applied to the study of rights. For instance, there are critiques that presume only to be working the elements of a particular formulation against itself and which describe themselves as immanent (e.g., Hegelian-Marxist critique, which inspired both early Frankfurt School theory and Derridean deconstruction). There are also those that work expressly against the grain of the text to draw attention to hidden elements within it.<sup>8</sup> It is not my objective here to provide a complete review of critical scholarship on human rights, or to provide an account of ‘theories of rights’. Rather, I aim to highlight examples of approaches to rights that take a critical attitude – i.e., that question the perils and possibilities of rights discourse. The variety of these types of approaches illustrates how rights scholarship outside the EU is different from rights scholarship in the EU: it is more deliberately ‘critical’.<sup>9</sup> These approaches also affirm Walker’s observation on the study of human rights development in the EU from the late 1960s onwards, namely: ‘the extent to which it has failed to resonate with the typical concerns of theoretically oriented human rights lawyers working in other contexts’.<sup>10</sup> These critiques of rights have valuable insights for this thesis but they are not doing the same thing. They do not analyse the human rights discourse *of the EU*, and certainly not of the FRA, from a *governmentality* perspective.

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<sup>8</sup> W Brown and J Halley, Introduction’ in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Duke University Press, London 2002) 1, 26.

<sup>9</sup> I use the definition of critique I referred to in the previous chapter and which I develop in Chapter 3.

<sup>10</sup> N Walker, ‘Legal Theory and the European Union: A 25<sup>th</sup> Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 581, 583. I made reference to this observation earlier in Chapter 1.

I have labelled the approaches that I discuss according to certain general assertions that they make with respect to rights discourse. The first is rights as ‘paradox’: if human rights are indeed the ‘Enlightenment promise of emancipation’,<sup>11</sup> as they are often-times perceived, then the idea that human rights have triumphed on the world stage is something of a paradox. Their triumph, moreover, can be shown as overshadowed by ‘dark times’ and by the ‘dark sides’ of human rights themselves. This is the second general theme. Furthermore, certain critiques of rights discourse have recognised the ‘other’ side of human rights through adopting a cultural perspective, which is the third theme.

#### **A. Rights as ‘Paradox’**

‘Paradox is the organising principle of human rights’,<sup>12</sup> according to Costas Douzinas. ‘Human rights’, he asserts, ‘have only paradoxes to offer; their energy comes from their aporetic nature.’<sup>13</sup> Douzinas explains the dilemma of paradox by undertaking a genealogy, or what he calls an ‘alternative history’,<sup>14</sup> of natural law. This history works its way from natural law to natural rights, through Hobbes and Locke, the classic critiques of Burke and Marx, the introduction to the argument of the free and subjected subject, psychoanalysis and human rights, human rights as utopia, the human rights of the other, and concludes with ‘the end of human rights’. Douzinas’ approach is undoubtedly a

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<sup>11</sup> C Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart, Oxford 2000) 1.

<sup>12</sup> C Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish, Abingdon 2007) 8.

<sup>13</sup> Douzinas (n 11) 21.

<sup>14</sup> *Ibid* 376.

critique (*The End of Human Rights*, he writes, is for ‘the critical mind and fiery heart’<sup>15</sup>) and as such is a distinct contribution to the Critical Legal Studies (CLS) movement in Britain. Douzinas himself calls the work a ‘critique of legal humanism inspired by a love of humanity’<sup>16</sup> and is very specific on his understanding of ‘critique’. He explains that his project has the Kantian aim of exploring the philosophical presuppositions, the necessary and sufficient conditions of a particular discourse (rights). Douzinas’ critique is, in other words, not a ‘criticism’.

Douzinas goes on to explain that ‘paradox’, as the organising principle of human rights, manifests itself in a number of ways. For instance, there is, first, the paradox of the theory and practice of human rights. Despite the free-flowing rhetoric on human rights post-1945 and the Universal Declaration on Human Rights, our age has witnessed more violations than previous ‘less enlightened’ epochs. Second, the historical development of human rights is beset by paradox. The triumph of human rights was declared, Douzinas recounts, after the collapse of communism. Paradoxically, this coincided with the ‘death of man’ as the sovereign centre of the world, as announced by social theory and philosophy in the 1970s and early 1980s. This, influenced by the thought of Nietzsche, Marx and Freud challenged the assumption of liberal humanism and the progressive realisation of the ‘whole man’ throughout history (although there has been in more recent years a marked return to the subject).<sup>17</sup> Third, human rights are ‘internally fissured’ – they are used as the defence of the individual against state power and are built in the image of an

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<sup>15</sup> *Ibid* 4.

<sup>16</sup> *Ibid* vii.

<sup>17</sup> *Ibid* 17.

individual with absolute rights. They are also, fourth, a combined term, exhibiting on the one hand the paradoxical elements of the human/humanism/humanity, and on the other hand, the discipline of law. Finally, the most intriguing element of the paradox I have left until last – the paradox of the ‘end of human rights’. The paradox here is the utopian element behind human rights. Rights represent a political and ethical utopia, the epiphany of which will never occur. Unlike classical utopias, human rights do not derive their force from a predicted future society of perfection but from the pain and suffering felt by the citizens of states that have claimed their triumph. ‘Human rights are the necessary and impossible claim of the law to justice.’<sup>18</sup> The message of an ‘end of human rights’, perhaps paradoxically in itself, is thus not a pessimistic one. The ‘*end* of human rights’, that is closing our doors to them, is not even mildly suggested. Rather, the end of human rights, the paradox implies, will come when they lose their utopian end.

Another critique of ‘paradox’ as the inherent condition of rights is made by Wendy Brown.<sup>19</sup> Brown’s critique features in a collection of essays that aims to reinvigorate the tradition of critique as vital to what the ‘intellectual left’ has to offer. The essays, edited by Brown and Janet Halley, apply ‘left critique’ to projects that invoke the promise of the liberal state to effect justice through law – the dominant form of such projects being human rights. (A ‘left analysis’ begins with a critique of liberalism’s assumption of a legitimate state in which

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<sup>18</sup> *Ibid* 380.

<sup>19</sup> W Brown, ‘Suffering the Paradoxes of Rights’ in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Duke University Press, London 2002) 420. Brown is used in this analysis despite not being affiliated to the discipline of law (Brown is Professor of Political Science) because her work has been used and quoted in legal studies and she has written with lawyers (e.g., J Halley).

we are guaranteed equality before the law and in which the individual is paramount. The analysis focuses on the social powers of producing subjects that liberalism largely ignores.) The essays grapple with an essential ‘paradox’: that of *identity* as both a crucial site of cultural belonging and political mobilisation, and as a vehicle of domination through regulation. Human rights is a project that constructs identities and so contains this paradox.

In Brown’s chapter, ‘Suffering the Paradoxes of Rights’, a Foucauldian analysis is used to describe rights as ‘paradox’. Her critique begins with the question of the value of rights discourse, specifically its value for women. From this she asks, ‘if much of the struggle against male dominance, homophobic practices and racism now dwells irretrievably in the field of rights claims and counterclaims, what are the possibilities and perils of this dwelling?’<sup>20</sup> The answer she gives is that rights language is ‘deeply paradoxical’ (and she makes this claim not just concerning rights discourse as it affects women but rights discourse more broadly). The ‘paradox’ is that rights only *appear* as ‘that which we cannot not want’.<sup>21</sup> Brown uses Foucault’s formulation of power to describe the regulatory powers of identity and of rights based on identity, and to argue that rights are ‘simultaneously politically essential and politically regressive’.<sup>22</sup> Rights secure our standing as individuals whilst always obscuring the way in which that standing is regulated and achieved. So, for example, to have a right by virtue of your character as a woman is to be designated and subordinated by gender. Given that rights emerge as paradoxical, what are the possibilities for interpreting these

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<sup>20</sup> *Ibid* 420.

<sup>21</sup> *Ibid* 421.

<sup>22</sup> *Ibid* 432.

paradoxes in a manner that renders them politically efficacious? ‘Paradox’, Brown writes, while not ‘an impossible political condition’, is nevertheless ‘difficult to negotiate’.<sup>23</sup> It is a ‘predicament in the discourse’.<sup>24</sup> Brown therefore leaves the question open.

The idea of rights as ‘paradox’ is integral to my study. In Chapters 6 and 7, I describe how the rights discourse of the FRA is paradoxical since it has the potential to both emancipate *and govern*. What I add to critiques of rights as ‘paradox’ is a governmentality perspective, which allows me to highlight the potential of rights to govern and the potential of rights discourse to be governed. Who or what is governed and/or does the governing, and indeed who or what is governable, are issues that unfold as the ‘paradox’ is explored in the coming chapters. Moreover, I agree with Douzinas that recognising the paradox does not imply an ‘end of human rights’. I extend his suggestion to say that the paradox, rather, points to the possibilities of rights discourse and these possibilities are realised by observing rights through a governmentality lens.

## **B. Living in ‘Dark Times’ and the ‘Dark Sides’ of Rights**

Earlier I touched on the phrase ‘dark times’ as an illustration of our present times, which resemble the pattern of the twentieth century: a ‘century of massacre, genocide, ethnic cleansing, the age of the Holocaust’.<sup>25</sup> An alternative understanding of ‘dark times’ is given by Duncan Kennedy, for whom the ‘dark times’ are represented by a ‘loss of faith’ in the coherence of

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<sup>23</sup> *Ibid* 430, 432.

<sup>24</sup> *Ibid* 432.

<sup>25</sup> Douzinas (n 11) 2.

rights discourse.<sup>26</sup> However, this loss of faith is, according to his analysis, an inevitable outcome of engaging in critique. He addresses the issue of why one should make such a critique of rights despite the unpleasant loss of faith that will inevitably ensue.

The CLS critique of rights,<sup>27</sup> Kennedy explains, was considered *perverse* because it was modernist – because it insinuated a loss of faith. But, he argues, this loss of faith is not perverted. The CLS, or left/modern/postmodern critique (left/mpm – his own version of the CLS critique of rights) is compelling because the ‘loss of faith’ is not a loss of faith in ‘everything’ such that one does not know what to believe in. That ‘wrong and evil tendency’ of the claim, or accusation, of nihilism is nowhere on the agenda. Left/mpm critique does not leave us with ‘nothing’: it does not necessarily imply a loss of faith in normativity in general and in the use of rights reasoning to determine what the law should be, and it does not suggest a reduction in the rights of citizens against their governments. Rather, what left/mpm critique does is to change attitudes toward a particular theory that had some claim to ‘rightness’. The answer, then, to why we ought to engage in critique is: so as to highlight problems that should be named and not hidden, so that we can then ‘replace the system, piece by piece ... with a *better* system’.<sup>28</sup> Kennedy labels his project as ‘reconstruction’ that opens up possibilities. I apply Kennedy’s sentiment in my thesis, although with some caution as to the qualification for a ‘better system’

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<sup>26</sup> D Kennedy, ‘The Critique of Rights in Critical Legal Studies’, in W Brown & J Halley (eds), *Left Legalism/ Left Critique* (Duke University Press, London 2002) 178, 178-79.

<sup>27</sup> Here Kennedy cites Mark Tushnet, Peter Gabel, Frances Olsen and himself, *ibid* 183.

<sup>28</sup> *Ibid* 218. Emphasis added.

so as to avoid that contentious term ‘progress’. I mean rather to invoke a sense of the openness of possibility.

As well as the ‘dark times’, there are the ‘dark sides’ of human rights themselves. David Kennedy, for example, describes human rights as the ‘dark sides’ of the humanitarian tradition.<sup>29</sup> The context for his analysis, which is informed by CLS and New Approaches to International Law (NAIL),<sup>30</sup> is an examination of some of the difficulties that arise when humanitarian sentiments are transformed into institutional projects, like human rights.<sup>31</sup> The ‘dark sides’ of human rights are shown through the understanding that they are ‘tools’ that humanitarians have devised for influencing foreign affairs. Furthermore, they represent a ‘vocabulary of governance’ and, finally, they allow humanitarians to provide the terms according to which global powers are exercised.<sup>32</sup>

Whilst ‘the human rights movement has unquestionably done a great deal of good’,<sup>33</sup> the problem for Kennedy is that rights create ‘costs’ when they are translated into governance. These costs are, first, that human rights occupy the field. As the ‘dominant and fashionable vocabulary for thinking about

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<sup>29</sup> D Kennedy, ‘Reassessing International Humanitarianism: The Dark Sides’, in A Orford (ed), *International Law and its Others* (CUP, Cambridge 2006) 131; D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton 2004).

<sup>30</sup> David Kennedy is described as the founder of NAIL

<<http://www.law.harvard.edu/faculty/dkenedy>> accessed 8 August 2008.

<sup>31</sup> Other examples he uses are efforts to humanise global trade, efforts to limit the violence and frequency of warfare.

<sup>32</sup> D Kennedy, ‘Reassessing International Humanitarianism: The Dark Sides’, in A Orford (ed), *International Law and its Others* (CUP: Cambridge 2006) 131, 132.

<sup>33</sup> *Ibid* 133.



emancipation’,<sup>34</sup> rights crowd out other ways of pursuing social justice that may be more effective (for example, religious vocabularies, local traditions). Second, rights often excuse government behaviour. Third, human rights perpetuate the myth of the ‘international community’, which consequently makes promises it cannot deliver. This unfortunately then ‘encourages a global misconception of both the nature of evil and the possibilities for good’.<sup>35</sup> Finally, the human rights movement acts as if it knows what justice means but recognises it as a relationship to the state rather than as a condition in society that needs to be worked at. In this way, human rights represent a ‘vocabulary of power’ used by NGOs, governments, world trade organisations and oil companies alike.

David Kennedy puts forward a few suggestions, or maxims for those with power, as participants in governance, which centre on an ideal notion of *responsibility*.<sup>36</sup> These include, first, ‘humanitarianism as critique’. Kennedy imagines a human rights that is trained in critical reasoning, which for him presents the advantage of revisiting again and again what justice requires. A second maxim is ‘tools are tools’. Human rights are described as an idolatry of tools – norms that we have treated as true rather than reminders of what might be made true. We ought to look at these tools with ‘cold and disenchanted eyes’<sup>37</sup> and question their wisdom. Third, in participating in human rights, ‘international humanitarians rule’. Kennedy highlights that, whilst experience has shown him humanitarians acting as if governance is elsewhere (in

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<sup>34</sup> D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton 2004) 9.

<sup>35</sup> *Ibid* 21.

<sup>36</sup> *Ibid* 347 and Kennedy (n 32) 152.

<sup>37</sup> Kennedy (n 32) 154.

government, in statecraft, in Member States that have signed up to international agreements), they are actually participants in this governance – in fact, rulers. International humanitarians rule in the name of human rights. A final example is the maxim ‘decision, at once responsible and uncertain’, which suggests that humanitarianism must embrace the act of decision and not seek to avoid responsibility for decision-making, as it has done.

Ultimately, Kennedy proposes that we search for ‘grace’ in governance,<sup>38</sup> which I interpret as acceptance of a responsibility for governance by the actors within human rights who govern – or the ‘rulers’, as he calls them. To my mind, Kennedy’s critique is particularly insightful for the comment he makes on the role of ‘rulers’. In what follows, particularly in Chapters 6 and 7, I shall attempt to take this forward in the context of the FRA’s ‘actors’ and ‘experts’. Attention to the layers of actors and experts involved in the power relations at play in the FRA’s rights discourse is a crucial part of my analysis in the thesis and, I suggest, of any critique of rights discourse. Kennedy’s comment on responsibility is also pertinent. I take it up in Chapters 7 and 8, where I discuss the individual’s participation in government and the possibility of accepting responsibility for this involvement. Like Kennedy, I question whether accepting responsibility in government means finding some sort of ‘grace’ in governance.

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<sup>38</sup> Kennedy (n 34) xxv.

### C. The 'Other' Side of Rights: Cultural Critiques

As well as the 'dark sides' of human rights, there are critiques that present the 'other' side of human rights. In this context, 'other' means other *cultures*. Critiques that focus on the 'other' side of rights tend to pay attention to 'other' cultures outside of the European West. So, for instance, Makau Mutua adopts a cross-cultural perspective to address 'the dire need to speak across cultures and identities in human rights'.<sup>39</sup> He advocates alternative understandings of the human rights movement that would elicit a reformation, reconstruction and multiculturalisation of human rights. Mutua's arguments are articulated using the idea of 'human rights as metaphor'.<sup>40</sup> (The metaphor idea is similar to that of human rights as 'paradox', as discussed above.) 'The human rights movement', Mutua argues, 'is marked by a damning metaphor'.<sup>41</sup> The metaphor is described as a three dimensional 'savages-victims-saviours' (SVS) construction, in which each element is depicted as a metaphor in itself. The metaphor is explained as having been constructed by the main authors of human rights discourse – the United Nations (UN), Western states, international non-governmental organisations (INGOs) and senior Western academics. Its utility is that it expresses the theoretical flaws in the current human rights corpus, which is fundamentally Eurocentric.

The 'savage' in the metaphor is constructed, from a conventional international human rights law perspective, as the state. The 'quintessential savage' is the

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<sup>39</sup> M Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, Philadelphia 2002) 2.

<sup>40</sup> *Ibid* Chapter 1.

<sup>41</sup> *Ibid* 10.

Third World state.<sup>42</sup> However, Mutua explains, the state is merely a construct that represents a repository for public power and is therefore a proxy for the ‘real savage’, which he describes as the *culture* of a society, or the ‘accumulation of a people’s wisdom and thus their identity’.<sup>43</sup> He suggests that the portrayal of the practice of female genital mutilation (which prevails in parts of Africa and the Middle East) in INGO reports is the most poignant illustration of a culture as savage. The ‘victim’ metaphor represents an identity that was entwined with the legacy of colonialism and questions of race, in which the basic characteristic of the victim is powerlessness against the state or culture in question. The victim in the metaphor is rarely conceived of as white. The metaphor of the ‘saviour’ is described by Mutua as embedded in the dual elements of a Eurocentric universalism and Christianity. Moreover, the metaphor is tied to a number of things: to the Enlightenment’s universalist pretensions, where Europe was nevertheless regarded as superior and the centre of the world; to international law itself, which is founded on the assumptions and pretensions of the Enlightenment; to colonialism, and thus to the idea of a conquest of the ‘primitive’ and a delivery of the primitive to ‘civilisation’. The actors with which the metaphor is associated are the UN, Western states and Western-controlled institutions (including the World Bank), the United States and its human rights foreign policy rhetoric, European states and, most importantly, with INGOs.

The flaws within the human rights corpus that the SVS metaphor exposes include the following in Mutua’s analysis: first, that the human rights corpus

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<sup>42</sup> *Ibid* 26.

<sup>43</sup> *Ibid* 22.

repeated the pattern of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions. Second, that the SVS metaphor rejected the crossing over of cultures and promoted a Eurocentric ideal, thereby reinforcing an ‘othering’ process in which there is a ‘savage culture and peoples’ that is depicted as other and outside the human rights orbit. Other angles on this type of critique have described human rights ‘as idolatry’ – where human rights have turned into a creed, a sort of humanism worshipping itself, which has the effect of raising doubts among religious and non-Western groups ‘who do not happen to be in need of Western secular creeds’.<sup>44</sup> Third, the human rights corpus ignored the power relations that exist between and within cultures, states, races and other ‘societal cleavages’.<sup>45</sup>

Mutua’s critique of rights as metaphor is informed by the works of critical legal scholars, feminist critics of rights discourse and critical race theorists. It aims to advance critical approaches to human rights, offering a ‘plea for genuine cross-contamination of cultures to create a new multicultural human rights corpus’.<sup>46</sup> A similar critique, that is at a base level concerned with culture, is Balakrishnan Rajagopal’s study of the complex relationship between international law and the Third World.<sup>47</sup> Rajagopal’s central concern is how one can write *resistance* into international law and make it recognise subaltern voices. He argues that international law needs to be fundamentally rethought if it is to take the disparate forms of Third World resistance seriously and he

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<sup>44</sup> M Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton 2001) 53.

<sup>45</sup> Mutua (n 39) 13.

<sup>46</sup> *Ibid* 8.

<sup>47</sup> B Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (CUP, Cambridge 2003).

problematises human rights as the sole approved discourse of resistance to oppression and emancipation.

Rajagopal's work, in his own words, straddles the fields of international law and law and society and presents a 'new kind of socio-legal international legal scholarship'.<sup>48</sup> In working towards a new theory of resistance, Rajagopal lists amongst his inspirations Foucault's notion of 'governmentality'. He describes how a Foucauldian analysis is relevant since his research questions are framed around power and, moreover, that the principal form of power in the Third World is not the state but within apparatuses of government, as well as in private actors. The self-acknowledged methodology of Rajagopal's analysis is an 'eclectic mixture' of an internal critique, based on discourse analysis, and an external critique, bringing insights and evidence from outside international law. It uses influences from postcolonial theory, poststructuralism, postmodernism, critical race theory, critical development theory and Third World Approaches to International Law (TWAIL).

Rajagopal's critique of rights, resistance and the Third World allows him to explore various themes that expose the limitations of rights language as the only language of resistance for these oppressed 'social majorities'. These themes include the 'paradox' that although the Third World is the prime area in which human rights are deployed, it did not feature in the origins and evolution of human rights discourse and the colonial 'logic of exclusion and inclusion'<sup>49</sup> that has ensued. There is also the 'paradox' of the role of the state in human

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<sup>48</sup> *Ibid* 3-4.

<sup>49</sup> *Ibid* 172.

rights discourse: the process of what he refers to as ‘etatization’<sup>50</sup> reinforces the expansion of the state, despite human rights being commonly seen as a counter-sovereignty discourse.

The critiques by Mutua and Rajagopal both use influences from critical theory to question assumptions within human rights discourse – assumptions to do with actors (the SVS metaphor) and to do with the potential of rights to act as a discourse of resistance (the relation between international law and Third World resistance). These elements of critique – i.e., challenging established assumptions concerning rights discourse and rights as resistance – are vital to this thesis also. But I do not simply apply them. Mutua’s SVS metaphor is pertinent to the postcolonial context he is analysing but does not readily apply to the internal rights discourse of the EU. The approach I use – governmentality – allows me to focus not on ‘savages-victims-saviours’ but on other actors and their expertise, and to challenge the assumptions that are made with respect to their roles (I do this in Chapter 6 in particular). Rajagopal takes a governmentality perspective on the relationship between international law and the third world. I am interested in examining a very specific new institution for human rights protection (the FRA) using a governmentality perspective. I will examine the roles of a very different set of actors and their expertise and, importantly, I add a focus on the techniques used to gather information and data – i.e., a focus on statistics.

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<sup>50</sup> *L’état* is the French term for ‘state’.

#### IV. THE DYNAMICS OF THEORISING: THE EU CONTEXT

In this Part, I examine theoretical-critical approaches to rights in an *EU* context, in contrast to the non-EU context that has gone before. I identify six different themes in EU legal scholarship on rights (in sections A-F). These themes, or ways of ‘theorising’ rights, represent core trends in the way in which rights have been put into discourse by prominent scholars in the discipline. Consequently, they show the ways in which rights are represented in the EU. The themes are: rights as ‘values’; rights as ‘language’; rights as ‘paradox’; rights as ‘irony’; rights and the body/bodies; and rights and governance. The point of reviewing this material is to highlight that there remains a (glaring and significant) gap for a governmentality perspective in EU legal scholarship on rights.

The themes of rights as ‘values’, as ‘language’, as ‘paradox’ and the feminist literature on bodies defined through rights is representative of earlier trends in EU scholarship on rights: the academic accounts I refer to here date from 1985 to 1998. The themes of rights as ‘irony’, rights and governance, and queer theory literature on bodies defined through rights are reflective of more recent trends. Hence the accounts here date from 2000-2007. There is some overlap with the way in which rights are put into discourse in non-EU contexts: features of rights as ‘values’, ‘language’ and ‘irony’ are present in non-EU human rights academic scholarship. The theme of rights as ‘paradox’ clearly appears in both areas of rights scholarship. There is, however, a marked difference: EU legal scholarship on rights tends to be what Neil Walker



describes as ‘event-sensitive’,<sup>51</sup> rather than ‘critical’. He uses ‘event-sensitive’ to suggest that the pace and variety of development constantly presents new problems for EU lawyers and has led to much ‘unapologetic innovation’<sup>52</sup> to recognise the pressing practical nature of the problems. In EU legal scholarship on rights, in Walker’s view the practical element tends to be addressed at the expense of meta-theoretical examinations, or bottom-up theoretical concern and innovation – i.e., I infer, at the expense of critical questions about rights discourse. This reasoning is behind my use of the phrase ‘theoretical-critical’ to describe approaches to rights in EU legal scholarship. The scholarship reviewed in this Part generally represents a ‘dynamics of theorising’ – there is not a complete absence of theorising rights but what de Búrca describes as a ‘deeper critique of rights’<sup>53</sup> remains scarce.

#### **A. Rights as ‘Values’**

An early trend in EU legal scholarship treats rights as ‘values’ or, in other words, as general principles of law that seem to possess an inherent quality of ‘the good’. Such scholarship explores the nature of rights themselves. For instance Manfred Dauses, as early as 1985, examines rights as ‘general principles’ of the Community legal order and it is the meaning of this phrase that interests him.<sup>54</sup> He describes the emergence of rights as ‘general principles’ through the dogma of the ECJ developing the case law in a

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<sup>51</sup> Walker (n 10) 588.

<sup>52</sup> *Ibid* 589.

<sup>53</sup> De Búrca, ‘The Language of Rights in European Integration’ in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Clarendon, Oxford 1995) 30.

<sup>54</sup> M Dauses, ‘The Protection of Fundamental Rights in the Community Legal Order’ (1985) 10 *European Law Review* 398, 398.

protracted and cautious manner.<sup>55</sup> Dausès interprets the Court's rulings as granting rights the status of integral parts of the Community's legal order, as 'basic structural principles'<sup>56</sup> and 'directly-applicable norms'<sup>57</sup> that are to be regarded as a primary source of law, independent of the Treaties. Dausès' analysis draws attention to the 'failure of the EC to provide for fundamental rights'. His central premise is that human rights as the foundation of the EU legal order has been underestimated by the Community and he thus calls for an affiliation with the Council of Europe machinery and a comprehensive code of fundamental rights for the new EU legal order. In his view, the characteristic features of general principles are:

not that they fail to provide practical solutions but that they define the structural foundation of the legal system and of the society which is subject to the rule of law, with the result that a general principle of law, unlike a 'simple' rule of law, cannot be ignored without simultaneously bringing into question the foundations of the legal order.<sup>58</sup>

Dausès is interested in questioning the *raison d'être* of fundamental rights, as foundations of a legal order. His theoretical perspective on rights seems to attribute a value to rights as (good) foundational principles.

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<sup>55</sup> *Ibid* 400. On the idea of general principles of law, which include protection of fundamental rights, see Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.

<sup>56</sup> Dausès (n 54) 405.

<sup>57</sup> *Ibid* 406.

<sup>58</sup> *Ibid*.

Almost a decade later, Andrew Clapham, writing in 1991,<sup>59</sup> questions the interaction between human rights and the development of the Community. An unquestionable ‘good’ is attributed to human rights, made explicit by comments such as the following: ‘Although economic success is vital, it will not be enough to create a large frontier-free market nor, as implied by the Single Act, an economic social area. It is for us, in advance of 1993, to put some flesh on the Community’s bones and, dare I suggest, give it a little more soul.’<sup>60</sup> The suggestion is, it seems, that human rights will provide this necessary ‘soul-like’ quality. They are conceptualised as ‘the way forward’<sup>61</sup> and the idea that Clapham advances is that there is something positive to be gained in moving towards a ‘European human rights area’.<sup>62</sup>

By 1994, rights discourse is situated in the context of the then new pillar of human rights in the EU, the TEU, by Patrick Twomey. He describes the TEU as a ‘lost opportunity’ to establish a ‘culture’ of rights at the Community level.<sup>63</sup> Again, a certain value-ridden quality is attributed to fundamental rights in his analysis. Moreover, Twomey’s interest is in interrogating the current state of affairs and he examines how the TEU fell short of making a cultural impact with respect to human rights. He is not, therefore, concerned with a critical questioning of the perils and potential of a ‘culture of rights’ in a Union where human rights were not part of the original, market-oriented design.

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<sup>59</sup> A Clapham, *Human Rights and the European Community: A Critical Overview* (Nomos, Baden-Baden 1991).

<sup>60</sup> Quoting Jacques Delors, *ibid* 104.

<sup>61</sup> AG Toth, ‘The European Union and Human Rights: The Way Forward’ (1997) 34 *Common Market Law Review* 491.

<sup>62</sup> *Ibid* 528.

<sup>63</sup> P Twomey, ‘The European Union: Three Pillars without a Human Rights Foundation’ in D O’Keefe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, Chichester 1994) 128.

Twomey's approach, like that of Dausen and Clapham, is what Walker describes as an 'event-sensitive' analysis, influenced by and centred around reviewing developments in rights discourse as defined by the Court of Justice and the TEU, for instance, and within the terms of that institutional discourse. As these commentaries show, in viewing rights as 'values', there has been little *critical* examination of the concepts of 'rights' or indeed 'values'.

## **B. Rights as 'Paradox'**

In Part III I highlighted how rights as 'paradox' is a common theme in critiques of rights in non-EU contexts. Rights as paradox also appears as a theme in early EU legal scholarship on rights. However, consistent with Walker's observation, approaches which reflect this theme do not broach the theoretical discussions on the nature of 'paradox' that are more typical in critiques of rights in non-EU contexts.

Two powerful voices came together in 1998 when Philip Alston and JHH Weiler wrote 'An Ever-Closer Union in Need of A Human Rights Policy', adapted from a report prepared for the *comité des sages* who were responsible for drafting 'Leading By Example: A Human Rights Agenda for the Year 2000'.<sup>64</sup> Alston and Weiler's objective was to draw attention to, and encourage reform of, what critics had described as the 'piecemeal, ad hoc, inconsistent, incoherent, half-hearted, uncommitted, ambiguous, hypocritical'<sup>65</sup> approach of the Community towards human rights protection. The authors interpreted this

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<sup>64</sup> P Alston and J Weiler, 'An "Ever-Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' (1998) 9 *European Journal of International Law* 658.

<sup>65</sup> *Ibid* 676.

observation as revealing that ‘the human rights policies of the European Union are beset by a *paradox*’.<sup>66</sup>

‘Paradox’ is used to illustrate the EU’s human rights situation and its attitude towards rights at the time. The authors use the term to explain the ‘schizophrenia that afflicts the Union between its internal and external policies’.<sup>67</sup> On the one hand, the Union *acts as a staunch defender* of human rights in both its internal and external affairs and, on the other, it *lacks a comprehensive or coherent policy* at either level. There are, moreover, fundamental doubts as to whether the Union possesses adequate legal competence with respect to a number of human rights issues that arose within the framework of its policies.

Alston and Weiler present ‘two sides of the balance sheet’. On the ‘positive side’, there are shown to be some promising features within both the internal and external policy dimensions of the Union with respect to human rights. Internally, the TEU claimed that ‘the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law’ (Article 6(1)) and that a ‘serious and persistent’ breach of human rights by a Member State would result in a loss of rights under the Treaty (Article 7). Moreover, the ECJ has repeatedly stressed the importance of respect for human rights in a series of cases<sup>68</sup> and a number of initiatives have

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<sup>66</sup> *Ibid* 661. Emphasis added.

<sup>67</sup> *Ibid* 664.

<sup>68</sup> Note in particular Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 4/73 *Nold v Commission* [1974] ECR 491; Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219.

been put into place by the Union in a range of fields, from gender equality to racism and xenophobia.<sup>69</sup> Externally, the positive elements of the Union's human rights policies are even more apparent, at the level of both third countries and international organisations. Human rights have become criteria for the accession of want-to-be Member States to the Union.<sup>70</sup> In addition, States that wish to enter into cooperation agreements with the Union, or to receive aid or preferential treatment with respect to aid, are required to give assurances to protect human rights, appreciating that serious consequences could ensue if they breach these assurances. The Union has also adopted a number of declarations giving emphasis to the importance of human rights in external relations, as well as a range of development cooperation initiatives with major human rights components.<sup>71</sup> At the level of civil society, the Union has worked to increase capacity to protect human rights within many countries.<sup>72</sup> On 'the other side' of the balance sheet, however, Alston and Weiler argue that the Union 'lacked a fully-fledged human rights policy'.<sup>73</sup> This deficiency is particularly apparent with respect to the Union's internal policies, where the institutions have merely succeeded in 'cobbling together a makeshift policy which has been barely adequate'.<sup>74</sup> According to Alston and Weiler, the abdication of responsibility at the internal level is made starker by the active external policy stance, hence the 'paradox'.

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<sup>69</sup> At the time there existed a European Monitoring Centre for Racism and Xenophobia (EUMC), for example.

<sup>70</sup> Treaty on European Union (Maastricht Treaty) art 49.

<sup>71</sup> Alston and Weiler (n 64) 662.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

The authors also illustrate the ‘paradox in practice’ with two examples. The first is the final statement adopted by the European Council in Cardiff in June 1998 in which the phrase ‘human rights’ was used only once and was far from being a prominent and consistent theme. The second example is the *UK v Commission* ruling of the ECJ of May 1998, which cast doubt on the legal basis for much of the Commission’s funding for human rights and democracy related activities.<sup>75</sup>

Alston and Weiler are clearly exasperated by the paradox: in their view the internal and external policies of the Union ought to be ‘two sides of the same coin’.<sup>76</sup> They do, however, recognise that a situation of paradox is inevitable. They suggest that, depending on their affiliations, officials would be concerned with either the internal or external domains and would not, for the large part, see internal/external as two sides of the same coin.

I suggest that in using ‘paradox’ to problematise the human rights situation in the EU in 1998, Alston and Weiler were engaged in an ‘event-sensitive’ analysis, at the expense of a deeper, theoretical examination of rights as ‘paradox’. As we saw in Part III, in non-EU contexts ‘paradox’ can be used to re-read rights discourse: to question the nature of the discourse itself, for instance how it is at once politically essential and politically regressive. This sort of use of ‘paradox’ is absent from Alston and Weiler’s work and also from EU legal scholarship on rights more generally.

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<sup>75</sup> Case C-106/96 *United Kingdom v Commission* [1998] ECR I-02729.

<sup>76</sup> Alston and Weiler (n 64) 664.

### C. Rights as ‘Language’

Around the same time as Alston and Weiler’s piece, a newer trend can also be identified: conceptualising rights as ‘language’, which shows signs of moving away from the ‘event-sensitive’ approach to theorising rights of earlier years. The trend is part of a more general movement towards broadening the focus of legal scholarship in the field of law and European integration, as was initiated through an edited collection by Jo Shaw and Gillian More, entitled *New Legal Dynamics of European Union*.<sup>77</sup> Their collection is interesting because its objective is to take some initial, tentative steps towards a ‘new voice’ in ‘EU legal studies’.<sup>78</sup> This new voice speaks about EU legal studies both from a legal perspective (applying approaches to legal scholarship, i.e., ‘socio-legal studies, postmodern theory, critical legal studies, law in context, etc.’) and from an interdisciplinary one (applying approaches to interdisciplinary scholarship, i.e., ‘comparative politics, international relations, public policy analysis, theories of institutional behaviour, etc.’).<sup>79</sup> Thus, what is being promoted is taking a step beyond the doctrinal paradigm and ‘orthodox legal scholarship’.<sup>80</sup>

De Búrca’s chapter in the collection, entitled ‘The Language of Rights in European Integration’,<sup>81</sup> respects the editors’ aims and makes a notable contribution to understanding rights as ‘language’. The chapter begins by confirming how an ‘absence of genuinely “critical” approaches in Community

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<sup>77</sup> J Shaw and G More (eds), *New Legal Dynamics of European Union* (Clarendon, Oxford 1995).

<sup>78</sup> J Shaw, ‘Introduction’ in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Clarendon, Oxford 1995) 5.

<sup>79</sup> *Ibid* 2.

<sup>80</sup> *Ibid* 2.

<sup>81</sup> De Búrca (n 53) 29.



legal scholarship' has extended to a lack of critique about the role of rights in European Community law.<sup>82</sup> This 'deeper critique of rights', as employed outside the EU context and which de Búrca identifies largely with the CLS movement, but also with feminist, communitarian, postmodern and other writers,<sup>83</sup> has had little impact on rights in the Community context (even in the near two decades that have elapsed since the time of writing). The 'deeper critique' focuses on the adversarial and individualistic nature of rights, and maintains that rights discourse is 'empty rhetoric' which conceals both the exercise of power and the reality of disempowerment. De Búrca argues that, in the context of the Community, comment on rights resembles 'criticism' more than critique, focusing on issues such as the 'space' given to rights matters being too small, legal developments in the area not going far enough, the need for a written catalogue of rights and that too few, or the 'wrong' rights are being protected. The focus is on the challenge (coming first from the German system) that the development of the rights narrative makes to the supremacy of EU law, which does not allow for the continued expansion of the role of rights to be taken into account. The objective of De Búrca's analysis is to draw attention to the merits of the 'deeper critical' approach to rights; she asks whether 'a more critical or even *sceptical* approach'<sup>84</sup> is called for which exposes the tendency of the 'rhetoric of rights' to conceal differences in power and status to benefit mainly the powerful.

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<sup>82</sup> *Ibid* 29.

<sup>83</sup> David Kennedy, Mark Tushnet and Carol Smart are amongst the examples cited by de Búrca, *ibid*.

<sup>84</sup> *Ibid* 30. Emphasis added.

De Búrca's critical perspective thus engages with the 'deeper critique of rights' in contexts outside the EU and encourages a scepticism towards rights discourse. Her approach is not hostage to the events of the time, or mere 'criticism', and is rather illustrative of a 'new direction' that shows not only an awareness of how commentators outside the EU context have problematised human rights, but also active engagement with and a desire to promote such approaches within EU legal scholarship. In this thesis, I am interested in furthering this type of research agenda and promoting a 'deeper critique of rights'.

#### **D. Rights as Irony**

A more recent trend in EU legal scholarship on rights, which follows the research agenda that de Búrca initiated, describes the human rights policies of the EU as a 'study in irony'. Andrew Williams, in 2004, draws on Alston and Weiler's analysis to reiterate that the Union is afflicted by an incoherence, or more accurately 'bifurcation', with respect to its internal and external human rights policies.<sup>85</sup> 'Bifurcation' signifies more than incoherence – it reveals an exclusionary and discriminatory element to the internal/external divide. Williams examines the internal/external situations by looking at two areas concerned with the external projection of the Union's human rights activities: development cooperation (i.e., the Union's relations with 'the south') and enlargement (i.e., relations with accession states) – which he then compares with the internal condition.

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<sup>85</sup> A Williams, *EU Human Rights Policies: A Study in Irony* (OUP, Oxford 2004).

He makes three main arguments: first, that the Community's narratives on human rights have evolved along distinct internal/external lines, which he terms 'bifurcation'; second, that bifurcation emerges from a myth, or an institutionally-constructed narrative with respect to the origins, foundations and role of human rights; and, third, that bifurcation is accelerated by the Community's search for a European identity. The significance of bifurcation is, Williams argues, that it reveals an 'irony' in the Community's human rights policies, namely that these policies may be understood as 'concealing attitudes of superiority and exclusion behind a language of universality and inclusion'.<sup>86</sup> Williams further describes the irony as taking two related forms: the 'irony of distance' and the 'irony of concealment'.<sup>87</sup> The former describes the ironic distance between rhetoric and practice – between the Community using fine words and authoritative statements on ethics and values in the language of rights, and the reality of rights being used as political vessels rather than as ethical principles. The latter, irony as concealment, refers to the disguise of rights as a fixed vision of the Community's values and standards, concealing a more complex and contradictory truth in practice.

From this analysis, the fundamental irony that Williams presents is that the human rights policies of the EU simultaneously oppose and promote discriminatory thinking – internally, the Community seems to have adopted the attitude that human rights within its own borders do not need attention; externally, the Community presents itself as a 'guardian of human rights, a

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<sup>86</sup> *Ibid* 15.

<sup>87</sup> *Ibid* 197.

beacon of virtue'.<sup>88</sup> Williams' approach to theorising rights as irony allows him to ask bigger questions, for instance: Has the Community subconsciously and subtextually allowed a discriminatory and exclusionary ideology to infiltrate its human rights policies? The question is the result of his particular approach of 'critical analysis' and 'genealogy'.<sup>89</sup> Williams' insights are interesting and while I am involved in a critical analysis, I ask some different questions from his. In this thesis, I develop a 'critical analysis', based not on a notion of 'irony' but on a Foucauldian conception of governmentality, with respect to a very specific focus of study: the FRA. Moreover, my critique of the FRA extends and updates Williams' analysis by both demonstrating and interrogating how rights *are* now being dealt with internally in the EU via this new Agency.

## **E. Rights and the Body/Bodies**

EU legal scholarship also contains literature problematising human rights from a perspective that focuses on 'a body', singular, or 'bodies', plural. This literature features work influenced by feminist perspectives<sup>90</sup> and queer theory.<sup>91</sup> By speaking of 'the body', singular, this literature is concerned (generally speaking) with the female, gay, lesbian, bisexual and transgender citizen of the EU; by speaking of 'bodies', plural, the literature is concerned with the wider concept of citizenship.

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<sup>88</sup> *Ibid* 201.

<sup>89</sup> *Ibid* 11, 16 and 17.

<sup>90</sup> I use 'feminist perspectives' rather than 'feminism' or 'feminist theory' to highlight that there is no single feminism or feminist theory but many feminisms.

<sup>91</sup> Queer theory is another branch of critical theory that is related to the feminist project(s). It differs from the feminist perspectives in that it problematises the categorisation of 'gender' and 'sexuality'. Judith Butler, author of what many would describe as a founding text of queer theory, *Gender Trouble* (Routledge, Abingdon 2007) explains that her concern has been to criticise the heterosexual assumption made in feminist theory, which tends to restrict the meaning of 'gender' to notions of masculinity and femininity.

Writing that has been informed by feminist perspectives has been the most prominent and most extensive of critically-oriented works on EU law.<sup>92</sup> The most popular targets of feminist analysis have been the areas of citizenship, mobility rights and social rights.<sup>93</sup> The feminist writings I use in what follows are earlier writings from the mid-1990s and are, therefore, representative of an earlier trend in EU legal scholarship on rights. The examples I take from queer theory include more recent writings, providing evidence that this is a newer trend in the scholarship.<sup>94</sup>

*i. Feminist Perspectives*

Sex equality law has been examined from the perspective of a ‘human rights foundation’ in early feminist literature on rights, by Claire McGlynn for instance.<sup>95</sup> Her 1996 piece aims, on the one hand, to look beyond the employment market, where the majority of legislation and scholarly attention was focused and, on the other, to move beyond the concept of equality. McGlynn is therefore interested in ‘new directions’, in looking for new ways to construct familiar and assumed concepts – i.e., she is interested in moving beyond seeing women solely in the public sphere and beyond ‘equality’. She argues that the preoccupation with the employment market shows a concern

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<sup>92</sup> L Flynn, ‘The Body Politic(s) of EC Law’ in T Hervey and D O’Keefe (eds), *Sex Equality Law and the European Union* (John Wiley and Sons, Chichester 1996) 301, 301 comments that such writing has been amongst the *most successful* of critically-oriented works.

<sup>93</sup> *Ibid.* See for example A Elman, ‘The Limits of Citizenship: Migration, Sex Discrimination and Same-Sex Partners in EU Law’ (2000) 38 *Journal of Common Market Studies* 729.

<sup>94</sup> Note that reference is sometimes made to queer theory as a ‘third wave’ in feminist, gay and lesbian studies. However, there is evidence of earlier work from a queer theory perspective: CF Stychin, *A Nation By Rights: National Cultures, Sexual Identity Politics and the Discourse of Rights* (Temple University Press: Philadelphia 1998).

<sup>95</sup> C McGlynn, ‘EC Sex Equality Law: Towards a Human Rights Foundation’ in T Hervey and D O’Keefe (eds), *Sex Equality Law and the European Union* (Wiley, Chichester 1996) 239, 239.

only with the public aspects of the position of women, ignoring the difficulties that women face in the private sphere. It is the reason some scholars have moved towards favouring ‘anti-discrimination’ over the concept of ‘equality’.<sup>96</sup> A move beyond equality, argues McGlynn, would suggest a move away from the implied comparison between those who are discriminated against, the disadvantaged (women), and those who are not, the norm (men). There is, McGlynn argues, insufficient recognition of the *different* position of women.<sup>97</sup> To address this, she suggests an altered focus – one on the concept of citizenship.<sup>98</sup> Her analysis proposes that a more progressive and empowering strategy would be to focus sex discrimination law in the concept of citizenship with a human rights foundation – i.e., a foundation that respects the human rights of women and would in turn protect and promote these rights.

Feminist approaches in EU legal scholarship have also sought to problematise the ‘body’ through theorising. Leo Flynn, for example, examines the ‘body politic(s) of EC law’.<sup>99</sup> Flynn adopts an earlier, more general argument made by Carol Smart in order to analyse EC law as sexist, male, gendered and gendering.<sup>100</sup> His specific focus is EC law as ‘gendered and gendering’, in particular how the female body is regulated and treated by law. Flynn draws on the jurisprudence of the ECJ to support his analysis, in particular the cases of *Grogan*,<sup>101</sup> *Adoui and Cornuaille*<sup>102</sup> and *Henn and Darby*.<sup>103</sup> These cases dealt

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<sup>96</sup> For a further problematisation of the ‘ideal of equality’ in the context of EU anti-discrimination law and the UK, see N Lacey, ‘Legislation Against Sex Discrimination: Questions from a Feminist Perspective’ (1987) 14 *Journal of Law and Society* 411.

<sup>97</sup> For more on the issue of equality versus difference, see L Irigaray, ‘Equal or Different?’ in M Whitford (ed) *The Irigaray Reader* (Basil Blackwell: Oxford 1994) 30.

<sup>98</sup> See also Elman (n 93).

<sup>99</sup> Flynn (n 92).

<sup>100</sup> C Smart, ‘The Woman of Legal Discourse’ (1992) 29 *Social and Legal Studies* 30-34.

<sup>101</sup> Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685.

with the issues of abortion, prostitution and pornography respectively. In the first two cases, the question in both instances was whether the national measures that regulated activities that were mainly or exclusively undertaken by women (abortion, prostitution) conflicted with the free movement rules as laid down in the Treaty. In *Henn and Darby*, the ECJ had to consider, indirectly, the issue of the representation of the female body and, directly, the meaning of the public morality exception to the free movement of goods under Article 30 of the Treaty Establishing the European Community (EC Treaty<sup>104</sup> – the ‘goods’ in this instance were indecent and obscene pornographic materials). In each of the cases, Flynn explains, the Court was involved in considering the regulation of the female body.

*Grogan*, Flynn suggests, propounds the centrality of the concept of the ‘market’ in EC law and, by consequence, reinforces the masculine logic that is associated with it. There is no room for the idea that it is not undesirable to be outside the market. What the judgement meant for women, Flynn argues, is that it forced them to accept control of abortion services by men – i.e., through the medicalisation of the procedures and the commercialisation of support services. It encouraged a patriarchal reading of the female body, which reinforced in that body the qualities of passivity and acquiescence. In *Adoui*, the Court accepted that the activities of sex workers came within the ‘public gaze’ and it was, therefore, appropriate to regulate them. Women, constituting the majority of sex workers, were thus placed in transgressive roles in the public sphere. Similarly in *Henn and Darby*, the Court allowed Member States

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<sup>102</sup> Joined Cases 115 and 116/81 *Adoui and Cornuaille v Belgian State* [1982] ECR 1665.

<sup>103</sup> Case 34/79 *R v Henn and Darby* [1979] ECR 3795.

<sup>104</sup> Treaty Establishing the European Community (Treaty of Rome, as amended).

to impose restrictions on the circulation of goods that are indecent or obscene, in other words that cause offence to public morals. The focus of the judgment was thus exposure to the ‘public gaze’ as opposed to a consideration of the nature of the harm and adverse effect that pornography has on women. Nor did the judgment state that pornography has a role to play in the persistent inequalities, political and economic, that women especially suffer. Flynn labels this a gendering strategy – one that silences women.

The approaches of Flynn and McGlynn are illustrative of critical approaches and as such they challenge assumptions made about ingrained conceptions in EU legal discourse that is concerned with rights: for instance the market, equal treatment and public morality. This is an important trend and one that I seek to develop in this thesis by questioning the assumptions made about the rights discourse of the FRA, albeit not from a feminist perspective.

## ii. *Queer Theory Perspectives*

The trend of challenging assumptions made about rights discourse is also continued by scholars using queer theory perspectives to problematise issues of sex, gender and identity. The relationship between rights, citizenship and sexual identity has been examined by Carl Stychin.<sup>105</sup> Stychin describes citizenship as a language to express a desire for rights and inclusion.<sup>106</sup>

However, when articulated through law, citizenship has the potential, he

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<sup>105</sup> CF Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Hart, Oxford 2003); CF Stychin, ‘Grant-ing Rights: The Politics of Rights, Sexuality and the European Union’ (2000) 51 *Northern Ireland Legal Quarterly* 281; CF Stychin, ‘A Stranger to its Laws: Sovereign Bodies, Global Sexualities, and Transnational Citizens (2000) 27 *Journal of Law and Society* 601; CF Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Temple University Press: Philadelphia 1998).

<sup>106</sup> CF Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Hart, Oxford 2003) 2.



demonstrates, to become limiting, disciplinary and regulatory. In *Governing Sexuality*,<sup>107</sup> Stychin examines ‘liberal’, ‘progressive’ law reform in the context of the UK and the EU, interrogating the way in which law acts as a force for the discipline of the self and of normalisation. He demonstrates how law operates not only in progressive, or even repressive, ways but as a means to regulate and manage individual behaviours – and it does so, in particular, by encouraging us to manage ourselves. Stychin’s assertions in this respect are inspired by Foucauldian ideas. He describes his work as located within a body of theoretical legal scholarship which borrows and applies insights from Foucault’s conception of power as both juridical and disciplinary.<sup>108</sup> He discusses how certain identities are normalised via disciplinary power; in the context of the EU, he refers to the ‘sexual citizen’, or the ‘disciplined, responsible citizen’.<sup>109</sup> The phrase is explained using the Foucauldian logic that the rights of sexual citizenship seem to flow only to the responsible citizen who contributes to the common good. ‘Citizenship’ is, therefore, part of a normative discourse of ‘civic inclusion’, which is built on a series of exclusions that are themselves reliant on binary divisions – citizen/non-citizen, for instance.

Stychin has also questioned the privileging of rights discourse in sexual citizenship strategies in the EU and examines its limits for challenging barriers to citizenship. In ‘*Grant-ing Rights*’<sup>110</sup> Stychin examines the case of *Grant*,<sup>111</sup> concerning sex discrimination in the employment of same-sex couples. The

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<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid* 3.

<sup>109</sup> *Ibid* 7, 17.

<sup>110</sup> *Ibid* chapter 4; also published as CF Stychin, ‘*Grant-ing Rights: The Politics of Rights, Sexuality and the European Union*’ (2000) 51 *Northern Ireland Legal Quarterly* 281.

<sup>111</sup> Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-621.

claimant in *Grant*, relying on the 1976 Equal Treatment Directive, was unsuccessful. Stychin identifies ‘the problem with rights discourse’ as ‘the way in which it seduces its users to believe in its totalising potential as a political strategy’.<sup>112</sup>

Stychin’s use of Foucault is an interesting and singular example of this type of critique being used to analyse rights in the EU. This thesis attempts to utilise and expand the analytical tools of power as discipline and normalization which Stychin has used. For instance, I find his argument that rights discourse is associated with self-discipline and regulation of the self to be compelling. Stychin’s work does not use the tool of governmentality, however; I extend his argument in this thesis, using governmentality to explain processes of government and self-government which occur alongside disciplinary power relations.

Rights have also been analysed from a queer theory perspective by Nico Beger who undertakes a ‘queer reading’ of two prominent court cases of the ECJ: the *Grant* case mentioned above and *P v S*<sup>113</sup> (which concerned sex discrimination in the employment of transsexuals).<sup>114</sup> Beger aims in effect to *re-read* these cases and through doing so to disrupt the seeming coherence of gender and sexuality. She is challenging the very meaning of these genres, to thereby provide fundamental critiques of ‘sex’, ‘gender’ and ‘identity’ as the

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<sup>112</sup> CF Stychin, ‘*Grant*-ing Rights: The Politics of Rights, Sexuality and the European Union’ (2000) 51 *Northern Ireland Legal Quarterly* 281, 299.

<sup>113</sup> Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

<sup>114</sup> N Beger, ‘Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)potency of Rights Politics at the European Court of Justice’ (2000) 9 *Social and Legal Studies* 249.

foundations for rights battles. Through the ‘queer theory looking glass’,<sup>115</sup> Beger sees the Court’s decision in *Grant* as maintaining and defending the exclusion of homosexual men and women as ‘Other’, or the ‘deviant subject’, not worthy of protection. She argues that the Court first acknowledged the homosexual identity and made it intelligible, then excluded it by maintaining the essence of a ‘heteronormative binary gender system’.<sup>116</sup> The exclusion happened because the ECJ, according to Beger’s queer reading of the case law, could not deal with a multiplicity of identities, sexualities and discriminations that do not fit into predetermined boxes. So Lisa Grant’s lesbian identity had to be excluded because, in the interests of maintaining a culturally dominant belief system, it could not be allowed to infiltrate the definition of sex discrimination. According to the system, there are two natural sexes and they result in individuals desiring a normal heterosexual gender identity.

Stychin and Beger are asking interesting, critical questions. This thesis develops on their field of inquiry to ask Foucault-inspired, ‘how’ questions on *the FRA* and its rights discourse from a non-feminist, non-queer, *governmentality* perspective.

## **F. Rights and Governance**

As noted in Chapter 1, an acknowledged phenomenon within the EU has been the increase in talk about governance. One of the concerns with introducing governance techniques, or ‘new modes of governance’ into the EU has been that these strategies are a departure from traditional *legal* methods. Human

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<sup>115</sup> *Ibid* 258.

<sup>116</sup> *Ibid* 264.

rights have conventionally featured in the legal, normative domain. There is thus anxiety over a potentially uneasy relationship between law and governance. However, interpreting rights from a governance perspective could also bring some valuable insights into the nature of the Community's protection of rights and provide reflections on the relationship between law and governance. De Búrca, most notably, has sought to develop this particular argument and her observations are of special interest to this thesis, not least of all because she directly refers to the FRA.

In 2005, de Búrca presented a critical, reflexive appraisal of agencies, in particular the FRA.<sup>117</sup> In this she examines the operation of agencies as an element of the emerging 'new modes of governance' in the EU. Her analysis rests on two main questions, one more general and the other specific to the FRA. First, de Búrca asks whether new modes of governance are in tension with the requirements of human rights protection. Second, she asks whether the FRA, as a 'new governance tool',<sup>118</sup> is likely to represent a positive move in the area of human rights protection and whether it is likely to contribute to the emergence of a human rights policy.

In answer to the first question, de Búrca distinguishes a 'rights model' from a 'governance model' in order to identify certain tensions between them. The features she attributes to these are the following: a human rights model is suspicious of voluntarism and self-regulation, which are features of the governance model. Furthermore, the human rights model values definition and

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<sup>117</sup> G de Búrca, 'New Modes of Governance and the Protection of Human Rights', in P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU* (Hart, Oxford 2005) 25.

<sup>118</sup> *Ibid* 25.

clarity, whereas the governance model prioritises open-endedness and reversibility in respect of goals and places emphasis on the importance of ongoing processes. Moreover, the role of courts is residual in the governance model, whereas the courts play a central role in the human rights model with respect to enforcement of rights. In order to tackle the second question, de Búrca asks why one ought to consider the FRA from the perspective of new modes of governance at all, giving three reasons. First, the competence debate: the soft, flexible and comparative dimension of some new modes of governance may seem attractive in avoiding the complexity of the competence debate, which has dominated the debate on human rights in the EU for years, especially since the ECJ's opinion on the Community's accession to the European Convention on Human Rights (ECHR).<sup>119</sup> Second, the lack of competence is complemented by a lack of political will either to transfer explicit legal powers to the EU, or to amplify the powers that already exist. And, third, the need for agencies is supported by a perceived importance for the role of expertise and specialised knowledge. I find De Búrca's examination of interest – but I aim to develop it to show why the FRA should be examined not only from a governance perspective but also from a *governmentality* perspective. The latter sees the relationship between rights and governance in a critical way and conceptualises the relationship differently: in terms of power.

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<sup>119</sup> Opinion 2/94 of the Court of Justice of 28 March 1996 on *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.

In 2007, De Búrca extended her focus on the relationship between law and governance in the context of rights,<sup>120</sup> exploring the relationship between what she calls the ‘experimentalist governance’ approach and the ‘human rights perspective’ in the context of the Race Discrimination Directive.<sup>121</sup> The ‘experimentalist governance’ approach can be distinguished, she says, from the ‘human rights perspective’ by virtue of a number of the features. The former favours self-regulation and departs from a hierarchical framework of answerability, whereas the latter does not. The former prioritises reversibility and open-endedness in the specification of goals, whereas the latter prefers clear definition of the commitment in question. Moreover, the former places more emphasis on actors/stakeholders – these are seen to actually generate norms and are responsible for their spread – the human rights perspective, however, sees actors in a bottom-up way (i.e., civil society upwards) and as enforcing and monitoring the norms and institutions that already exist. Finally, de Búrca argues that the experimentalist governance approach sees the role of the courts as residual, monitoring the functioning of the processes that are established, whereas in the human rights model the role of courts is crucial in ultimately enforcing the role of the legal commitment.

De Búrca’s chapter echoes the arguments she made in 2005 but seeks this time to show how a hybrid relationship between law and governance is possible, using the Race Directive as an illustration. The Directive, de Búrca argues, contains features of both the experimentalist governance approach and the

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<sup>120</sup> G de Búrca, ‘EU Race Discrimination Law: A Hybrid Model?’ in G de Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart, Oxford 2006) 97.

<sup>121</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Race Directive’) [2000] OJ L 180/22.

human rights perspective and combines them without losing the strengths of either. Thus, for example, a feature of the new governance approach is that the Directive is tied to a complementary institution, or agency, which was then the European Monitoring Centre for Racism and Xenophobia (EUMC).<sup>122</sup> A feature of the human rights model is that a judicial remedy is available for discrimination on the grounds of race. De Búrca's analysis probes these elements further to argue for a hybrid relationship between law and governance – i.e., one that combines the positive features of both models. She later sketches a new framework for the relationship between law and new governance in a piece written in 2007 with Walker. Together, they argue that both law and new governance should be understood in terms of 'mutual penetration orientation'.<sup>123</sup> That is, they argue that since law and new governance possess some similar traits and also some very distinct elements, they ought to be understood in a relationship of conceptual overlap that will require ongoing adjustment. I agree with this observation and I aim to show how a governmentality perspective can *extend* the understanding of a hybrid relationship between law and governance: it does not focus on law to the exclusion of other forms of regulation strategy and regulatory governance.

Further insight into the rights and governance approach is found in an argument made by Olivier de Schutter in 2007, suggesting a transformation of the approach to fundamental rights in the Union from a focus on harmonisation through legislation to an 'alternative approach', framed in terms of

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<sup>122</sup> Note that as of 1 March 2007 the EUMC was replaced by the FRA.

<sup>123</sup> G de Búrca and N Walker, 'Reconceiving Law and New Governance', *EUI Working Papers LAW No. 2007/10* <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=987180](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987180)> accessed 15 October 2008.

governance.<sup>124</sup> His alternative approach would focus on a ‘form of permanent *learning*’, supporting ‘the emergence of a post-regulatory, non formalistic mode of governance, which represents a gain in reflexivity’.<sup>125</sup> The hypothesis of de Schutter’s paper is that, the question of competence aside, the fundamental rights policies of the Member States may benefit from being better coordinated and that exchanges of information may have to become more systematic and organised. Exchange of information would, he says, promote a system of ‘collective learning’ in the field of fundamental rights. De Schutter presents three examples in the area of fundamental rights where a move to open methods of coordination has been made by the Community in an attempt to overcome the challenges of regulatory competition and of harmonising legislation: the fields of health care, asylum and immigration, and the rights of the child.<sup>126</sup> In each of these areas he points to the benefits of an exchange of experiences, of the consequent reflection on practices concerning fundamental rights protection across the Member States and thus on mutual learning. This particular approach therefore places emphasis on learning, on deliberation and on interdependency between States. It is an attractive insight into the role of governance processes but I aim to supplement it by probing further. I critically examine this feature of ‘collective learning’ and its place in the FRA’s governing processes; De Schutter does not go this far.

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<sup>124</sup> O de Schutter, ‘Fundamental Rights and the Transformation of Governance in the European Union’ (2006-2007) 9 *Cambridge Yearbook on European Legal Studies* 133.

<sup>125</sup> *Ibid* 134.

<sup>126</sup> The Open Method of Coordination (OMC) is a recognised ‘new governance’ tool in the EU legal structure. See further P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (4<sup>th</sup> edn OUP, Oxford 2008) Chapter 5.



## V. CONCLUSION

This chapter began with the idea that human rights is a constructed discourse and set out to examine how human rights have been ‘put into discourse’ – first, in contexts outside of EU legal scholarship and, second, in EU legal scholarship. Thus I showed how commentators on rights in contexts outside the EU have analysed rights as ‘paradox’, explored the ‘dark sides’ of rights and the present ‘dark times’ as marked by a lack of critique of rights discourse and, finally, interrogated the cultural, or ‘other’, side of human rights. Within EU legal scholarship on rights, the chapter explored how rights have been put into discourse as ‘values’, ‘language’, ‘paradox’ and ‘irony’. There have also been a number of feminist and queer critiques of rights, and contributions have been made by law academics on the topic of rights and governance. The objective of this side-by-side review of the two literatures (EU and non-EU) was to make a comparison between the two contexts and show how the perception that there is an elusive novelty of theorising in the EU legal context is accurate. EU legal scholarship on rights, generally speaking, remains event-sensitive and the ‘deeper critique of rights’ has not been assumed by scholars writing in this field – with some notable exceptions (for example, de Búrca, Stychin and Walker). These exceptions do not, however, take a Foucauldian, governmentality perspective on rights. This is precisely the element that this thesis adds to the literature: a governmentality perspective on rights discourse. Furthermore, it examines rights discourse in the context of a case study of the FRA – an entity which, due to its novelty, has yet received little attention. In the coming chapters, I argue that considering the lack of critique that pervades

EU legal scholarship on rights there is space for this particular timely, important and illuminating perspective. As a first step toward this, the next chapter outlines 'governmentality'.

## *A Foucauldian Critique of Rights: Governmentality*

### I. INTRODUCTION

This chapter aims to describe the methodology of this thesis, which is best articulated as *critique*; the type of critique that I engage in is Foucauldian and relies on Foucault's particular framework of governmentality.<sup>1</sup> The precise objectives of this chapter are twofold: first, to describe what critique is and give a detailed account of governmentality. Second, to highlight examples of legal scholarship that use governmentality as a methodology. The reason I highlight these examples is that they illustrate the creativity and usefulness of a governmentality perspective and thereby lend support to its use in this thesis. Satisfying the first objective is the task of Part II. In Part III, I outline governmentality scholarship, first setting the scene by drawing attention to how Foucault is used in law in general.

A brief, preliminary note on 'methodology' is in order. By methodology I refer to an 'approach' or a framework for analysis.<sup>2</sup> Methodology is closely related to what we understand the field of enquiry to be and guides the thinking, or

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<sup>1</sup> See D Moore, *Criminal Artefacts: Governing Drugs and Users* (University of British Columbia Press, Vancouver 2007), describing governmentality as a 'framework'.

<sup>2</sup> I have deliberately not used the term 'method'. 'Method' has empirical and sociological connotations that I am not drawing upon here – for example, is the method a qualitative or quantitative analysis? Is it comparative? What methods of data collection are used – observation, case studies, interviews? For a discussion of 'theory', 'methodology', 'approach' and 'method' see R Cryer, T Hervey and B Sokhi-Bulley, 'Workshop Preparatory Materials, Legal Research Methodologies in European Union and International Law', AHRC Collaborative Doctoral Training Project 1 Oct 2006-30 Sept 2008, Second Workshop 27-28 June 2008 <[http://www.shef.ac.uk/law/research/clc/research/projects/res\\_methodology](http://www.shef.ac.uk/law/research/clc/research/projects/res_methodology)> accessed 1 October 2008.

questioning, of and within that field. A methodology, furthermore, has theoretical connotations. Thus, a methodology directly influences research questions and vice versa, making researching a reflexive process. Saying that a methodology has theoretical connotations does not, however, imply that there is 'a' single 'theory' that I 'apply' to my work. Foucault did not present a 'theory', rather ideas or 'just fragments'<sup>3</sup> of thought. His methodological position, and indeed the approach that he encourages, is, rather, a 'critical attitude'.<sup>4</sup> Moreover, he supports *use* of these theory fragments, describing his own work as 'a *tool-box* which others can rummage through to find a tool they can use however they wish in their own area ... I don't write for an audience', he says, 'I write for users, not readers.'<sup>5</sup> In this thesis, the particular Foucauldian tool that interests me is governmentality.

## II. GOVERNMENTALITY

### A. What is Critique?

I have just stated above that critique implies a 'critical attitude'. Critique can also refer to a type of theorising; it can be understood, in other words, as 'critical theory'. By this I refer to 'critical' (small 'c') scholarship; I am not referring to the specific movements/methods of, first, 'Critical theory' (capital 'C')<sup>6</sup> or, second, 'Critical Legal Studies' (CLS).<sup>7</sup> The object of a critique (i.e.,

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<sup>3</sup> M Foucault, 'Two Lectures' in M Foucault, *Power/Knowledge* (C Gordon, ed; C Gordon and others, trs) (Longman, London 1980) 78, 79.

<sup>4</sup> M Foucault, 'What is Critique?' in M Foucault, *The Politics of Truth* (S Lotringer and L Hochroth, eds) (Semiotext(e), USA 1997) 24.

<sup>5</sup> M Foucault, 'Prisons et asiles dans le mécanisme de pouvoir' in *Dits et Ecrits, t II* (Gallimard, Paris 1994) 523-4.

<sup>6</sup> Critical theory (capital 'C') refers to a distinct body of thought associated with the Frankfurt School, wherein the 'Critical' component consists of developments on Marxist thought,

of a critical attitude/critical theory) is to question both the *perils* and the *possibilities* of a system. A critical analysis of rights discourse recognises the *perils* of the discourse as paradox – i.e., as having a disciplinary and governing, as well as emancipatory, potential – and the last chapter explored critiques of rights which problematise rights as paradox. Critique also opens *possibilities* for the analysis of rights discourse as a discourse of power, to understand how the perils arise. It promises new possibilities – for instance, new ways of framing old problems and thereby attaining new knowledge of the problems.<sup>8</sup> The term ‘critique’ stems from the Greek ‘krisis’, which implies an art of judgement.<sup>9</sup> While critique has etymologically moved away from crisis, there is a sustained connection between them in the field of medicine. Here, the term ‘critical condition’ has connotations that can be sustained in political crisis as well. A ‘critical condition’ requires immediate, accurate and effective action. It is a particular kind of call, ‘an urgent call for knowledge, deliberation, judgment and action to stave off catastrophe’.<sup>10</sup> Critique, is a ‘will to knowledge’;<sup>11</sup> it really wants to know *how* things work and why, not simply how we are told they are supposed to work.<sup>12</sup>

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heavily influenced by the critical philosophies of Kant, Hegel, Weber and Freud. Proponents of Critical theory include Max Horkheimer, Theodor Adorno, Walter Benjamin and Jürgen Habermas.

<sup>7</sup> CLS refers to a separate method associated *inter alia* with the Harvard School, which followed on from the American realist movement and draws on elements from the Frankfurt School and on poststructuralism. Proponents of CLS include Duncan Kennedy, David Kennedy, Mark Tushnet and Roberto Unger.

<sup>8</sup> I develop what these new possibilities might be in terms of rights discourse and the FRA in Chapter 8.

<sup>9</sup> W Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press, Princeton 2005) 5.

<sup>10</sup> *Ibid* 7.

<sup>11</sup> This phrase is taken from M Foucault, *The History of Sexuality: Volume 1: The Will To Knowledge* (R Hurley, trs) (Penguin, London 1998).

<sup>12</sup> W Brown and J Halley, ‘Introduction’ in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Duke University Press, London 2002) 1, 28.

Furthermore, I believe that critique is essential in our present ‘dark times’,<sup>13</sup> despite the suggestion that we are supposedly ‘more enlightened’ than in previous, darker times. The ‘twentieth century is the century of massacre, genocide, ethnic cleansing, the age of the Holocaust’<sup>14</sup> and the twenty-first century is following in its footsteps as it becomes marked by terrorism and threats to security, forced detention, torture and deprivation of liberty. The history of rights discourse demands that the dangerously *uncritical* view that, ‘human rights are ... the energy of our societies, the fulfilment of the Enlightenment promise of emancipation and self-realisation’<sup>15</sup> be challenged through a will to knowledge.<sup>16</sup> Critique allows us, first, to recognise the times as dark and then to reclaim them for something other than the darkness.<sup>17</sup>

It is equally important to understand what critique is *not*. Critique implies more than *criticism*: it explores, as I have said, the possibilities of a system. Nor is critique ‘just theorizing’<sup>18</sup> that bears no relation to ‘practice’. The claim has often been made that critique is ‘disinterested, distanced, negating or academic’<sup>19</sup> and that it does not provide insights into progressive change.<sup>20</sup> However, critique is neither disinterested nor distant; rather, it engages the discourse which it contests. It re-reads it and re-considers its claims, searching

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<sup>13</sup> Brown (n 9) 9. Brown claims to borrow the phrase from Arendt, who borrows it from Brecht, and Brecht probably from the ancient Greeks. See also the reference to ‘dark times’ as a theme in critiques of rights in Chapter 2, pp. 29-34.

<sup>14</sup> C Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart, Oxford 2002) 2.

<sup>15</sup> *Ibid.*

<sup>16</sup> I note that today, especially in Britain, there is an opposite and growing sense that rights have gone too far and this sentiment is translated in political terms to an agenda on removing rights instruments (e.g., the Conservative Party line of abolishing the Human Rights Act 1998). This challenge to rights is nevertheless a dangerously *uncritical* view.

<sup>17</sup> Brown (n 9) 16.

<sup>18</sup> Brown and Halley (n 12) 2.

<sup>19</sup> Brown (n 9) 7.

<sup>20</sup> Brown and Halley (n 12) 25.

for what is authentic in the discourse. Before uncovering the power relations within the discourses that regulate and govern us, critique re-asserts the importance of the said discourses. Critique is, therefore, far from negating and academic. It does not reject, refute or dismiss its object. It cannot, since by re-reading it must affirm the object. Critique is thus an act of reclamation, which takes over the object, or the discourse, for a purpose other than that for which it is currently employed.<sup>21</sup>

Foucault's methodology centred on a particular conception of *power* and thus a Foucauldian critique is essentially interested in questions of power. Foucault's objective was to analyse the subject (i.e., the socially constructed individual) not in terms of law or repression, but in terms of power.<sup>22</sup> He called this his 'methodological course' or 'imperative' and in his earlier work he focused on power as discipline.<sup>23</sup> Although Foucault's conception of power developed and altered over the course of his work (from, as I will explain, power as discipline to power as government),<sup>24</sup> power remained the methodological tool of analysis.<sup>25</sup>

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<sup>21</sup> I borrow here from Brown (n 9).

<sup>22</sup> Foucault (n 11) 92.

<sup>23</sup> Foucault (n 3) 101-2. See also M Foucault, *Discipline and Punish: The Birth of the Prison* (A Sheridan, trs) (Penguin, London 1991).

<sup>24</sup> See section B(ii), below.

<sup>25</sup> Foucault's methodology has also been described, in his earlier work, as an *archaeology* (see for example G Gutting, *Michel Foucault's Archaeology of Scientific Reason* (CUP, Cambridge 1995)) and, in his later work, as a *genealogy* (see M Foucault 'Nietzsche, Genealogy, History' in P Rabinow (ed), *The Foucault Reader* (Pantheon Books: New York, 1984) 76; M Foucault, *Discipline and Punish: The Birth of the Prison* (A Sheridan, trs) (Penguin, London 1991); and Foucault (n 11)). 'Genealogy' is a term Foucault borrowed from Nietzsche (see F Nietzsche, *On the Genealogy of Morality* (M Clark and A Swensen, eds; trans) (Hackett Publishing Company, Indiana 1998)) and which, briefly speaking, searches for a 'will to knowledge' above 'truth' and combines the three elements of power relations, subjugated knowledges and history. This thesis is not undertaking a genealogy since the historical element would be lacking; whilst I am interested in power and subjugated knowledges there is not enough historical examination for this study to constitute a genealogy.

At a general level, Foucault's projects were concerned with a particular type of question, which becomes the focus for anyone interested in a Foucauldian critique – the 'how' question. 'How' questions interrogate the 'how' of *power*. They examine how meanings are produced and attached to various social subjects and objects and thus differ from conventional 'why' questions. 'Why' questions prompt limited answers since they 'presuppose the identities of social actors and a background of social meanings'.<sup>26</sup> They generally take the possibility that particular policies and practices could happen as unproblematic. The analysis in my thesis deliberately moves away from conventional 'why' questions to 'how'. I am not saying that we ought not to ask 'why' questions – only stressing that someone asking those questions will most probably be taking a different approach from the one I adopt here. The specific 'how' I am interested in questioning is: '*how [these] mechanisms of power, at a given moment, in a precise conjuncture and by means of a certain number of transformations, have begun to become ... politically useful*'.<sup>27</sup>

I want also to stress the value and aim of critique. In terms of its value, Foucault himself was of the opinion that there is something in critique that is akin to 'virtue';<sup>28</sup> he speaks of the 'critical attitude as virtue in general'.<sup>29</sup> He has described, furthermore, critique as 'the art of not being governed quite so much'.<sup>30</sup> That is, not wanting to be governed, and not wanting to be governed *like that*. Critique is a questioning enterprise: 'critique is the movement by which the subject gives himself the right to question truth on its effects of

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<sup>26</sup> RL Doty, *Imperial Encounters* (University of Minnesota Press: Minneapolis 1996) 4.

<sup>27</sup> Foucault (n 3) 101.

<sup>28</sup> Foucault (n 4) 32.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid* 29.



power and question power on its discourses of truth'.<sup>31</sup> There is therefore something liberating in it, in that it both challenges assumptions and questions the norm or what are given as natural representations. The aim of critique is to renew perspective.<sup>32</sup> A Foucauldian critique is characterised by 'a determination to throw off familiar ways of thought and to look at the same things *in a different way*'.<sup>33</sup> The new insights that a Foucauldian critique provides are nevertheless difficult since Foucault provides questions rather than answers, a 'way of looking at things' or a methodology for analysis, rather than a formula that answers the 'what next' question. I go on now to examine the particular critical perspective that I am using in this thesis: governmentality.

## **B. Governmentality**

Governmentality was referred to earlier as one of the 'tools' in Foucault's 'tool-box' and I used this illustration to emphasise that governmentality is not a 'theory' but resembles, rather, a 'critical attitude' – in other words, a type of approach, or *perspective*.<sup>34</sup> I will from now on refer to a 'governmentality perspective'. A perspective provides a different way of looking at the same things; a governmentality perspective is a different way of examining existing structures, as a form of government. Government is associated with power and thus a governmentality perspective is concerned with power. Moreover, governmentality refers at once to an approach (i.e., a critical attitude) *and* to

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<sup>31</sup> *Ibid* 32.

<sup>32</sup> Brown and Halley (n 12) 26-7.

<sup>33</sup> M Foucault, 'The Masked Philosopher' in M Foucault, *Ethics: Volume 1: Subjectivity and Truth: Essential Works of Foucault 1954-1984* (P Rabinow, ed; R Hurley, trs) (Penguin, London 2000) 321, 325. Emphasis added.

<sup>34</sup> Rose et al, 'Governmentality' (2006) *Annual Review of Law and Social Science* 83, 83.

the process of ‘government’ itself (where government is understood in the Foucauldian sense of the term; I explain below). It thus describes the power relation itself.<sup>35</sup> It is both a rationality of government (a way of thinking about the practices of government) and, at the same time, an art of government (the process of governing or being governed), as I describe below.

Foucault’s work represented a genealogy of power which developed from an earlier conception (in the early 1970s) of power as discipline to the portrayal (in the late 1970s) of power as government. In this part of the chapter, I begin by describing power as government and then work backwards to situate this within the earlier context of power as discipline, so as to give a full account of the meaning and context of ‘governmentality’ (sections i and ii). In Part III, I first elicit attitudes towards Foucault in law and, second, give examples of scholarship that takes a governmentality perspective.

*i. The ‘Art of Government’*

‘Governmentality’ is clearly a play on the word ‘government’. It was not because ‘government’ itself was a bland term that a new one had to be invented. Rather, it was because ‘government’ as conventionally understood did not convey connotations of *power*. Foucault’s conception of government relied on a particular perception of power relations:

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<sup>35</sup> For an alternative viewpoint see J Morison, ‘Modernising Government and the E-Government Revolution: Technologies of Government and Technologies of Democracy’ in P Leyland and N Bamforth (eds), *Public Law in a Multi-Layered Constitution* (Hart, Oxford 2003) 131 and above, Chapter 1, pp. 5 and (n 18).

This word [government] must be allowed the very broad meaning it had in the sixteenth century. ‘Government’ did not refer only to political structures or to the management of states; rather, it designated the way in which the *conduct* of individuals or of groups might be directed – the government of children, of souls, of communities, of the sick ... *To govern, in this sense, is to control the possible field of action of others.*<sup>36</sup>

Understood in this perhaps literal manner (the verb ‘to govern’ can literally mean ‘to control or influence’),<sup>37</sup> government refers to the ‘conduct of conduct’; a form of activity or practice that aims to shape, guide or affect the conduct of some person or persons. It is a ‘govern/*mentality*’.<sup>38</sup>

In a lecture given at the Collège de France in 1978, posthumously given the title ‘Governmentality’,<sup>39</sup> Foucault presents his most concise definition of the term. He explains that ‘governmentality’ means three things:<sup>40</sup> first, ‘the *ensemble* formed by the *institutions, procedures, analyses, reflections, calculations and tactics* that allow the exercise of this very specific albeit complex form of power, which has as its target population’. Second,

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<sup>36</sup> M Foucault, ‘The Subject and Power’ in M Foucault, *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion, ed; R Hurley, trs) (Penguin, London 2002) 326, 341. Emphasis added.

<sup>37</sup> *The Concise Oxford Dictionary* 10th edn (OUP, Oxford 1999).

<sup>38</sup> A Barron, ‘Foucault and Law’ in J Penner et al (eds), *Jurisprudence and Legal Theory: Commentary and Materials* (OUP, Oxford 2005) 955, 984.

<sup>39</sup> Presented by Foucault as the fourth lecture of his course ‘*Sécurité, Territoire, Population*’ (‘Security, Territory, Population’): M Foucault, *Security, Territory, Population* (M Senellart, ed; G Burchell, trs) (Palgrave Macmillan, Basingstoke 2007) 87. Foucault asserted, by the fourth lecture, that he should have given this whole series the name of the history of ‘governmentality’ rather than *Security, Territory, Population*, given his intended focus in the lectures (108). See also M Foucault, ‘Governmentality’ in *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion ed; R Hurley, trs) (Penguin: London, 2002) 201.

<sup>40</sup> M Foucault, ‘Governmentality’ in *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion ed; R Hurley, trs) (Penguin: London, 2002) 201, 219-20.

governmentality refers to ‘the tendency that, over a long period and throughout the West, has steadily led to the pre-eminence over all other forms (sovereignty, discipline and so on) of this type of power, which may be termed “government”’. Third, governmentality is the (result of the) process by which the state gradually ‘becomes governmentalized’.

So, first, governmentality describes a form of government of all and of each,<sup>41</sup> rendering both a society – or a *population*, not just individuals – governed or governable. Foucault’s analysis of power moved from concentrating on the subjectification of the individual, to subjects as members of a population or as living beings.<sup>42</sup> ‘*Population*’ itself does not refer only to ‘people’ but to phenomena and variables,<sup>43</sup> such as birth rate, mortality rate and marriage statistics. It encompasses the whole field of ‘the social’,<sup>44</sup> a phrase which describes the whole network of social relationships.<sup>45</sup> ‘The social’, consequently, is the target of governmentality analysis. The ‘state’ itself has a less prominent role; it is no longer itself at stake in social relations but stands outside them.<sup>46</sup>

The ‘Governmentality’ lecture undertakes a genealogical examination of ‘government’, the second criterion of Foucault’s definition, beginning in the sixteenth century. We learn that from then until the 1700s, the whole literature

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<sup>41</sup> M Foucault, “‘*Omnes et Singulatem*’”: Toward A Critique of Political Reason’ in M Foucault, *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion, ed; R Hurley, trs) (Penguin, London 2002) 298.

<sup>42</sup> This refers to the concept of ‘biopower’. See below n 76.

<sup>43</sup> Foucault (n 11) 11.

<sup>44</sup> C Gordon, ‘Governmental Rationality: An Introduction’, in G Burchell et al, *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, Chicago 1991) 1, 28 and 34.

<sup>45</sup> Foucault, ‘The Subject and Power’ in M Foucault, *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion, ed; R Hurley, trs) (Penguin, London 2002) 326, 345.

<sup>46</sup> Gordon (n 44).

on government was influenced by Machiavelli's *The Prince* and the question of government was conceptualised as a question of the *state*. However, *The Prince* insinuates an 'art of government' within which 'the prince's relation to his *state* is only one particular mode'.<sup>47</sup> By undermining the significance of the state, Foucault was encouraging a different line of inquiry: 'we should direct our researches on the nature of power not towards the juridical edifice of sovereignty, the state apparatuses and the ideologies which accompany them, but towards *localised systems* [of domination] and towards *strategic apparatuses*'.<sup>48</sup> We should pursue an understanding that the state is a function of changes in *the practice of government*.<sup>49</sup> The state, thus, as he says in his third criterion, gradually becomes 'governmentalised'.

Let us consider for a moment the implications for this project of Foucault's treatment of, first, the state and, second, the meaning and implications of the 'art of government'. First, rather than to talk of 'the state', it is more helpful to talk of 'the social' in a study involving the EU, which is itself a supranational polity that seeks to avoid state-like connotations and yet has a distinct field of activity (e.g., policy construction, law-making) that can be described as 'the social'. The power relations within 'the social' are dispersed throughout the entire network of EU social relations:

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<sup>47</sup> M Foucault, *Security, Territory, Population* (M Senellart, ed; G Burchell, trs) (Palgrave Macmillan, Basingstoke 2007) 205.

<sup>48</sup> Foucault (n 3) 102.

<sup>49</sup> Gordon (n 44) 4. Foucault's inattention to the state has been criticised even by those who use and value his analysis of governmentality. See for example W Brown *Regulating Aversion: Tolerance and the Age of Identity and Empire* (Princeton University Press, Princeton 2006) 78-106.

power ... is conceived ... as a strategy, that its effects of domination are attributed not to “appropriation”, but to dispositions, manoeuvres, *tactics, techniques, functionings*; that one should decipher in a network of relations, constantly in tension, in activity rather than a privilege that one might possess.<sup>50</sup>

In this thesis, these ‘tactics, techniques and functionings’ refer to the power relations and processes within the FRA. The analysis is developed further in Chapter 6, where the tactics, techniques and functionings are interpreted as the actors that make up the Agency’s structure, the classification of these actors as experts, and the use of statistics in the collection of information and data.

Second, within the field of the social government operates as ‘an art’. An ‘art’ refers to that which ‘in its field, imitate[s] what nature carries out on its own’.<sup>51</sup> The model for the art of government, in Foucault’s work, is God imposing his laws upon his creatures and grew out of a type of government based on the natural order: pastoral power. This type of power has connotations of Christian thought and the relation of a shepherd to his sheep. The ‘good shepherd’ represents a ‘pastoral expert’.<sup>52</sup> Pastoral power describes ‘a form of collectivising and individualising power concerned with the welfare of the “flock” as a whole’.<sup>53</sup> This relation has, in modern governmentality,<sup>54</sup> moved

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<sup>50</sup> M Foucault, *Discipline and Punish: The Birth of the Prison* (A Sheridan, trs) (Penguin, London 1991) 26. Emphasis added.

<sup>51</sup> Foucault quoting Aquinas (n 47) 315.

<sup>52</sup> N Rose, ‘The Politics of Life Itself’ (2001) 18 *Theory Culture and Society* 1, 6.

<sup>53</sup> *Ibid* 9.

<sup>54</sup> The starting point of modern governmentality was the emergence of doctrines of reason in sixteenth century Europe such that the principles of government were no longer part of some divine order.

beyond a simple responsibility and obedience, so that there are now multiple ‘entanglements’,<sup>55</sup> or networks, which communicate the relation.

As demonstrated in some of his later work, Foucault’s concern with the ‘art of government’ developed from a concern with ‘security’. The lecture series *Security, Territory, Population* begins with the question: ‘Can we say that the general economy of power in our societies is becoming a domain of security?’<sup>56</sup> His objective then, in early 1978, was to paint a history of the technologies of security in order to determine whether we can actually speak of a ‘society of security’. Some general features of the ‘apparatuses of security’ (or *dispositifs*) are the following: first, spaces of security. In terms of space/territory/boundaries, security is exercised over a whole population (as opposed to discipline, which is exercised over the bodies of individuals). Second, the form of normalisation specific to security (which is different from the disciplinary type of normalisation). Third, population – as both the subject and object of the mechanisms of security. Population is thus ‘undoubtedly an idea and a reality that is absolutely modern in relation to the functioning of political power’.<sup>57</sup> It is through concentrating on population that the concern with ‘government’ took root. ‘Government’ replaces ‘sovereignty’; Foucault finds himself talking less of the sovereign the more he talks about government. Government is not equivalent to ‘rule’. It is this new series of security-population-government that he thought should be analysed.

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<sup>55</sup> Rose (n 52) 10. These are called ‘entanglements’ as they signify (ethical) relations that bind all subjects to themselves and to one another, including the experts themselves.

<sup>56</sup> Foucault (n 47) 10.

<sup>57</sup> *Ibid* 11.

The ‘art of government’ signifies more than the art of governing. Informed by early anti-Machiavellian literature,<sup>58</sup> Foucault distinguishes three characteristics of the ‘art of government’. First, how it understands the meaning of ‘to govern’ and of ‘governor’. ‘Governing’ can be applied to a number of things: a household, children, souls and the sick, for instance. A ‘governor’ may be any monarch, emperor, magistrate, judge and the like. It seems then that governing, the people who govern and the practice of government are multifarious – such that ‘there are many governments in relation to which the Prince governing his state is only one particular mode’.<sup>59</sup> Second, government is described as ‘the right disposition of *things* arranged so as to lead to a suitable end’.<sup>60</sup> In other words, government is more than the targeting of power towards inhabitants and territory, it is a sort of complex of men and things. The ‘things’ are men in their relationships with things such as customs, habits, and ways of thinking and acting. And, third, government is about the rights disposition of those ‘things’ *towards a suitable end*. For the sovereign, the end would be the common good. However, government suggests the emergence of a new type of finality and a plurality of specific ends. For example, the government has to ensure the greatest possible production of wealth, that the people are provided sufficient means of subsistence and that the population can increase; this is a series of specific ends. And these ends will be achieved by arranging (*disposer*) different things to meet these ends. The ends are not achieved, therefore, solely through imposing the law on men

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<sup>58</sup> Foucault refers here to Guillaume de La Perriere’s text *Le miroir politique: contenant diverses manières de gouverner* (1555) in Foucault (n 47) 92. He finds the text disappointing in comparison to *The Prince* but nevertheless containing some valuable insights.

<sup>59</sup> Foucault (n 47) 93.

<sup>60</sup> *Ibid* 96. Emphasis added.



(as with sovereignty) but through the disposition of things – of employing *tactics* rather than laws, of requiring more than simple obedience to the law.

The art of government thus understood did not gain its full scope until the eighteenth century. It remained ‘imprisoned’ until then, blocked within the forms of administrative monarchy for a number of historical reasons.<sup>61</sup> It was not until a specific problem emerged – the problem of population – that the art of government was unblocked. The concern with population made it possible to calculate the problem of government from outside the juridical framework of sovereignty. This was made possible in two ways: first, through the emergence of *statistics*; and second, through population appearing as the end of government. In terms of the former, statistics made it possible to move the focus away from the model of the family to the population as something which possesses its own regularities – its death rate, incidence of disease, its regularities of accidents, and its own economic effects.<sup>62</sup> In terms of the latter, population appears as the end of government, meaning that the end of government is thus not just to govern but to improve the condition of the population – its wealth, longevity and health. In this way, population becomes ‘the subject of needs and aspirations, but also the object of government manipulation; vis-à-vis government, [population] is both aware of what it wants and unaware of what is being done to it’.<sup>63</sup>

Finally, ‘art of government’ is used almost interchangeably with ‘rationality of government’ so as to signify government as an activity or practice. An ‘art of

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<sup>61</sup> *Ibid* 101.

<sup>62</sup> *Ibid* 104.

<sup>63</sup> *Ibid* 105.

government' refers to ways of knowing what the activity of government consists of and how it might be continued. 'Rationality of government' describes a way of thinking about the practice of government: who or what is governed, what governing is, who or what can govern. Therefore, 'government' signifies the birth of an art, of 'absolutely new tactics and techniques'.<sup>64</sup>

ii. *From Discipline to Government*

What is the role of power in this new art of government? In answer to this I explore the genealogy of power relations that Foucault undertook from the earlier idea of disciplinary power to the development of governmentality.

In the work prior to his 'power-government period',<sup>65</sup> Foucault's account of power focused on power as *discipline*. He describes his objective as having been 'to create a history of the different modes by which, in our culture, human beings are made subjects',<sup>66</sup> which he told using a radically different account of power. In his genealogies of the prison (*Discipline and Punish*) and of sexuality (*The History of Sexuality*) he describes how the subject has been 'subjected, used, transformed'<sup>67</sup> through a new mechanism of power that is absolutely incompatible with the idea of sovereignty<sup>68</sup> and that is dependant on bodies. This new type of power is disciplinary power.

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<sup>64</sup> *Ibid* 106.

<sup>65</sup> G Wickham, 'Foucault, Law and Power: A Reassessment' (2006) 33 *Journal of Law and Society* 596, 596. Foucault's lecture series entitled *Security, Territory, Population* (n 47) and the *The Birth of Biopolitics* (M Senellart, ed; G Burchell, trs) (Palgrave Macmillan, Basingstoke 2008) best express the period when Foucault explored 'governmentality'.

<sup>66</sup> Foucault (n 45) 326.

<sup>67</sup> Foucault (n 50) 136.

<sup>68</sup> See, by way of disagreement, Brown (n 49).

Disciplinary power exhibits the following characteristics: first, its capacity to discipline comes from it being exercised by means of a constant and permanent surveillance. It allows for a state of ‘permanent visibility that ensures the automatic functioning of power’,<sup>69</sup> as illustrated perfectly via the model of the panopticon.<sup>70</sup> Second, power is a process, meaning that power cannot be understood as possessed by one individual, to be exercised over another. Rather, ‘[p]ower functions’<sup>71</sup> and individuals are in a position to both submit to and exercise this power. Power is therefore something that circulates or functions only when part of a chain; it refers to ‘a complex strategical situation in a particular society’.<sup>72</sup> Third, power produces knowledge. One directly implies the other and ‘there is no power creation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute...power relations’.<sup>73</sup> Power and knowledge join together at the site of discourse, making this relation intelligible. This knowledge takes the form of subject identities (in *Discipline and Punish*, the delinquent; in *The History of Sexuality*, the sexed subject).

The power/knowledge dyad supports the fourth and final characteristic of power as productive. Power should not fundamentally be associated, as it typically is, with its negative connotations – i.e., it excludes, it represses, it censors, it abstracts, it masks, it conceals – because ‘[i]n fact, power produces;

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<sup>69</sup> Foucault (n 50) 201.

<sup>70</sup> *Ibid* Part Three (3).

<sup>71</sup> M Foucault, *Society Must Be Defended* (D Macey, trs) (Penguin, London 2003) 29.

<sup>72</sup> Foucault (n 11) 93.

<sup>73</sup> Foucault (n 50) 27.

it produces *reality*; it produces domains of objects and *rituals of truth*.<sup>74</sup> This truth, or knowledge, or ‘reality’:

isn’t outside power, or lacking in power ... Truth is a thing of this world: ... it induces regular effects of power. Each society has its regime of truth, its “general *politics*” of truth: that is, the types of discourses which it accepts and makes function as true.<sup>75</sup>

This ‘political economy of truth’ that exists in each society is characterised by five important traits:

truth is centred in the form of scientific discourse and the institutions which produce it; it is subject to constant political and economical incitement (the demand for truth, as much for economic production as for political power; it is the object, under diverse forms, of immense diffusion and consumption (circulating through apparatuses of education and information whose extent is relatively broad in the social body ...); it is transmitted, produced and under the control, dominant if not exclusive, of a few great political and economic apparatuses (university, army, writing, media); lastly, it is the issue of a whole political debate and social confrontation (‘ideological’ struggles).<sup>76</sup>

I analyse human rights as one such discourse of truth. But what does power as discipline have to do with power as government? There is not in fact a

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<sup>74</sup> *Ibid* 194. Emphasis added.

<sup>75</sup> Foucault (n 3) 131.

<sup>76</sup> *Ibid*.

spectacular leap from one understanding to the other. Foucault takes the same methodological course in his later analyses of governmentality as in *Discipline and Punish*, prioritising ‘practices’ over institutions and the state.<sup>77</sup> It is worth taking some time to understand this methodology, since ‘power as discipline’ is an important step towards ‘power as government’ and I use both in this thesis (i.e., the hypothesis of the thesis is that the rights discourse of the FRA shows characteristics of power as discipline and power as government(ality)).

First, the shift from discipline to government is a matter of scale. The same style of analysis that was used to study techniques and practices addressed to *individual* human subjects within particular, local institutions could also be addressed to the technical questions and practices for governing *populations* of subjects.<sup>78</sup> However, the shift is not simply a matter of degree, so that one can say that whereas discipline spoke of a ‘microphysics’ of power (where the target was the subject), governmentality speaks of a ‘macrophysics of power’ (where the target is a population).<sup>79</sup> Discipline remains in the power relation, only now there is a triangle: sovereignty-*discipline*-government.<sup>80</sup> The triangle is not a linear model but a spatial distribution of sovereignty, discipline and government, enabling the government of a polity. The *space* becomes the main concern, wherein the *circulation* of people, merchandise, air and so on, represents a mutation in the technologies of power and a typical feature of

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<sup>77</sup> To illustrate, in *Discipline and Punish* changes in the rationale and meaning of the practice of punishing are the focus, rather than transformations in the structure of the penal institutions.

<sup>78</sup> Gordon (n 44) 4.

<sup>79</sup> Note that the link between the microphysics and macrophysics of power is explained by the term ‘*biopower*’. An interesting step in the evolution of Foucault’s thought from discipline to government, biopower is not directly useful to my analysis. For a more detailed account see Foucault (n 11), especially Part Five; Foucault (n 71); Foucault (n 47); Gordon (n 44).

<sup>80</sup> This is a notable change from Foucault’s earlier view ((n 3) 104) that disciplinary power is ‘absolutely incompatible with the relations of sovereignty’.

modern societies.<sup>81</sup> Discipline was never more important than in the management of the population. Foucault does not imply replacing a society of discipline with a society of government, or a society of sovereignty with a society of discipline. Within the triangle, population is the target and security the essential mechanism.

Second, the governmentality perspective (power as government) retains from disciplinary power the notion of ‘disciplines’. That is, a concern with a ‘multiplicity of often minor processes [which] ... gradually produce the blueprint for a more general method’.<sup>82</sup> The focus remains therefore on ‘meticulous, often minute techniques’.<sup>83</sup>

Finally, the ‘how’ of power is central to the governmentality perspective, as it was in analysing power as discipline. The how question, as explained above, examines how meanings are produced and attached to various social subjects and objects, thus ‘constituting particular interpretative dispositions that create certain possibilities and preclude others’.<sup>84</sup> In other words, how questions highlight an important aspect of power: namely, that power is productive. That is, that power functions so as to create particular and dominant meanings, or subject *identities* and their range of conduct. The result is that identity is an effect of power. If power is also a process, this means that identities are in a constant process of being constructed.

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<sup>81</sup> Foucault (n 47) 29 and 34. See also S Elden, ‘Rethinking Governmentality’ (2007) 26 *Political Geography* 29.

<sup>82</sup> Foucault (n 50) 138-39.

<sup>83</sup> *Ibid.*

<sup>84</sup> Doty (n 26).

In this thesis, I am interested in using Foucault's methodology as a way of analysing practices (of the FRA) as forms of discipline and government. In particular, I am interested in statistics, the idea of the overall good of the population (i.e., the citizenry of the EU) and the panopticon. That is, how statistics and the overall goal of improving the condition of the population by promoting and protecting human rights reveal an 'art of government' at work in the FRA's rights discourse. I examine this in Chapters 6 and 7. I explain how the FRA perfectly illustrates the panoptic schema, revealing processes of disciplinary power within its rights discourse in Chapter 5.

### III. LAW AND GOVERNMENTALITY SCHOLARSHIP

Having given an account of the particular type of Foucauldian critique in which this thesis engages, I now situate this critique in current legal scholarship by providing examples of literature that uses a governmentality perspective. The point of drawing attention to this literature is to highlight examples of how such a critique not only can, but has, been successfully undertaken. These examples illustrate the usefulness, creativity and versatility of a governmentality perspective. Its application in other areas, namely crime control, risk and regulation, and governing liberal-democratic societies supports its use in this thesis. This is in spite of the not so warm reception that Foucault has received from the discipline of Law in general. Here there is little evidence of scholarship that uses Foucault's work, especially compared with the use of Foucault's work in other areas (for example, International Relations

and Political Theory<sup>85</sup>). I show this in section A, where I locate the use of Foucault's ideas in Law as a discipline and in turn emphasise the innovation of using a Foucauldian, governmentality perspective to examine rights and the FRA.

### **A. Foucault and Law**

I discuss here the general use of Foucauldian ideas as part of an accepted canon of approaches to law and the more specific use of certain Foucauldian ideas in the work of particular legal scholars. In terms of the promotion of Foucauldian ideas as an approach to law or legal problems, textbooks on 'legal theory' dating back to the late 1990s have included reference to either critical theory or CLS and in some cases Foucault and law specifically, especially those that are more recent.<sup>86</sup> In terms of the use of Foucault in various branches of scholarship, certain ideas – in particular, on disciplinary power – have been used in the work of a handful of legal scholars. I outline examples below, discussing Alan Hunt and Gary Wickham's notable account of *Foucault and Law* of 1994 and reaction to it.

Hunt and Wickham focused on the concept of governance and were concerned with answering the question: 'What role does law play in modern governmental rationality'? They used governmentality as a 'resource for and

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<sup>85</sup> See for example, Brown (n 49) and Doty (n 26).

<sup>86</sup> For example, H McCoubrey and N White, *Textbook on Jurisprudence* (Blackstone, London 1996) contains a chapter on CLS. See also I Ward, *An Introduction to Critical Legal Theory* (Cavendish: London 1998) and, more recently, A Barron 'Foucault and Law', in J Penner et al (eds) *Jurisprudence and Legal Theory: Commentary and Materials* (OUP, Oxford 2005) and B Golder and P Fitzpatrick, *Foucault's Law* (Routledge, New York 2009).



background to<sup>87</sup> devising a sociology of law as governance. However, not only did they not deal directly with the notion of ‘governmentality’ but the ‘method principles’ for a sociology of law as governance drew more on Durkheim and his analysis of ‘the social’ than on Foucault. Hunt and Wickham interestingly tackled the issue of why the use of Foucault in law is limited, arguing, first, that law was never a central concern for Foucault and, second, that legal scholarship exhibits a longstanding intellectual insularity and is not open to new, critical analyses. Their arguments also pointed to the limits and weaknesses of Foucault’s work on law.

Their approach received some valid criticism. Tadros points to its inadequacies and to shortcomings in other recent jurisprudential scholarship on Foucault.<sup>88</sup> He highlights how the concept of the ‘juridical’ has been misconceived so that the substance of Foucault’s argument is missed. Hunt and Wickham mistakenly equate the term ‘juridical’ with law, whereas juridical refers, rather, to the conception of power relations. Moreover, law as it operates in the field of power relations is only *a* directing force, only a single form of effective norm. Tadros believes that Foucault’s argument nevertheless encourages rather than precludes an account of law. His piece can be read as a validation of the importance of Foucault’s work for an understanding of the way in which modern (human rights) law operates (although his account makes no reference to human rights law *per se*).

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<sup>87</sup> A Hunt and G Wickham, *Foucault and the Law: Towards a Sociology of Law as Governance* (Pluto Press, London 1994) 75.

<sup>88</sup> V Tadros, ‘Between Governance and Discipline: The Law and Michel Foucault’ (1998) 18 *Oxford Journal of Legal Studies* 7.

On a similar note, Wendy Brown and Janet Halley observe a turn to law by left critique in recent decades and use a Foucauldian approach to analyse projects that are founded on the idea of ‘the liberal state’s promise to make justice happen by means of law’<sup>89</sup> (human rights being one such project). They thereby illustrate how Foucault and the law are not mutually exclusive.

Another interesting alternative viewpoint to that of Hunt and Wickham, again downplaying the privileged status of law, is presented by one commentator who provides a Foucauldian critique of international human rights law. Evans complains of the way in which law has colonised the discourse of human rights.<sup>90</sup> This has happened, he explains, through the discipline (given a Foucauldian meaning) that privileged international legal discourse as the sole source of truth-claims for the global human rights regime. Human rights ought, rather, to be understood as three overlapping discourses, each with its own language and normative framework: the legal, political and philosophical. The elevated position given to legal discourse perturbs him since it prompts the following conclusions: first, that international law masks human rights violations; second, that human rights law is a discourse of domination as much as it is a discourse of freedom; and finally, that it stifles the possibility of critique.

Other examples of the use of Foucault by legal scholars include the work of Carl Stychin, who has used Foucault to study rights, sexuality and citizenship

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<sup>89</sup> Brown and Halley (n 12) 7.

<sup>90</sup> T Evans, ‘International Human Rights Law as Power/Knowledge’ (2005) 27 *Human Rights Quarterly* 1046.

in the context of the EU as we saw in Chapter 2.<sup>91</sup> More recently, Katerina Sideri uses Foucault to comment on the ways in which legal rules conceal the ordering of social relations in a study on law-making and governance structures in the EU.<sup>92</sup> Furthermore, in the particular field of international law, an interesting contribution has been made by Leonard Hammer.<sup>93</sup>

The above illustrations, that is those that I have framed as reactions to Hunt and Wickham's approach to Foucault and law, point to the advantages of using Foucault to understand and analyse law. This thesis is adding to this literature, by using Foucault to analyse human rights law and legal scholarship in the context of the FRA (and thus the EU). The thesis also adds, more specifically, to governmentality scholarship.

## **B. Governmentality Scholarship**

The scholarship reviewed here does not come exclusively from the discipline of law, where work on governmentality is still lacking,<sup>94</sup> but from related disciplines and inter-disciplinary areas. Examples are thus taken from, for instance, the fields of criminology and sociology. The commentaries that are cited are referred to by lawyers in legal writing and this further supports the legitimacy of including their insights here.

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<sup>91</sup> See for example C Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Hart, Oxford 2003).

<sup>92</sup> K Sideri, *Law's Practical Wisdom: The Theory and Practice of Law Making in New Governance Structures in the European Union* (Ashgate, Aldershot 2007).

<sup>93</sup> L Hammer, *A Foucauldian Approach to International Law* (Ashgate, Aldershot 2007). Hammer considers various aspects of international law (for example, international legal theory; international human rights via reference to the right to freedom of religion or belief; and human security), analyses the problems posed therein and then presents an alternative understanding in the form of a Foucauldian reading.

<sup>94</sup> Note the exception of Rajagopal's work as discussed in Chapter 2: B Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (CUP, Cambridge 2003).

It is possible to identify the following specific areas in which valuable contributions have been made in the field of governmentality scholarship: crime control; risk and regulation; and governing liberal-democratic societies. (In general, the first two areas can be seen as sub-areas of the latter. I focus on work that examines the ‘governing societies’ and so include this as a third area). It is also interesting to note two general commentaries that point to governmentality as a school of thought in itself: the first is the edited collection entitled *The Foucault Effect*,<sup>95</sup> in which I want to draw attention to the chapter by Colin Gordon, and the second is an article by Nikolas Rose, Pat O’Malley and Mariana Valverde.<sup>96</sup> I begin by discussing the latter two pieces, before going on to look at how governmentality is used in work belonging to the three areas of crime control, risk and regulation, and governing societies.

Gordon focuses on Foucault’s 1978 and 1979 lecture courses, highlighting that these constitute a ‘fresh domain of research’ in which Foucault explored governmental rationality, or ‘governmentality’. Gordon’s chapter provided a comprehensive introduction to the concept of governmental rationality. It has been cited in numerous further analyses of governmentality and the concept of government.<sup>97</sup> The chapter appears in a collection entitled *The Foucault Effect* which, as a whole, is a compilation of studies in governmentality; the authors describe the Foucault effect as ‘the making visible, through a particular perspective in the history of the present, of the different ways in which an

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<sup>95</sup> G Burchell et al (eds), *The Foucault Effect: Studies in Governmentality* (The University of Chicago Press, Chicago 1991).

<sup>96</sup> Rose et al (n 34).

<sup>97</sup> See for example M Dean, *Governing Societies* (Open University Press, New York 2007); D Garland, ‘Governmentality and the Problem of Crime’ (1997) 1 *Theoretical Criminology* 172.

activity or art called *government* has been made thinkable and practicable.’<sup>98</sup>

These studies are thus labelled as something resembling a school of thought in themselves.

This point is also noted by Rose et al, who similarly talk of governmentality studies as a separate category of scholarship. Rose et al examine the spread of the governmentality perspective from the early 1980s onwards, focusing on the reception of this approach. They argue, ultimately, for the continuing productivity and creativity of governmentality as a way of analysing the structures and processes of government. The article suggests that the concepts and methodological choices used in governmentality studies have spread so successfully because they resonated with the trends at the time in a number of independent fields. The authors give examples of the fields in question (citing writings in each field), namely: critical sociology and criminology; science and technology studies; and changes in knowledge practices, codes and formats (i.e., the rise in the use of statistics). Rose et al also draw attention to various subfields in which governmentality is taken up as an approach, including for example social work and nursing (by theoreticians and practitioners alike) and studies in technologies of risk. The end point of the review is to emphasise the legacy of governmentality as a flexible and open-ended tool, which should be retained above all for its creativity.

The creativity of governmentality as a tool has spread to three specific areas: crime control; risk and regulation; and governing liberal-democratic societies.

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<sup>98</sup> Burchell et al (n 95).

First, in the area of crime control, I discuss another of Rose's works. Rose addresses the issue of the staggering increase in the number and variety of regimes of control in advanced liberal democracies.<sup>99</sup> His premise is that programmes of crime control have less to do with the control of crime than with the government of the moral order. Rose asks what contribution recent analyses of governmentality have made to understanding the complex and contradictory pattern of current crime control strategies.<sup>100</sup> He determines that writings on governmentality have identified different spaces open for government (the Community, the global world, for instance) and implicate forms of knowledge and types of expertise within control strategies. They have identified complex '*technologies of government*', which reframed the role of the state and which drew attention to 'the social' as the site of government. The observation Rose is making is that a whole range of technologies of freedom have been invented to govern us 'at a distance'<sup>101</sup> through relatively independent entities. These entities seek to regulate individual conduct by reactivating and regenerating ethical values that help maintain order and obedience 'by binding individuals into shared moral norms and values: governing through the self-steering forces of honour and shame, or propriety, obligation, trust, fidelity and commitment to others.'<sup>102</sup> David Garland makes a similar point with respect to the idea of 'government at a distance'.<sup>103</sup> He analyses the criminological value of the main themes of governmentality

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<sup>99</sup> N Rose, 'Government and Control' (2000) 40 *British Journal of Criminology* 321.

<sup>100</sup> Rose refers to: A Barry et al (eds), *Foucault and Political Reason* (UCL Press, London 1996); M Dean, *Governmentality: Power and Rule in Modern Societies* (Sage, London 1999); M Dean and B Hindess, *Governing Australia: Studies in Contemporary Rationalities of Government* (CUP, Cambridge 1998); N Rose, *Powers of Freedom: Reframing Political Thought* (CUP, Cambridge 1999).

<sup>101</sup> Rose (n 99) 324. Emphasis added.

<sup>102</sup> *Ibid* 324.

<sup>103</sup> Garland (n 97).

literature (including, for example, ideas about ‘the social’) through an analysis of some of the governmental techniques that were emerging in the field of crime control in the 1990s.

In *Criminal Artefacts*, Dawn Moore engages in an analogous exercise, examining the issue of drug control within the broader context of governing.<sup>104</sup> Moore is interested in asking how questions: *How* did the current conception of the criminal addict within the criminal justice system come to be? *How* does it replicate itself and flourish? She describes her project as using in part a ‘governmentality *framework*’.<sup>105</sup> This framework ‘assists in understanding, then, how and why particular practices and mentalities of rule emerge within certain contexts.’<sup>106</sup> The focus within such a framework is on the role of expertise, as well as on the idea of governing the self, and on resistance. The governmentality framework helps Moore to reach the conclusion that ‘the criminal addict is governed through a messy constellation of contingencies’.<sup>107</sup> The relationships and connections that surround the criminal addict mean that there is no one knowledge, expertise, actor or object that governs. Overall, the objective of Moore’s project is, in the spirit of Foucauldian ‘problematism’, to offer a different way of thinking about how we discover and constitute the criminal addict and the mentalities of governance, and in turn to rethink how we respond to crime, perhaps even to rethink the notion of crime itself.

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<sup>104</sup> Moore (n 1).

<sup>105</sup> *Ibid* 6. Emphasis added.

<sup>106</sup> *Ibid* 8.

<sup>107</sup> *Ibid* 158.

Moving on to the second example field, the area of risk and regulation studies, the work of Colin Scott illustrates the use of a governmentality perspective.<sup>108</sup> Scott has moved away from an obsession with ‘law’ to a focus on control and regulation, or regulatory governance. Scott examines governmentality as a theory of the ‘post-regulatory state’; ‘the age of governance’ operates, he argues, via self-regulation rather than through a sovereign-state based system of command and control. An understanding of ‘regulation’ would be bettered using the ‘new tool’ of governmentality – ‘[w]e enrich our understanding of regulation when we have *better tools* to understand the pervasiveness of non-state law and non-hierarchical control processes and their effect on regulatory processes’.<sup>109</sup> In answer to the lawyers’ concern regarding the subservient role of law in regulation, he suggests, it is not that law is ignored – it is rather that ‘the use of law is one amongst a “range of multiform *tactics*” for governing’. According to regulation scholars, law is just one form of effective norm; ‘norms are effective because they form part of a wider scheme of regulation which has monitoring and behaviour modifying mechanisms’.<sup>110</sup>

Finally, governmentality has also been used to investigate the structures of power which are involved in governing societies. For example, Mitchell Dean analyses the idea of ‘governing societies’, where governing and government rely on Foucault’s conception of ‘governmentality’.<sup>111</sup> His book is a move away from ‘hoary old ideas of politics and territorial states to a cultural and

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<sup>108</sup> C Scott, ‘Regulation in the Age of Governance: The Rise of the Post-Regulatory State’ in J Jordana and D Levi-Faur (eds), *The Politics of Regulation* (Edward Elgar Publishing, Cheltenham 2004) 145.

<sup>109</sup> *Ibid* 167. Emphasis added.

<sup>110</sup> *Ibid* 156.

<sup>111</sup> Dean (n 97). See also Dean (n 100).



network form of governance'.<sup>112</sup> The themes featured in the analysis include regarding power as plural and heterogenous – i.e., focusing on network forms of governance and regimes of practices rather than focusing on central and sovereign government – and a rethinking and recovering of the concept of sovereignty.

The above insights are valuable to this thesis: I develop the core ideas of 'technologies of government' and 'government at a distance' (Rose and Garland) by applying them to a rights/governance/EU context. I am interested in asking 'how' questions, as Moore is, and in using governmentality as a 'framework'. Moreover, I support Scott's assertion for governmentality as a 'new tool' for analysis, where the analytical focus is on 'tactics for governing' or, as Dean describes, on 'network forms of governance' and regimes of practices. This thesis therefore supports and supplements governmentality scholarship.

#### IV. CONCLUSION

This chapter has outlined the methodological position of this thesis, which I describe as critique – the particular critique that I engage in is governmentality. The chapter began by presenting a definition of critique followed by a detailed account of a governmentality perspective and this satisfied the first objective of this chapter. The second objective was to give an illustration of work that has used a governmentality perspective, so as to highlight the creativity and

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<sup>112</sup> Dean (n 100) 14.

usefulness of this particular perspective and to situate this thesis as both within and adding to this literature.

A crucial element of critique is time, as Brown states, or ‘political time’;<sup>113</sup> that is, the time must be right within the political imaginary for an engagement with critique. I argue that the time is right for a governmentality critique of human rights in the EU, given the emergence of governance structures that have been allocated a rights agenda – i.e., the FRA. A governmentality perspective emphasises a concern with tactics, techniques and functionings, and with minor processes. The FRA exhibits features that resemble such processes, namely: features that are resemblant of human rights monitoring, the presence of actors, of experts and the role of statistics in the FRA’s structure and operating processes. Analysing these features forms the backbone of the chapters that follow.

The next chapter, Chapter 4, introduces the FRA and describes its origins, structure and tasks. Chapters 5 to 7 then analyse the power relations at work in the FRA, first from an examination of power as discipline (observing the monitoring function of the FRA, in Chapter 5) and then from an examination of power as government (observing the FRA in the context of its governance discourse, in Chapters 6 and 7).

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<sup>113</sup> Brown (n 9) Chapter One.

## *The Fundamental Rights Agency: An Introduction*

### I. INTRODUCTION

The Fundamental Rights Agency of the EU officially came into being on 1 March 2007.<sup>1</sup> Almost a decade in the making, the Agency has blossomed at a rapid rate since March 2007, with respect to both its organisational make-up and its activities. The structural framework of the FRA is now fully in place and its activities and mandate are now clearly defined and underway. In the last few months, the FRA has completed publication of two major documents: its first complete comparative thematic report (on homophobia and discrimination on the grounds on sexual orientation, the ‘Homophobia Report’)<sup>2</sup> and its first EU-wide survey (on minorities and discrimination, EU-MIDIS).<sup>3</sup>

This chapter aims to introduce the FRA and recount the history of the Agency’s development, its organisation and activities. This focus provides a comprehensive understanding of what the Agency does, its place in the EU’s general structure and, most importantly, its place in the EU’s rights discourse.

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<sup>1</sup> The date when Council Regulation 168/2007/EC of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1 took effect.

<sup>2</sup> The ‘Homophobia Report’, as I refer to it throughout this thesis, consists of two parts: European Union Agency for Fundamental Rights (FRA), ‘Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part I: Legal Analysis’, 30 June 2008 and European Union Agency for Fundamental Rights (FRA), ‘Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part II: The Social Situation’, 31 March 2009  
<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_p2\\_0309\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm)> accessed 24 April 2009.

<sup>3</sup> European Union Minorities and Discrimination Survey, survey results  
<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)> accessed 24 April 2009.

Particular features from these observations on the FRA's structure and role are then drawn upon in the analysis in Chapters 5 and 6 – most notably the role of actors and experts, and the collection of information and data as vital to the fulfilment of the Agency's tasks. The account in this chapter runs from October 1998 to April 2009. As I detail below, the seeds of a human rights agency for the EU were sown in October 1998; April 2009 represents the two calendar years that the Agency has been in operation and thus constitutes a reasonable length of time in which to draw observations on its role and functions. By this date, the FRA had produced two of its biggest publications: the Homophobia Report and the EU-MIDIS survey. April 2009, furthermore, represents a practical cut-off point for the timing of this project. The chapter will also discuss academic comment on the Agency, so as to situate the thesis within extant scholarship on the FRA and thereby show that critical analyses on the FRA are lacking. Reviewing the academic literature also serves to broaden the account in this chapter from merely the way the Agency is described in the institutional literature to the way it has been perceived thus far.

The structure of the chapter is as follows: in Part II, I present an account of the origins of the Agency. In Part III, I describe the tasks of the FRA and give evidence of its activities to date. Part IV then discusses the organisation of the Agency, in terms of the layers of actors that are involved. Finally, Part V outlines extant scholarship on the FRA.

## II. THE ORIGINS OF THE FRA

### A. New Beginnings

#### i. *The Climate in 1999: ‘An “Ever-Closer” Union in Need of a Human Rights Policy’*<sup>4</sup>

In 1998, Philip Alston and JHH Weiler detected an unfavourable climate in the EU: the ‘ever-closer union’ was exhibiting a ‘piecemeal, ad hoc, inconsistent, incoherent, half-hearted, uncommitted, ambiguous’<sup>5</sup> approach towards human rights. Their paper, entitled ‘An “Ever-Closer Union” in Need of a Human Rights Policy’<sup>6</sup> was adapted from a report prepared for the *comité des sages*, who were responsible for drafting ‘Leading By Example: A Human Rights Agenda for the Year 2000’.<sup>7</sup> The report was the result of a project, initiated within the European University Institute’s Academy of European Law and funded by the European Commission, to produce a ‘Human Rights Agenda’ for the European Union. The Alston and Weiler paper was the beginning of the impetus that led to the FRA. In June 1999, partly in answer to the challenges raised in the paper, the Cologne European Council began the institutional move towards the FRA, suggesting that ‘the question of the advisability of setting up a Union Agency for human rights and democracy should be considered’.<sup>8</sup> In December 2003, the Brussels European Council proposed something more

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<sup>4</sup> P Alston and J Weiler, ‘An “Ever-Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights’ (1998) 9 *European Journal of International Law* 658.

<sup>5</sup> *Ibid* 676.

<sup>6</sup> *Ibid*.

<sup>7</sup> ‘Leading By Example: A Human Rights Agenda for the Year 2000’, Florence, European University Institute 1998, available in P Alston, *The EU and Human Rights* (Oxford University Press, Oxford 1999) 921. The Agenda was launched at a conference held in Vienna on 9-10 October 1998.

<sup>8</sup> Cologne European Council 3-4 June 1999, Presidency Conclusions, para 46.

concrete: to build on the closest existing institution, the EUMC, and to extend its mandate by turning it into a human rights agency, ‘stressing the importance of human rights data collection and analysis and with a view to defining Union policy in this field’.<sup>9</sup> The Commission concurred and put forward its intention to submit a legislative proposal to amend the Regulation of the EUMC to this effect. The Commission’s support came as a surprise to many,<sup>10</sup> given that it had rejected earlier proposals from the two ‘committees of wise men’ to establish an EU human rights agency.<sup>11</sup>

In December 2004, the Brussels European Council called for further implementation of the agreement to establish an EU Human Rights Agency. The idea for a Human Rights Agency was also included in the ‘Hague Programme: Strengthening Freedom, Security and Justice in the European Union’,<sup>12</sup> which was adopted by the Community on 4-5 November 2004. The ‘Strategic Objectives 2005-2009, Europe 2010: A Partnership for European Renewal – Prosperity, Solidarity and Security’,<sup>13</sup> adopted by the Commission on 26 January 2005, also stated that the protection of fundamental rights should be at the forefront of European action and that the best way forward would be to establish a European Agency of Fundamental Rights.

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<sup>9</sup> Brussels European Council 12-13 December 2003, Presidency Conclusions, Brussels, 5 February 2004, 27.

<sup>10</sup> G de Búrca, ‘New Modes of Governance and the Protection of Human Rights’, in P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU* (Hart, Oxford 2005) 25, 33.

<sup>11</sup> *Ibid.*

<sup>12</sup> OJ 2005/C 53/01.

<sup>13</sup> Communication from the President in agreement with Vice-President Wallström, COM (2005) 12 final, 26 January 2005.

ii. *What's in a Name?*

The FRA replaces its forerunner, the EUMC. This latter body began its activities in 1998 and ended them on 28 February 2007 to become the FRA on 1 March 2007.<sup>14</sup> Whilst the fight against racism, xenophobia and related intolerances remain a part of its mandate, the FRA, as its name conveys, has a broader scope than the EUMC.

The beginnings of the EUMC date back to June 1994, when the Corfu European Council proposed the establishment of a consultative commission on racism and xenophobia. A year later, the Cannes European Council called for the consultative commission, in cooperation with the Council of Europe, to consider the viability of a European monitoring centre on racism and xenophobia. The role of the EUMC was to study the phenomena of racism, xenophobia, islamaphobia and related intolerance, and their manifestations.<sup>15</sup> The Centre did so by analysing causes, consequences and effects, working out strategies to combat racism, and highlighting examples of good practice regarding the integration of migrants and ethnic and religious minority groups in EU Member States. The Regulation establishing the EUMC defined the objectives of the Centre as, to 'collect, record and analyse information and data, including data resulting from scientific research communicated to it by research centres, Member States, Community institutions, international organizations ... and non-governmental organisations'.<sup>16</sup> To achieve these

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<sup>14</sup> The EUMC had been established by virtue of Council Regulation 1035/97/EC of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia [1997] OJ L 151/1, which has now been repealed and replaced by Regulation 168/2007 (n 1).

<sup>15</sup> Information on the EUMC is available on the FRA website  
<[http://fra.europa.eu/fraWebsite/about\\_us/about\\_us\\_en.htm](http://fra.europa.eu/fraWebsite/about_us/about_us_en.htm) accessed> 30 January 2009.

<sup>16</sup> (n 14) art 2(2)(a).

ends, the EUMC set up the European Racism and Xenophobia Information Network (RAXEN) in 2000.<sup>17</sup> RAXEN remains in operation today and now forms part of the network structure of the FRA.

The new human rights body for the EU that was seriously being considered by late 2003 had to have a new (and the right) name, a name that would evoke its more extensive scope. In discussions prior to the proposal from the Commission for legislation on a fundamental rights agency, there was concern over using both ‘fundamental rights’ and ‘agency’ in the title of the body. The debate included discussion of using the term ‘human rights’ versus ‘fundamental rights’, the latter being thought of as more wide-ranging.<sup>18</sup> ‘Fundamental rights’ was also thought to fit better with the concept of citizenship and was, moreover, reflective of the Charter of Fundamental Rights of the EU, whereas human rights feature in the title of the European Convention on Human Rights (ECHR).<sup>19</sup> This distinction between the Charter and the ECHR seems to have brokered the deal in favour of ‘fundamental rights’ being in the name of the new agency since there is a clear mirroring of the title of the Charter. This is appropriate since the Charter represents the mandate of the Agency’s work. It should be noted, however, that the Commission emphasised that there is no definitional difference between the terms.<sup>20</sup>

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<sup>17</sup> *Ibid* art 2(2)(h).

<sup>18</sup> Comment from Deputy Secretary General of the Council of Europe, Mrs M de Boer-Buquicchio in European Policy Evaluation Consortium (EPEC), Preparatory Study for Impact Assessment and Ex-Ante Evaluation of the Fundamental Rights Agency: Public Hearing Report’, February 2005, 19-21.

<sup>19</sup> *Ibid* 13 and 19-21.

<sup>20</sup> *Ibid* 13.



As for labelling the new body as an ‘agency’, the Commission had proposed in 2005 that the body be called the ‘European Human Rights *Institute*’.<sup>21</sup> The Commission reasoned that ‘agency’ implied a body that performs tasks on behalf of somebody else. An ‘institute’, by contrast, whilst working on behalf of the EU institutions and the Member States, would also have a direct influence on citizens and on promoting the awareness of fundamental rights. In addition, it would be similar to national human rights institutes (NHRIs). Comparison was made with the recently established Institute for Gender Equality.<sup>22</sup> The term, evidently, did not stick.

## **B. The Institutional Discourse**

It was 2003 by the time the Commission showed willing to submit a proposal for further legislative action on the setting up of a human rights agency. A dual set of processes led up to the proposal. First, the Commission initiated a public consultation process, launched by means of a Communication presented on 25 October 2004.<sup>23</sup> A large number of written responses were received and a preliminary analysis of the responses, dated 19 January 2005, is available.<sup>24</sup> The Commission also organised a public hearing on 25 January 2005 as part of the public consultation.<sup>25</sup> Second, the Commission undertook an impact assessment, wherein it carefully assessed the impacts of Union measures under

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<sup>21</sup> European Policy Evaluation Consortium (EPEC), ‘Preparatory Study for the Impact Assessment and Ex-Ante Evaluation of Fundamental Rights Agency: Final Report’, February 2005, 10. Emphasis added.

<sup>22</sup> See Council Regulation 1922/2006/EC of 30 December 2006 on Establishing a European Institute for Gender Equality [2006] OJ L 403/9.

<sup>23</sup> Communication from the Commission, ‘The Fundamental Rights Agency Public Consultation Document’, COM (2004) 693 final, 25 October 2004.

<sup>24</sup> European Policy Evaluation Consortium (EPEC), ‘Preparatory study for Impact Assessment and Ex-Ante Evaluation of a Fundamental Rights Agency: Analysis of Responses to Public Consultation’, 19 January 2005.

<sup>25</sup> A Report of this hearing is available (n 18).

different policy options. The results of the impact assessment are presented in a Report of June 2005<sup>26</sup> and are supported by a preparatory study.<sup>27</sup>

On 30 June 2005, the Commission issued its Proposal for a Council Regulation establishing a European Agency for Fundamental Rights and for a Council Decision empowering the European Agency for Fundamental Rights to pursue its activities.<sup>28</sup> The European Parliament gave its views in the form of a Draft European Parliament Resolution on the Proposal on 27 September 2006.<sup>29</sup> Council Regulation 168/2007 establishing a European Agency for Fundamental Rights was then adopted on 15 February 2007,<sup>30</sup> followed a year on by the Council Decision outlining the scope of the pursuit of the FRA's activities – i.e., its Multi-annual Framework – on 28 February 2008.<sup>31</sup> In what follows, I examine each of the three stages – the pre-proposal stage, the proposal, and the legislation that followed – so as to tell the institutional history of the FRA.

*i. The Pre-Proposal Stage*

At this stage the Commission undertook, first, a public consultation, launched by means of a Communication and, second, an Impact Assessment. The

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<sup>26</sup> Commission (EC), Commission Staff Working Paper, Annex to the Proposal for a Council Regulation establishing a European Agency for Fundamental Rights, and to the Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, 'Impact Assessment Report', {COM (2005) 280 final}, 30 June 2005.

<sup>27</sup> (n 21).

<sup>28</sup> COM (2005) 280 final.

<sup>29</sup> Draft European Parliament Legislative Resolution on the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, (COM (2005) 0280 – C6-0288/2005 – 2005/0124(CNS)), 30 November 2006.

<sup>30</sup> (n 1).

<sup>31</sup> Council Decision of 28 February 2008 implementing Regulation 168/2007/EC as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012 [2008] OJ L 63/14.

Communication, first, covered the areas of the Agency's field of action, thematic areas to be covered by the activities of the Agency, its geographic scope, tasks, relations with civil society, synergies with other bodies (e.g., the Council of Europe), and its structure. These issues aroused some curiosity as to what kind of agency the Commission was supporting.

In the introduction to the Communication, the Commission announced that the 'Agency should be a *crossroads*, facilitating contact between the different players in the field of fundamental rights, allowing synergies and increased dialogue between all concerned'.<sup>32</sup> The field of action of the Agency would be defined by Article 6(1) TEU<sup>33</sup> and by the Charter (which affirms the rights common to the constitutional traditions and international obligations of the Member States, including the ECHR, the EU and Council of Europe Social Charters, and the jurisprudence of the European Court of Human Rights and the Court of Justice). A point of discussion was whether to include Article 7 TEU within the scope of the Agency. Article 7 requires Member States to respect the principles set out in Article 6 TEU and allows the Union, in the event of a 'clear risk of serious breach' of one of the stated principles, to take preventive measures (Article 7(1)). Article 7 has a broad reach, since it covers not only the areas in which a Member State is acting under EU law, but also where the Member State is acting outside the scope of EU law. In diplomatic tones, the Commission put forward the message that the Article 7 remit could not be reconciled with the aim of the Agency. Moreover, it could, the

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<sup>32</sup> Communication from the Commission, The Fundamental Rights Agency Public Consultation Document, Brussels 25 October 2004, COM (2004) 693 final, 3-4. Emphasis added.

<sup>33</sup> Art 6(1) TEU reads: 'The Union is founded on the principles of liberty, democracy and respect for human rights and fundamental freedoms'. Note the change, since the Treaty of Amsterdam 1997, from the 'Union is based on' to the 'Union is founded on'.

Commission argued, lead to overlap with the functions of the Council of Europe, risking duplication and contradiction.<sup>34</sup> Another point of discussion was the geographical scope of the Agency, specifically whether this should extend to third countries. The Commission's response was that such an extension would 'dilute' the message of the Agency, since it believed that maintaining the remit of the Agency within the EU was the most effective way of placing responsibility for human rights on the institutions and of helping to determine the capacity and expertise the Agency would acquire. As to the tasks of the Agency, the Communication provided the mould for the final text of the 2007 Regulation, stating that the Agency would be responsible for the 'collection and analysis of objective, reliable and comparable data at the European level'.<sup>35</sup>

The Commission received 94 contributions in response to the Communication, which are available in a preliminary analysis.<sup>36</sup> The responses followed the framework of a set of questions outlined by the Commission as guidelines for response.<sup>37</sup> Contributions were received from a range of groups, namely civil society – NGOs and others (e.g., the AIRE Centre, Amnesty International) – private citizens, NHRIs, anti-discrimination or equal opportunities bodies (e.g., the Northern Ireland Human Rights Commission), national parliaments (e.g., the Joint Committee on Human Rights, House of Commons, UK), Member States and accession states, and international and European organisations (e.g., the Council of Europe). The responses revealed that an absolute majority

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<sup>34</sup> (n 32) 6.

<sup>35</sup> *Ibid* 8. Compare this to Regulation 168/2007 (n 1) art 4 (1)(a).

<sup>36</sup> (n 24).

<sup>37</sup> <[http://ec.europa.eu/justice\\_home/fsj/rights/fsj\\_rights\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/rights/fsj_rights_intro_en.htm)> accessed 4 October 2006.

welcomed the creation of the FRA (only two out of the 94 respondents disagreed with the setting up the Agency<sup>38</sup>). The responses showed a noticeable difference of opinion with respect to certain issues between the Member States and the EU institutions on the one hand, and NGOs on the other. For instance, regarding the debated Article 7 remit of the Agency, NGOs supported a monitoring role for the Agency in addition to the role of collecting and analysing data, expressing a desire to see the Agency act as a ‘watchdog’ for fundamental rights in all Member States.<sup>39</sup> Also, with respect to the activities of the Agency, NGOs wanted a far broader role than ‘mere data and information collection’. They asked for monitoring of human rights abuses ‘on the ground’ and a mandate to respond to problems where they occur, the power to investigate allegations by individuals of human rights violations by EU institutions, and a quasi-judicial mandate. This would act as a tool to allow friendly settlements of disputes without the need to go to court, as well as the power to intervene as a third party in cases before the ECJ.

The public consultation was completed by a public hearing. According to the Public Hearing Report, more than 200 participants – representing NGOs, the Council of Europe, the EUMC and several Member States – were involved in the hearing. The main conclusions of the hearing included that the FRA should be a regulatory and not executive agency, genuinely independent, should offer expertise in the field of human rights by acting as a ‘network of networks’ and should be a ‘supportive instrument’ to the EU institutions.<sup>40</sup> The hearing was

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<sup>38</sup> On the grounds that the Constitution has not been adopted and that human rights issues are better dealt with at the level of the Member States.

<sup>39</sup> (n 24) 8.

<sup>40</sup> (n 18) 2.

structured around the following four discussion topics: 1) the rights and thematic areas of work of the Agency, including its geographical scope, 2) sustaining and securing relations with the Council of Europe, 3) tasks to be allocated to the Agency and, 4) the structure of the Agency. Each of these topics received contributions from different bodies, including the Council of Europe.

The second part of the pre-proposal stage was the Impact Assessment. Its purpose was to present an assessment of the impact of alternative policy options on which to structure the Agency. The Final Report on the Preparatory Study for the Impact Assessment of February 2005<sup>41</sup> raised some interesting definitional issues. The first of these was an issue we have already discussed, namely the distinction between ‘fundamental rights’ and ‘human rights’. The second concerned ‘monitoring’. The Commission distinguished between ‘observatory monitoring’, which it described as the observation of impacts on fundamental or human rights resulting from the implementation of EU legislation and policies, and ‘monitoring in the *legal* sense’.<sup>42</sup> This latter type of monitoring cannot be delegated to a Community Agency due to constitutional constraints in place to help maintain a balance of powers. The old *Meroni* doctrine allows the legislator to delegate regulatory powers only to those institutions provided for by the Treaties.<sup>43</sup> To do otherwise would disrupt the guarantee of a balance of powers as provided for by the Treaty.

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid* 14.

<sup>43</sup> Case 9/56 *Meroni v High Authority* [1957-8] ECR 133. *Meroni* was concerned with the issue of the delegation of powers by the High Authority to independent agencies; the delegation was held to be incompatible where it involves a transfer of discretionary power that implies a large margin of discretion on the part of the agency. (Note also Opinion 2/94 of the Court of Justice

The Final Impact Assessment Report of June 2005 highlighted some ‘clear’ problems and needs with respect to the human rights situation in the EU that were identified in the study.<sup>44</sup> These included problems of data: there was deemed to be a lack of (comparable) information and the fundamental rights data which was available was of a limited quality. In addition, there was a lack of systematic observation of impacts on fundamental rights from EU legislation and policies and there was a lack of public awareness of fundamental rights. The Commission identified five policy options to address these problems and it was the fourth of these that came to inform the FRA. The first was the ‘status quo’ option – this retained current structures, such as the EUMC and the Network of Independent Experts (NIE – discussed later, in Part IV(B)) whilst allowing for short-term developments, such as the Institute for Gender Equality. The second was the ‘focused observation agency’ option – under which the Agency covered a number of thematic areas and provided ‘technical assistance’ to the EU institutions, and the third was ‘general observation Agency’ option – which would have covered more thematic areas than option two. The chosen fourth option was the ‘observation and assessment, union policies only Agency’ option – it included the broader thematic areas of activity of option three. This would provide the Agency with greater responsibility as regards observation of the EU institutions and the Member States where they act within the remit of EU law. The final, fifth

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of 28 March 1996 on *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, where the ECJ ruled that the Community lacked legislative competence under the Treaties to become a party to the European Convention on Human Rights. The ECJ also highlighted the limits of human rights as a legislative foundation for Community action – although note that the Regulation establishing the FRA is based on art 308 EC.)

<sup>44</sup> (n 26).

option was the broadest: ‘assessment, within and outside EU politics Agency’ – it would have given the Agency the remit to monitor fundamental rights within the Member States for the purposes of Article 7 TEU and also when they act autonomously, outside the ambit of EU law.

Option four was considered the most appropriate but ‘second best option’<sup>45</sup> to option five since it entailed medium financial cost and was more politically palatable. Option five was rejected because of, for instance, its uncertain legal basis, the view that its broad mandate would risk overburdening a fledgling agency and that such a broad mandate would risk duplicating the work of other, existing institutions at the European and international levels (most notably the Council of Europe). The Commission also considered ‘horizontal issues’ that the policy option selection raised, including the Article 7 question. The argument for extending the Agency’s mandate was dismissed on the grounds that ‘Article 7 procedures refer to an extraordinary incident and a constitutional crisis’; as a result, a breach of fundamental rights that engaged Article 7 would be so grave that it would not require a special mechanism, i.e., the agency, to notice such a breach.<sup>46</sup> The Commission also considered the issue of coverage of third countries. The argument was to not extend the Agency’s reach to cover third countries since this would demand substantial resources and, once again, risk duplicating the work of existing international and civil society organisations. The final ‘horizontal issue’ the Commission considered was that of the (old EUMC) focus on racism and xenophobia. It

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<sup>45</sup> *Ibid* 73.

<sup>46</sup> *Ibid* 13.



was thought that policy option four would help avoid the feared dilution of racism and xenophobia from the areas of concern of the Agency.

*ii. The Commission Proposal for Secondary Legislation*

Two proposals emerged from the Commission in the summer of 2005: the first was the Proposal for a Council Regulation establishing the FRA and the second was the Proposal for a Council Decision regarding the areas of activity of the Agency. The Commission described a regulation as the appropriate legal instrument for establishing a Community agency and a decision as the most appropriate legal instrument to empower the agency to pursue its activities in the areas referred to in Title VI TEU.<sup>47</sup> Overall, the objectives, scope and tasks of the Agency as referred to in the Proposal made it to the text of the final Regulation. There was, however, one change with respect to scope, which was to remove the Charter from the wording in Article 3 (although recital 9 does mention the Charter as the ‘particular’ reference point for the FRA with respect to fundamental rights). Also, the structure of the Agency changed by the time of the drafting of the Regulation. The Proposal envisaged a Director, a Management Board and an Executive Board (Articles 11-13), whereas, pursuant to the Regulation, the FRA’s structure includes a Scientific Committee (Article 11).

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<sup>47</sup> Title VI: Provisions on Police and Judicial Cooperation in Criminal Matters.

iii. *The Council Regulation and Decision*

Following the Proposal from the Commission, the Parliament was asked to respond and did so in November 2006 in the form of a legislative resolution.<sup>48</sup> It approved the Proposal, with amendments. A few months later, the Regulation of February 2007 established the FRA, which was to be based in Vienna – the home of the old EUMC. The new Agency was inaugurated on 1 March 2007 by the Commission President José Manuel Barroso, together with Austria's federal Chancellor Alfred Gusenbauer and delegates from Austria, Germany, the European Parliament, the Commission and the old EUMC.<sup>49</sup> The account of the occasion that is given in the FRA's magazine, *Equal Voices*, gives the impression of it being an occasion of considerable pomp and ceremony, not least as suggested by the photographs of musicians, flower arrangements, signs of 'thumbs up', smiles on the faces of prominent individuals and the tone of the speeches given by the delegates.

The Regulation defines the foremost objective of the new Agency as the following: 'to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with *assistance and expertise* relating to fundamental rights'.<sup>50</sup> To achieve this objective, the FRA will act within the scope of fundamental rights as defined in Article 6(2) of TEU (Article 3 of the Regulation) and the Charter (recital 9), and will deal with fundamental rights issues in the EU and its Member States

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<sup>48</sup> Draft European Parliament Legislative Resolution on the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights (COM (2005) 0280 – C6-0288/2005 – 2005/0124(CNS)), 30 November 2006.

<sup>49</sup> For details, see the FRA's magazine, *Equal Voices*, Issue 21, October 2007.

<sup>50</sup> (n 1) art 2. Emphasis added.

when they are implementing EU law. The resultant tasks of the Agency, as well its organisation, are discussed below.

A year on from the Regulation and pursuant to Article 5(1), the Council Decision regarding the adoption of a Multi-annual Framework for the FRA was adopted on 28 February 2008.<sup>51</sup> The Multi-annual Framework (MAF) determines the thematic areas of the FRA's activities, extending these beyond (though including) racism and xenophobia. It covers five years, i.e. 2007-2012, and mentions nine thematic areas which the tasks of the Agency will be based in, namely: 1) racism, xenophobia and related intolerance, 2) discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination), 3) compensation of victims, 4) rights of the child, including protection of children, 5) asylum, immigration and integration of migrants, 6) visa and border control, 7) participation of citizens of the Union in the Union's democratic functioning, 8) information society and, in particular, respect for private life and protection of personal data, and 9) access to efficient and independent justice.<sup>52</sup> In addition the Agency may also, according to Article 5(3) of the Regulation, carry out other tasks at the request of the European Parliament, the Council or the Commission that could fall outside these thematic areas.

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<sup>51</sup> (n 31). The Multi-annual Framework was adopted by the Justice and Home Affairs Council of the EU, on a proposal by the European Commission and after consultation with the relevant Committee of the European Parliament (the Civil Liberties, Justice and Home Affairs Committee, or LIBE).

<sup>52</sup> *Ibid* art 2.

### III. TASKS AND ACTIVITIES

The main objective of the FRA, therefore, pursuant to Article 2 of the 2007 Regulation is to provide ‘assistance and expertise’ relating to fundamental rights to the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law, so as to ensure that, through their actions, fundamental rights are fully respected.<sup>53</sup> In the coming sections I examine the tasks and activities that the FRA undertakes in fulfilment of this overarching objective.

#### A. Tasks: The Annual Work Programme

The tasks of the FRA are defined in Article 14 of Regulation 168/2007. The primary task listed is ‘to collect, record, analyse and disseminate relevant, objective, reliable and comparable information and data’.<sup>54</sup> The final text of the Regulation does not refer to ‘monitoring’ as a task of the FRA, despite this seemingly being the focus of earlier discussions and commentaries.<sup>55</sup> Connected to this, the FRA does not have the competence to analyse individual complaints. Under the ‘Frequently Asked Questions’ section of the FRA website, there is the question: ‘You have been discriminated against, can FRA help you?’<sup>56</sup> and it is answered with an explanation of how the individual will be referred, for help, advice and support, to organisations within her Member

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<sup>53</sup> (n 1) art 2.

<sup>54</sup> *Ibid* art 14(1)(a).

<sup>55</sup> See the suggestion for a monitoring function for the Agency in the European Parliament’s reference in May 2005 to the Treaty on European Union (Maastricht Treaty) arts 6 and 7 – in European Parliament Resolution on promotion and protection of fundamental rights: the role of national and European institutions, including the Agency for Fundamental Rights, INI/2005/2007, 26 May 2005, point 26. See also P Alston and O De Schutter (eds), *Monitoring Fundamental Rights in the EU* (Hart, Oxford 2005).

<sup>56</sup> <<http://fra.europa.eu/fra>> accessed 1 March 2009. This information is also contained in a ‘Factsheet About FRA’, available under the ‘About Us’ section.

State (i.e., NHRIs and National Equality Bodies. Lists of these bodies are provided).<sup>57</sup>

Article 14 of the Regulation also places emphasis on the issue of the ‘comparability’ of information and data. A further task of the Agency is thus to ‘develop methods and standards to improve the comparability, objectivity and reliability of data at European level’ through cooperating with the Member States and with the Commission.<sup>58</sup> The Agency is also to ‘carry out, cooperate with or encourage scientific research and surveys, preparatory studies and feasibility studies’;<sup>59</sup> ‘formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing EU law’;<sup>60</sup> to publish an annual report on fundamental rights issues covered by the Agency’s area of activity, and an annual report on its activities;<sup>61</sup> and to publish thematic reports based on its analysis, research and surveys.<sup>62</sup> I will examine the progress that the Agency has made with regard to these tasks presently.

The tasks of the Agency are carried out through various activities and these are covered by the Agency’s MAF (2007-2012), which was described above. The activities of the Agency are, furthermore, set out in an Annual Work Programme, which describes the activities and projects of the FRA for a given year. The activities outlined are in accordance with the MAF. The Annual

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<sup>57</sup> Note the national human rights institution and the national equality body for the UK are the Equality and Human Rights Commission and the Equality Commission for Northern Ireland.

<sup>58</sup> (n 1) art 14(1)(b).

<sup>59</sup> *Ibid* art 14(1)(c).

<sup>60</sup> *Ibid* art 14(1)(d).

<sup>61</sup> *Ibid* art 14(1)(e) and (g).

<sup>62</sup> *Ibid* art 14(1)(f).

Work Programme itself is adopted each year by the Management Board, having been submitted by the Director and following the opinion of the Commission and the Scientific Committee.

The FRA has adopted three Annual Work Programmes to date in 2007, 2008 and 2009.<sup>63</sup> The Work Programme for 2007 had a limited thematic remit of racism and xenophobia since the FRA's MAF had not been adopted by the time the Programme was drafted on 13 July 2007. The 2008 Work Programme was adopted in April of that year and was thus in accordance with the MAF, as well as with the Agency's areas of competence as defined by Regulation 168/2007. The 2009 Work Programme was adopted by the FRA's Management Board in December 2008.<sup>64</sup> In what follows I outline the FRA's most recent Work Programme.

The 2009 Annual Work Programme is the more detailed of the three Work Programmes, showing the proliferation in the FRA's range of activities and organisational development. The 2009 Work Programme envisages a continuation of activity in the areas of racism, xenophobia and related intolerance but adds a variety of projects in other fundamental rights areas, such as asylum, irregular immigrants, data protection, rights of the child, access to justice and rights of the mentally ill. The Programme anticipates that the FRA will publish a number of key reports on 2009, including the final

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<sup>63</sup> <[http://fra.europa.eu/fraWebsite/about\\_us/activities/work\\_programme/work\\_programme\\_en.htm](http://fra.europa.eu/fraWebsite/about_us/activities/work_programme/work_programme_en.htm)> accessed between March 2008 – January 2009.

<sup>64</sup> The 2009 Annual Work Programme was updated on 24 June 2009 <[http://fra.europa.eu/fraWebsite/about\\_us/activities/work\\_programme/work\\_programme\\_en.htm](http://fra.europa.eu/fraWebsite/about_us/activities/work_programme/work_programme_en.htm)> accessed 1 July 2009. The time frame of this thesis means that these changes have not been included in the discussion here.

results of its thematic report(s) on homophobia (which I address below in section B).

An interesting adjunct to the 2009 Programme is section 1 on ‘who we are and what we do’, which outlines the Programme’s focus as not only the MAF but also the Charter. A clear and deliberate link has been made between the two (emphasised by the diagrammatical explanation of page 4 of the Programme), highlighting that the MAF falls broadly under the six chapters of the Charter (dignity, freedoms, equality, solidarity, citizen’s rights and justice). There is emphasis in this first section on cooperation with the Council of Europe,<sup>65</sup> and with governmental organisations and public bodies competent in the field of fundamental rights in the Member States (including NHRIs, equality bodies, Ombudsmen institutions) and international organisations such as the UN. This comes under the heading of ‘working methods – a *new integrated* approach’.<sup>66</sup> This new integrated approach covers not only relations between bodies but also relations between rights issues. The programme highlights that in addition to the specific thematic areas outlined in the MAF, the FRA ‘also carries out work on Fundamental Rights in general and undertakes activities which cut across the various thematic areas (*transversal* and *horizontal* tasks)’.<sup>67</sup> This latter wording is new (the Regulation does not describe the scope of the Agency’s tasks thus).

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<sup>65</sup> Emphasis was also placed on a relationship of cooperation and coordination between the FRA and the Council of Europe in the introductory comments to the 2008 Work Programme, in accordance with art 9 of Regulation 168/2007 (n 1).

<sup>66</sup> European Union Agency for Fundamental Rights (FRA), ‘Annual Work Programme 2009’, December 2008, 3

<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/publications\\_reports\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/publications_reports_en.htm)> accessed 15 March 2009. Emphasis added.

<sup>67</sup> *Ibid* 5. Emphasis added.

The rest of the Programme then covers, first, the activities for 2009, second the horizontal activities covering all MAF areas, third the organisation and funding of the meetings of the bodies of the agency, fourth a summary of human resources, and finally a summary of financial resources. The third, fourth and final sections are self-explanatory. In what follows, I focus on the activities for 2009 and the horizontal activities in all MAF areas.

Under activities for 2009, the Work Programme states that the FRA will develop its work in seven out of the nine thematic areas of its MAF and it locates each area within one of the chapters of the Charter. The thematic areas covered are the following: information society and respect for private life and protection for personal data (which comes under the chapter entitled ‘Freedoms’ in the Charter); asylum, immigration and integration of migrants (‘Freedoms’); discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds, i.e., multiple discrimination (‘Equality’); rights of the child (‘Equality’); participation of the citizens of the EU in the EU’s democratic functioning (‘Citizen’s Rights’); access to efficient and independent justice (‘Justice’). Under each of these thematic areas, specific projects are outlined with details of whether they are ‘first priority’ or ‘second priority’,<sup>68</sup> research activities, communication and awareness raising,

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<sup>68</sup> The projects proposed in the 2009 Work Programme exceed the financial and human resources capacity of the Agency for that year. Therefore, the Management Board of the Agency is to select the most important projects – and these are marked as ‘first priority’ and are categorised as such because they follow up past work, correspond to key EU priorities and



networking and educational activities and performance indicators. So, for example, under the thematic area of ‘discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds, i.e. multiple discrimination’, a particular project listed is ‘multiple and intersectional discrimination on grounds of gender, age and ethnic origin in the EU Member States’. It is marked as ‘first priority’, with a discussion of how, despite the existence of the Race Equality Directive which covers multiple discrimination and the growth in academic research on multiple discrimination, there is a lack of primary and evidential data on the intersecting and cross-cutting themes of discrimination. Where more than two grounds of discrimination are being explored within a project, the FRA finds that this is normally with regard to women and ethnic minorities and usually in the field of employment – the significant intersection of age, ethnic origin, sex, gender and race is less well-recognised, particularly in the areas of health and employment.

The FRA seeks to encourage a better understanding of the multiple dimensions of discrimination. As a result, it is developing a major three-year research project, with a quantitative and qualitative dimension, which may be extended to cover multiple discrimination against young people, additional combinations of grounds of discrimination such as race, religion, disability or sexual orientation, and areas such as access to housing, social security, education, goods and services. Under ‘research activities’, the Work Programme specifies that the project will be initiated in 2009 with ‘work in-house’ ‘to develop

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are considered essential to work in a specific area. Other projects which, although important, can be postponed until next year are listed under ‘second priority’.

appropriate, innovative and robust methodological approaches for its research work in 2010’.<sup>69</sup>

Under horizontal activities covering all MAF areas, the Work Programme lists the following activities: networking and stakeholder cooperation, research and data collection, and communication and awareness-raising. The Programme states how each of these is to be achieved. Thus, for instance, under networking and stakeholder cooperation, the Programme specifies the bodies with which the Agency cooperates, for example the Council of Europe and the Fundamental Rights Platform (FRP). The Programme also outlines the following objectives: human rights education (addressing not only the needs of the stakeholders but the long term aim of increasing greater public awareness and citizens’ active participation in democratic institutions), training for EU correspondents (training journalists on fundamental rights issues) and the fundamental rights conference (planned for 2009, to bring together a variety of stakeholders – including international organisations, inter-governmental organisations, NGOs, governments and victims support organisations – to support good practice and policy development at the European, national and local level) .

## **B. Products**

The FRA collects, records, analyses and disseminates a significant amount of information and data on fundamental rights issues. The ‘products’<sup>70</sup> of this activity cover the following areas: reports and related publications; news,

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<sup>69</sup> (n 66) 15.

<sup>70</sup> The new FRA website lists the Agency’s output as ‘products’ – see at <[http://fra.europa.eu/fraWebsite/products/products\\_en.htm](http://fra.europa.eu/fraWebsite/products/products_en.htm)> accessed 10 March 2009.

education and training; and online documentation. I focus on reports and related publications, since under this category the FRA has produced its most detailed and wide-ranging outputs: the annual reports, the Homophobia Report and its first EU-wide survey (EU-MIDIS). I return to these three publications throughout the coming chapters of the thesis.

*i. Reports and Related Publications*

*a. The Annual and Thematic Reports*

As evident from the name, the Agency produces one annual report per year. According to Article 4(1)(e) and (g) of Regulation 168/2007, the FRA is to produce one annual report *on fundamental rights issues* covered by the Agency's areas of activity (highlighting examples of good practice) and one annual report on its *activities*. The former is what is referred to as 'The Annual Report' on the FRA's website<sup>71</sup> and it is the prime document addressing the Agency's task of collecting, recording, analysing and disseminating relevant, objective, reliable and *comparable* information and data.<sup>72</sup> The annual report on the Agency's activities is referred to as 'The Activity Report' and covers the achievements of the FRA in the given year.<sup>73</sup> It discusses the role of the FRA, its work with EU bodies, Member States and other stakeholders, and

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<sup>71</sup> *Ibid.* See under 'Publications and Reports', 'Annual Reports'.

<sup>72</sup> The statistics collected by the networks at the national level across 27 Member States must be *comparable* if they are to support the overall desired outcome of improving the knowledge and understanding of fundamental rights across the EU. See the Work Programme 2009 (n 66), 'Outcome', listed under 'Research and Analysis – Development of Data Comparability', 22.

<sup>73</sup> The Activity Report is available under the 'About Us' section of the FRA's website, under 'Activities': <[http://fra.europa.eu/fraWebsite/attachments/ar08p1\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/ar08p1_en.pdf)> accessed 10 March 2009.

cooperation and awareness raising activities. The 2008 Annual Report was released on 24 June 2008 and covers fundamental rights issues for 2007.<sup>74</sup>

Since the MAF was not in place during the reporting period, the focus of the 2008 Annual Report is racism, xenophobia and related intolerance. The dominant theme of the Report is the application of the Race Equality Directive,<sup>75</sup> which is the main legislation addressing discrimination on the grounds of racism and xenophobia. The topics of the Report are: an overview of the legal and institutional initiatives against racism and discrimination; racist violence and crime; racism and discrimination in the areas of social life, which covers employment, housing, education and healthcare; and developments in policy and legislation to tackle racism and xenophobia at the EU level. In each of these topic areas, the focus is on statistical data and information gathering and the Report aims to provide a comparative analysis of the statistics. For example, on the first topic – the overview of initiatives against racism and xenophobia – the Report notes that the full implementation of the Race Equality Directive is incomplete. It examines the number of sanctions issued, which are (if proportionate) a legitimate and mandatory response to ethnic and racial discrimination, by each of the Member States using the available statistics. According to these, the UK has the most effectively applied sanctions against ethnic discrimination in the EU. The UK, according to the available statistics, leads as regards the number and range of sanctions issued in racial or

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<sup>74</sup> European Union Agency for Fundamental Rights (FRA), 'Annual Report 2008', 2009 <[http://fra.europa.eu/fra/material/pub/ar08/ar08\\_en.pdf](http://fra.europa.eu/fra/material/pub/ar08/ar08_en.pdf)> accessed 16 November 2008. The Annual Report 2009, covering fundamental rights issues in the year 2008, was published on 24 June 2009 <[http://fra.europa.eu/fraWebsite/attachments/FRA-AnnualReport09\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA-AnnualReport09_en.pdf)> accessed 1 July 2009. It falls outside the time frame of this study.

<sup>75</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Race Directive') [2000] OJ L 180/22.

ethnic discrimination cases. The final part of the Report includes conclusions and opinions of the FRA, on each of the topic areas of the Report. These are addressed, in this instance, to the Member States.

According to Regulation 168/2007, the FRA is also to produce thematic reports, which cover analyses, research and surveys in the thematic areas of the MAF and in response to requests from the European Parliament, the Council or the Commission.<sup>76</sup> Individual country reports are produced by experts at the national level and these are compiled into an EU level report which constitutes the *comparative* thematic study, drawing comparisons between the Member States, identifying gaps and examples of good practice.<sup>77</sup> There has been one complete comparative thematic study from the FRA to date, the Homophobia Report, consisting of two parts: the legal analysis (published on 30 June 2008) and the social analysis (published on 31 March 2009).<sup>78</sup> This two-part approach to the legal and sociological aspects of the thematic area is referred to as a ‘socio-legal analysis’.<sup>79</sup> Forthcoming comparative studies, anticipated during 2009, are on child trafficking, discrimination on the grounds of race and ethnicity in the area of employment and NHRIs in the EU.<sup>80</sup>

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<sup>76</sup> (n 1) art 4(1)(f) and art 5(3).

<sup>77</sup> The FRA’s website makes a distinction between thematic reports and comparative reports – arguably this distinction is confusing. Regulation 168/2007 (n 1) makes reference only to thematic reports (art 4(1)(f)) and, as I have explained here, what the FRA website calls ‘comparative reports’ are the compiled national thematic reports of the 27 Member States. These are also referred to as the ‘comparative thematic studies’.

<sup>78</sup> (n 2).

<sup>79</sup> European Union Agency for Fundamental Rights (FRA), ‘Annual Work Programme 2007’, 2007, 17.

<sup>80</sup> FRA News, March 2009 < [http://fra.europa.eu/fraWebsite/attachments/newsletter-march09\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/newsletter-march09_en.pdf) > accessed 10 March 2009. The thematic report ‘Child Trafficking in the EU: Challenges, Perspectives and Good Practices’, originally anticipated in Spring 2009, was released on 7 July 2009 < [http://fra.europa.eu/fraWebsite/attachments/Pub\\_Child\\_Trafficking\\_09\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/Pub_Child_Trafficking_09_en.pdf) > accessed 10 July 2009.

The Homophobia Report has drawn a vast amount of media attention, with support for the FRA's Director as 'one who swims against the stream'.<sup>81</sup> The context of the Report is a request from the European Parliament, in June 2007, for a comprehensive comparative study on the existence of homophobia and discrimination on the grounds of sexual orientation in all Member States. The Report was intended to contribute to the debate on the need for a new 'horizontal directive' covering all grounds of discrimination. The FRA's mandate for supporting the prohibition of unequal treatment on the basis of sexual orientation is Article 13 EC and Article 21(1) of the Charter, two of few international instruments to explicitly endorse the prohibition. Existing Community legislation also prohibits direct or indirect discrimination on the grounds of sexual orientation but only with respect to employment.<sup>82</sup> This, the FRA observes, means that the principle of equal treatment is applied 'unequally' through existing directives, creating an artificial 'hierarchy' of grounds of discrimination where one is protected more fully than the others. The debate on a new horizontal directive revolves around whether to extend the scope of the Race Equality Directive so as to cover other grounds, such as sexual orientation, disability, age, religion and belief. In providing a background context, the FRA describes recent years as presenting a worrying social situation, evidenced by events such as the banning of Pride marches and hate speech from politicians.<sup>83</sup> An EU response was set in motion by a

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<sup>81</sup> The Director was presented with the 'Salmon of the Year' award by the Danish National Association for Gays and Lesbians (LBL) – FRA Press Release of 18 August 2008 <<http://fra.europa.eu/fra>> accessed 10 September 2008.

<sup>82</sup> Council Directive (EC) 78/2000 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

<sup>83</sup> European Union Agency for Fundamental Rights (FRA), 'Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part II: The Social Situation', 31 March 2009

resolution of the European Parliament in 2005, which condemned homophobia and sexual orientation discrimination.<sup>84</sup> Following the publication of the Homophobia Report, the Commission issued a Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation<sup>85</sup> in July 2008.

Part I of the Homophobia Report, 'The Legal Situation' is a comparative analysis based on the national reports compiled by the FRA's legal experts (FRALEX).<sup>86</sup> It consists of data on the legal protection provided to LGBT (lesbian, gay, bisexual and transgender) persons in the areas of employment, family reunification, freedom of assembly, criminal law and general free movement issues. Part I also focuses separately on transgender issues and highlights examples of good practice in the Member States to overcome homophobia and sexual orientation discrimination.

The FRA draws a number of conclusions from the data gathered and, in fulfilment of its objective of providing assistance and expertise to the Community and its Member States, delivers its opinions on these results in

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<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_p2\\_0309\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm)> accessed 24 April 2009.

<sup>84</sup> European Parliament Resolution on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States, INI/2008/2184, 2 April 2009.

<sup>85</sup> Commission (EC), Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final, 2 July 2008.

<sup>86</sup> European Union Agency for Fundamental Rights (FRA), 'Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States Part I: Legal Analysis', 30 June 2008, 8 <<http://fra.europa.eu/fra/index>> accessed 1 August 2008. The FRA's teams of legal experts are collectively referred to as FRALEX; their position in the FRA's structure is explained below in Part IV(B). In developing Part I of the Report, the FRA also consulted with key stakeholders, such as the Commission, the Commissioner for Human Rights of the Council of Europe and the European level NGO, ILGA-Europe.

accordance with Article 4(1)(d) of Regulation 168/2007. The FRA generally finds that the legal protection afforded to LGBT persons varies considerably across the EU and puts forward the following five opinions:<sup>87</sup> first, that there is an ‘equal right to equal treatment’ – the FRA supports the creation of a horizontal directive for all discrimination grounds covered by Article 13 EC (following the model of the Race Equality Directive). Second, the FRA states that the rights and advantages conferred on married couples should be extended to unmarried, same-sex couples joined by registered partnership or where the relationship shows a sufficient degree of permanency. The rights and advantages referred to are those provided for under the Free Movement Directive, the Family Reunification Directive and the Qualification Directive.<sup>88</sup> Third, the Agency suggests that the Commission consider proposing legislation to cover homophobia – specifically hate speech and homophobic hate crime. Fourth, the FRA emphasises the position of transgender persons as victims of discrimination and homophobia and proposes that this be recognised in the suggested new horizontal directive, and in new or improved legislation in the Member States (to ensure, for instance, the full legal recognition of the new gender). The Agency supports this opinion with the suggestion that the ECJ’s interpretation of equal treatment to include transgender discrimination be clarified, so that there is neither confusion nor differential application of the principle of equal treatment within Member States. It also proposes that the

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<sup>87</sup> *Ibid.*

<sup>88</sup> Council Directive 2004/38/EC of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (‘Free Movement Directive’) [2004] OJ L 158/77; Council Directive 2003/86/EC of 22 September 2003 on Family Reunification (‘Family Reunification Directive’) [2003] OJ L 251/12; Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (the ‘Qualification Directive’) OJ L 304/12.



notions of ‘sex’ and ‘gender’ be interpreted more broadly, so as to include transvestites and ‘all those to wish to present their gender differently’.<sup>89</sup> Finally, the FRA gives an opinion on the finding that there is a lack of statistical data on discrimination on the grounds of sexual orientation, stating that the lack is partly attributable to misunderstandings concerning the requirements of EU data protection legislation. It suggests a review of the processes of collecting sensitive personal data for statistical purposes.

Part II of the Homophobia Report, ‘The Social Situation’, examines the ‘social situation’ of LGBT persons drawing on material gathered through interviews with LGBT NGOs, equality bodies and public authorities in all Member States, and a questionnaire survey of stakeholders. This data is combined with existing academic literature and reports drafted by national researchers (a list of which is given in Annex 1 of the Report). The expert bodies responsible for undertaking the research were the Danish Institute for Human Rights (DIHR) and the international consultancy firm, COWI. Part II is structured around eleven themes: attitudes towards LGBT persons, hate crime and hate speech, freedom of assembly, the labour market, education, health, religious institutions, sports, media, asylum and multiple discrimination. The focus of Part II is on the social aspects of the situation regarding protection against discrimination as well as whether, and in what ways, LGBT persons experience homophobia sexual orientation discrimination and transphobia. It is meant to be read in conjunction with Part I so as to provide a complete set of evidence for the FRA to ‘develop its opinions and to tackle the problems identified’.<sup>90</sup>

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<sup>89</sup> (n 86) 157.

<sup>90</sup> (n 83) 24.

The key findings of Part II of the Report (i.e., the FRA's 'conclusions') can be divided into the general and the specific. The FRA finds that, generally, LGBT persons experience homophobia, discrimination and transphobia in different forms in all Member States, often taking the form of demeaning and derogatory statements. The different forms of this negative treatment manifest themselves in schools, in the workplace, in retirement homes and in the refusal to recognise same-sex couples as full legal partners.

Specifically, the FRA identifies, first, that there is a phenomenon of 'invisibility' of LGBT persons in various sectors of EU society, which means that discrimination against LGBT persons is consequently less visible and its extent difficult to determine. This is reinforced by a strategy of invisibility, whereby LGBT persons want to remain invisible by not being (able to be) open about their status, for fear of homophobia, discrimination and transphobia and so do not report their experiences of discrimination. Second, the FRA determines the extent of homophobia and discrimination, stating that it affects LGBT persons in all areas of social life. For example, instances of homophobic speech are found in the media, at times articulated by prominent political or religious figures. Third, the FRA comments on a lack of statistical data, which shows, according to the Agency, that reporting systems for national collection of official data are either missing or insufficient in most Member States. Official statistical data on discrimination is collected in only a few Member States and only within a few areas (e.g., on incidents of homophobic hate speech and crime, data is collected by recording the number of police reports

or court decisions in Lithuania, Sweden and the UK; no data is collected in the remaining 24 Member States). Fourth, the FRA observes a significant data gap: academic research and unofficial NGO data regarding homophobia, discrimination on the grounds of sexual orientation and transphobia are lacking in many Member States and at the EU level. This points to a deep lack of qualitative and quantitative research and statistics on all the thematic areas covered in this Part of the Homophobia Report.

The FRA gives a total of 32 opinions in Part II of the Report, the first and foremost being support for a horizontal directive on all discrimination grounds – the FRA welcomes the Commission’s Proposal of 2 July 2008 for a Council Directive on equal treatment. The remaining opinions come under the headings of strengthening the implementation of anti-discrimination legislation, combating hate crime, protecting the right to freedom of assembly, improving asylum procedures, equal treatment in the labour market, equal treatment in health, equal treatment and participation in sport, improving media reporting and improving knowledge through research and data collection. There is, therefore, repeated emphasis on the lack of statistical data. This becomes crucial to the analysis in Chapters 6 and 8 of this thesis.

b. Other Publications: The Survey

The FRA released the results of its first EU-wide survey, EU-MIDIS, in April 2009. Given the scale and uniqueness of this survey, it is what I focus on here.

In addition, the FRA also produces rapid responses,<sup>91</sup> studies and discussion papers,<sup>92</sup> and statements.<sup>93</sup>

EU-MIDIS is the first ever EU-wide survey to record the experiences of discrimination and racist crime suffered by immigrant and ethnic minority persons resident in the EU Member States. As the FRA confirms, a ‘survey of this kind has never been undertaken in Europe’.<sup>94</sup> Impetus for EU-MIDIS came from FRA findings, in its reports, of a *severe lack of data* on minorities in many EU countries.<sup>95</sup> This lack of (comparable) data has, according to the FRA, made it difficult for policy-makers at the EU and international levels to intervene to tackle discrimination and victimisation against minorities. The survey aims to be an instrumental tool in the development of policies that will address discriminatory and racist practices, and improve support structures for those whom it labels as victims of discrimination and racist crime.

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<sup>91</sup> The idea of the ‘rapid response’ is a mechanism that was instituted by the EUMC. It refers to the FRA reacting to a particular, recent set of factual events which require further examination to assess whether there has been a breach of fundamental rights and to identify any relevant information that may result in future action by the FRA or EU institutions. The FRA website lists four documents produced by the FRA under ‘rapid response’ – including, for example, an incident report which analyses the impact of the bomb attacks that took place in London on 7 July 2005 on the EU’s Muslim communities: ‘The impact of 7 July 2005 London bomb attacks on Muslim Communities in the EU (10/11/2005 - November 2005)’ <[http://fra.europa.eu/fraWebsite/products/publications\\_reports/rapid\\_responses/pub\\_tr\\_impact\\_londonattacks\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/rapid_responses/pub_tr_impact_londonattacks_en.htm)> accessed 15 March 2009.

<sup>92</sup> These are varied and may consist of external papers written by academic or other specialists that are commissioned by the FRA as background papers for forthcoming projects or activities. They may also be internal papers or lectures that are written by FRA staff for presentation at European conferences or other such events. For examples see <[http://fra.europa.eu/fraWebsite/products/publications\\_reports/studies\\_discussion\\_papers/studies\\_discussion\\_papers\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/studies_discussion_papers/studies_discussion_papers_en.htm)> accessed 15 March 2009.

<sup>93</sup> For example, the FRA recently issued a statement on the occasion of International Women’s Day (8 March 2009) <[http://fra.europa.eu/fraWebsite/news&events/news&events\\_en.htm](http://fra.europa.eu/fraWebsite/news&events/news&events_en.htm)> accessed 20 March 2009.

<sup>94</sup> European Union Agency for Fundamental Rights (FRA), ‘EU-MIDIS European Union Minorities and Discrimination Survey: Technical Report: Methodology, Sampling and Fieldwork’, 2009 <[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)> accessed 24 April 2009.

<sup>95</sup> <[http://fra.europa.eu/fraWebsite/eu-midis/eumidis\\_details\\_en.htm](http://fra.europa.eu/fraWebsite/eu-midis/eumidis_details_en.htm)> accessed 8 May 2009.

The surveyed groups were selected on the basis of information supplied to the FRA by RAXEN (i.e., detailed national annual reports on the vulnerability of different minority groups to discrimination and victimisation in each Member State), identification of the largest minority group/s in each Member State (which had to reach a minimum overall size of 5 percent to be sufficient for random sampling in specific areas), and the availability of the group/s to be surveyed in more than one Member State (which allowed for the identification of ‘aggregate groups’ for comparison between Member States – e.g., ‘Roma’.) The groups surveyed therefore included, for example, Asians (Cyprus), Central and Eastern Europeans (Ireland, UK), Roma (Bulgaria, Czech Republic, Greece, Hungary, Poland, Romania and Slovakia) and North Africans (Belgium, France, Italy, Malta, Netherlands and Spain).<sup>96</sup> The survey data was collected via face-to-face interviews with 23,500 immigrant and ethnic minority people in all 27 Member States during 2008. FRA collaborated with Gallup Europe, who were signed as the main contractor after a tendering procedure, to carry out the full-scale survey throughout the EU during 2008. The survey was carried out using the method of random sampling, so as to ensure results were as representative as possible of the groups and locations surveyed.<sup>97</sup>

The results of the survey are to be released in a series of reports during 2009 and 2010. The FRA has so far released an ‘EU-MIDIS at a glance’ report

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<sup>96</sup> For a full list and definitions of the groups see European Union Agency for Fundamental Rights (FRA), ‘EU-MIDIS at a Glance: Introduction to the FRA’s EU-wide Discrimination Survey’, 2009, 14-15 <[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)> accessed 24 April 2009.

<sup>97</sup> For further detail on the sampling methods see *ibid* 18 and (n 94) 13.

(introducing the survey and key findings)<sup>98</sup> and a full technical report (outlining the methodology).<sup>99</sup> It is to produce a series of nine ‘Data in Focus’ reports, which give details on selected themes to emerge from the research – the first in the series, on ‘The Roma’, has been released on 22 April 2009.<sup>100</sup> The Roma were chosen as the first group on which to focus since EU-MIDIS showed that, of all the groups surveyed, the Roma reported the highest levels of being discriminated against. A full results report is to be presented at the FRA Fundamental Rights Conference in December 2009, in Stockholm. The key findings of the survey are summed up by the FRA’s Director in the following terms: ‘[t]he survey reveals how the “dark figure” of racist crime and discrimination really is in the EU. Official racism figures only show the tip of the iceberg.’<sup>101</sup> Three key findings can be identified:<sup>102</sup> first, that crime and discrimination are grossly under-reported. Second, that there is a sense of resignation among minorities and migrants – i.e., the FRA reports that 82% of respondents who claimed they had been discriminated against did not report their most recent experience and comments that this reveals an ‘urgent need for *better information*’ as well as pointing to a possible lack of support services in

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<sup>98</sup> (n 96).

<sup>99</sup> (n 94).

<sup>100</sup> European Union Agency for Fundamental Rights (FRA), ‘EU-MIDIS European Union Minorities and Discrimination Survey: Data in Focus Report: The Roma’, 2009 <[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)> accessed 24 April 2009. The second ‘Data in Focus’ report, ‘Data in Focus Report 2: Muslims’ was released on 28 May 2009 <[http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS\\_MUSLIMS\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS_MUSLIMS_EN.pdf)> accessed 1 July 2009.

<sup>101</sup> FRA Media Release, ‘EU survey of minorities and immigrants sheds new light on the extent of racism in the EU’ (Vienna/Brussels 22 April 2009) <[http://fra.europa.eu/fraWebsite.eu-midis.index\\_en.htm](http://fra.europa.eu/fraWebsite.eu-midis.index_en.htm)> accessed 24 April 2009.

<sup>102</sup> <[http://fra.europa.eu/fraWebsite.eu-midis.index\\_en.htm](http://fra.europa.eu/fraWebsite.eu-midis.index_en.htm)> accessed 24 April 2009. See also ‘Speaking Points for EU-MIDIS Press Conference’, Press Conference Speech by Morten Kjaerum <[http://fra.europa.eu/fraWebsite.eu-midis.index\\_en.htm](http://fra.europa.eu/fraWebsite.eu-midis.index_en.htm)> accessed 24 April 2009.

some Member States.<sup>103</sup> Third, that the Roma are most vulnerable to discrimination and racist crime.

The FRA's Director comments on the hope that '[t]his data will help us to better understand what is needed to *change the situation for the better*',<sup>104</sup> and outlines the ways in which policy-makers can use the data with this end goal in mind. In this respect, he makes three points: the data can, first, assist policy-makers in developing effective policy responses to address discriminatory and racist practices and to improve support structures for victims. Second, there is a need to encourage reporting and to improve the recording of experiences of discrimination and racist crime. Finally, the data will help in targeting support measures and funds at 'those groups that need it most' – for example, the Roma.<sup>105</sup>

#### c. FRA Opinions

According to Article 4(1)(d) of Regulation 168/2007, the FRA is to 'publish conclusions and *opinions* on specific thematic topics for Union institutions and the Member States when implementing Community law', on its own initiative or at the request of the European Parliament. These opinions are detailed

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<sup>103</sup> (n 101). Emphasis added in quotation.

<sup>104</sup> 'Speaking Points for EU-MIDIS Press Conference', Press Conference Speech by Morten Kjaerum, 5 <[http://fra.europa.eu/fraWebsite.eu-midis.index\\_en.htm](http://fra.europa.eu/fraWebsite.eu-midis.index_en.htm)> accessed 24 April 2009. Emphasis added.

<sup>105</sup> *Ibid* 6.

documents that are available to download from the FRA's website.<sup>106</sup> The FRA also includes opinions in its comparative reports, as described above.<sup>107</sup>

ii. *News, Education and Training*

In addition to the above documents, the FRA also provides news updates on the Agency, and education and training. The FRA produces a newsletter every quarter, *FRA News*,<sup>108</sup> which is available online and open to subscription,<sup>109</sup> and a magazine entitled *Equal Voices*. The magazine is published three times a year and contains articles and features on new developments, current events relating to fundamental rights, new research, surveys and expert input on issues.

The FRA also engages in education and training aimed at a spectrum of individuals, including young people and journalists. Young people were targeted via the *S'Cool Agenda*, the first issue of which (2007-2008) was published as part of the FRA's activities in the context of the '2007 European year of Equal Opportunity for All', the '2008 European Year of Intercultural Dialogue' and the 'Diversity Day of the European Union Agency of Fundamental Rights' (on 14 November 2007). It acted as an awareness-raising

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<sup>106</sup> A very recent example is the FRA's opinion on the proposal for a Council Framework Decision on the use of Passenger Name Record, of 28 October 2008 <[http://fra.europa.eu/fraWebsite/attachments/FRA\\_opinion\\_PNR\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA_opinion_PNR_en.pdf)> accessed 15 March 2009.

<sup>107</sup> (n 86) Chapter 1 and (n 83) 17-23.

<sup>108</sup> Formerly *The FRA Bulletin*.

<sup>109</sup> The address, as indicated on the FRA website, is <[info@fra.europa.eu](mailto:info@fra.europa.eu)>.



tool aimed at young people to encourage them to learn about fundamental rights issues in Europe whilst recording their daily school activities.<sup>110</sup>

*iii. Online Documentation*

Part of the FRA's output includes a separate database which provides free online access for the general public to publications of the Agency, case law and details of organisations in the fundamental rights field. The database is known as the FRA's Infoportal.<sup>111</sup> Along with this online resource, the FRA website should be mentioned.<sup>112</sup> This has been transformed over the last three years from the old EUMC site into a brand new, user-friendly and detailed resource, which received a significant makeover in January 2009.

#### IV. THE ORGANISATION OF THE FRA

The structure of the FRA is important to this thesis because, if read uncritically, it conceals power relations. The FRA is made up of what can be described as a multiplicity of actors. The present Director of the Agency, Morten Kjaerum, proposed that it be seen as a 'network of networks'.<sup>113</sup> The phrase is fitting since it connotes the Agency consisting not of layers of actors within a hierarchical, pyramidal structure but, rather, of a collection of actors

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<sup>110</sup> Further details can be found at:  
<[http://fra.europa.eu/fraWebsite/products/education\\_training/education\\_training\\_en.htm](http://fra.europa.eu/fraWebsite/products/education_training/education_training_en.htm)>  
accessed 15 March 2009.

<sup>111</sup> <<http://infoportal.fra.europa.eu>> accessed 15 March 2009. The Infoportal replaces the old FRA Database and FRA Infobase.

<sup>112</sup> <[http://fra.europa.eu/fraWebsite/home/home\\_en.htm](http://fra.europa.eu/fraWebsite/home/home_en.htm)> last accessed 27 May 2009.

<sup>113</sup> Mr Morten Kjaerum, President of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, in (n 18) 26-7.

representing ‘nodes in a heterarchical network’.<sup>114</sup> That is, multi-level actors operate at multiple sites that together form a structure recognised as the FRA. The nodes can be divided into three groups: there are, first, what I describe as the more visible, EU level bodies. Second, there are the less visible, national level bodies. Third, there are ‘other’ bodies – these are bodies with which the FRA cooperates. They exist on a variety of levels, ranging from the regional and international to the local.

#### **A. Visible, EU Level Bodies**

The more visible ‘nodes’ of the FRA’s structure are the four bodies of the Agency itself. According to Article 11 of Regulation 168/2007, the Agency is to consist of a Management Board, an Executive Board, a Scientific Committee and a Director.

The first and largest body of the Agency, the Management Board, is composed of 30 individuals, consisting of one independent person appointed by each Member State ‘having high level responsibilities in an independent national human rights institution or other public or private sector organisation’,<sup>115</sup> one independent person appointed by the Council of Europe, and two representatives of the Commission. One of these is elected Chairperson<sup>116</sup> and the other, Vice-Chairperson.<sup>117</sup> The members must be ‘persons with appropriate experience in the management of public or private sector

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<sup>114</sup> J Morison uses this idea to describe multi-level government in ‘Modernising Government and the E-Government Revolution: Technologies of Government and Technologies of Democracy’ in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart, Oxford 2003) 131, 140.

<sup>115</sup> (n 1) art 12(1)(a).

<sup>116</sup> The current Chairperson is Anastasia Crickley, of Ireland.

<sup>117</sup> The current Vice-Chairperson is Hans Tretter, of Austria.

organisations and, in addition, knowledge in the field of fundamental rights'.<sup>118</sup>

The members' names are available from the Agency's website and the Board has been in place since the summer of 2007. The Board is to meet twice a year and for 'extraordinary meetings' and its first meeting was held on 12-13 July 2007, at which time the Chairperson and Vice-Chairperson were appointed.

The Management Board's role is to act as the Agency's 'planning and monitoring body'.<sup>119</sup> This role entails the following nine functions:<sup>120</sup> adoption of the Annual Work Programme in accordance with the MAF, on the basis of a draft submitted by the Agency's Director after the Commission and the Scientific Committee have delivered an opinion; adoption of the annual reports (both the Annual Report on Fundamental Rights Issues and the Activity Report, as per Article 4(1)(e) and (g)); appointment and, if necessary, dismissal of the Director; adoption of the annual budget; adoption of the Agency's rules of procedure; adoption of arrangements on transparency and access to documents; appointment of the members of the Scientific Committee; and have the competence to establish that a member of the Management Board no longer meets the criteria of independence.

The second body, the Executive Board, is made up of six individuals, namely the Chairperson and Vice-Chairperson of the Management Board, two other Management Board members (elected by the Management Board, pursuant to the independence requirement and for a term of two and a half years) and one of the Commission representatives on the Management Board. The Council of

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<sup>118</sup> (n 1) art 12(1) and (5).

<sup>119</sup> *Ibid* art 12 (6)(a).

<sup>120</sup> As specified in the Regulation (n 1) art 12(6).

Europe representative on the Management Board may participate in the meetings of the Executive Board. A list of Executive Board members is available on the FRA website.<sup>121</sup> Their role is to ‘assist’ the Management Board<sup>122</sup> and to provide advice and assistance to the Director.<sup>123</sup>

The third body, the Scientific Committee, is composed of eleven ‘independent persons, highly qualified in the field of fundamental rights’,<sup>124</sup> appointed by the Management Board at its meeting of 2-4 June 2008 for a term of five years (members of the Management Board cannot themselves be members of the Scientific Committee). The members of the Committee were appointed following an open call for applications and a selection procedure that involved consultation with the competent Committee of the European Parliament (i.e., the Civil Liberties, Justice and Home Affairs Committee, or LIBE). The Scientific Committee elects its Chairperson and Vice-Chairperson for a term of office of one year. A list of the Committee members is available on the FRA website. The Committee’s role is to act as ‘the guarantor of the *scientific quality* of the Agency’s work, guiding the work to that effect’.<sup>125</sup> To that end, the Scientific Committee is involved in the early stages of the preparation of the majority of the FRA’s documents – for example, the annual reports.

The FRA is headed by a fourth body, a Director, according to Article 15(1) of Regulation 168/2007. The Director, currently Morten Kjaerum of Denmark,

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<sup>121</sup> <[http://fra.europa.eu/fraWebsite/about\\_us/organisation/executive\\_board/executive\\_board\\_en.htm](http://fra.europa.eu/fraWebsite/about_us/organisation/executive_board/executive_board_en.htm)> accessed 10 March 2009.

<sup>122</sup> (n 1) art 13(1).

<sup>123</sup> <<http://fra.europa.eu/fra/index.php>> accessed 1 August 2008.

<sup>124</sup> (n 1) 14(1).

<sup>125</sup> *Ibid* art 14(5).

was appointed by the Management Board in accordance with a cooperation procedure in Article 15(2) on 7 March 2008 and took up his position on 1 June 2008. He described his appointment as ‘an inspiring challenge and a great privilege’.<sup>126</sup> The selection of the Director began with an open call for applicants and took place via a transparent selection process. The Commission drew up a shortlist of candidates,<sup>127</sup> who then addressed the Council and the European Parliament (LIBE) and the institutions then gave their opinions on the nominees. Taking these opinions into account, the Management Board finally gave its decision on the Director by a secret vote. The Director will hold his position for a term of five years (after which time the term may be extended once, for a period of three years).

The Director’s role is to ‘represent’ the Agency.<sup>128</sup> The responsibilities of the Director thus include: preparing the publication of the annual reports, thematic reports and conclusions and opinions referred to in Article 4(1) of the Regulation and the preparation and implementation of the Annual Work Programme. The Director is also responsible for all staff matters and day-to-day administration, implementation of the Agency’s budget, cooperation with National Liaison Officers and with civil society, and must independently participate in the meetings of the Management Board, without voting rights.<sup>129</sup>

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<sup>126</sup> Press Release 7 March 2008, ‘Morten Kjareum becomes first Director of Fundamental Rights Agency’ <<http://fra.europa.eu/fra>> accessed 14 August 2008.

<sup>127</sup> Morten Kjareum of Denmark and Dario Carminati of Italy (see *FRA Bulletin*, Issue 02, March 2008).

<sup>128</sup> (n 1) art 23(3).

<sup>129</sup> *Ibid* art 13(4).

## **B. Less Visible, National Level Bodies**

Article 6 of the 2007 Regulation describes the Agency's 'working methods'. It specifies that in order to carry out its tasks, the Agency is to draw on the expertise of a variety of organisations and bodies in each Member State and to involve national authorities in the collection of data. Thus, the FRA is to set up new information networks, use existing networks and organise meetings of external experts at the national level. There are three 'nodes' of networks at the national level.

The first is the primary point of contact for the Agency in a Member State, known as the National Liaison Officer. The latter is a government official nominated by the Member State.<sup>130</sup> Extending out from this point of contact are two other networks of experts at the national level. These are known as RAXEN and FRALEX. In the collection and analysis of information, the FRA must ensure the quality and comparability of data particularly given the differences in data quality and availability across the EU. The FRA's comparative analysis is developed on the basis of 'background material' collected at the national level through these two groups of contractors.

RAXEN refers to the groups of National Focal Points (NFPs) which report on racism, xenophobia and related intolerances. RAXEN has been operational since 2000, when the NFPs worked for the EUMC. The NFPs are present in each of the Member States, having been selected through an open call for tender and then contracted on the basis of annually renewable framework

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<sup>130</sup> *Ibid* art 8(1). The National Liaison Officer for the UK is Mr Rob Linham from the Ministry of Justice; the Deputy National Liaison Officer is Mr Sergio Moreno, also of the Ministry of Justice. This information is available on the FRA website.

contracts, and are responsible for collecting data and information under the thematic areas of the FRA's activity. They consist of consortia that are typically made up of bodies such as anti-racist NGOs, university research centres, institutes for human rights, or government-affiliated organisations.<sup>131</sup> Each NFP produces a National Data Collection Report and it is from the information in these reports that the thematic chapters of the Annual Report are produced by the FRA.

FRALEX refers to the FRA's 'group of legal experts' reporting on legal aspects of fundamental rights issues in all Member States. The FRALEX members are selected in the same way. The call for tender was launched by FRA in July 2007 to identify highly qualified experts in the field of fundamental rights in each Member State; the three highest-ranking proposals were awarded framework contracts.<sup>132</sup> The team of experts for each country consists of a Project Manager, Senior Experts<sup>133</sup> and Experts, who must satisfy a list of requirements put forward by the FRA.<sup>134</sup>

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<sup>131</sup> For example, the NFP for the UK is the Centre for Rights, Equality and Diversity, University of Warwick  
<[http://www2.warwick.ac.uk/fac/soc/sociology/rsw/research\\_centres/cred/](http://www2.warwick.ac.uk/fac/soc/sociology/rsw/research_centres/cred/)> accessed 5 March 2009.

<sup>132</sup> In the UK, a framework contracts was awarded to the Human Rights Law Centre, The University of Nottingham.

<sup>133</sup> The FRALEX Senior Expert for the UK is Professor David Harris, Human Rights Law Centre, The University of Nottingham.

<sup>134</sup> For example, all 'experts' must supply a CV that shows evidence of a postgraduate university degree in law, at least one scientific publication (e.g. article in a peer reviewed academic journal or a book). Senior experts must supply a CV showing evidence of a postgraduate university degree in law, at least seven years of relevant experience in the field of fundamental rights (gained through, for example, teaching, research working for an NGO), and at least ten scientific publications – information obtained from 'FRA Set up of contract and Guidance Documentation', supplied on request by Human Rights Law Centre, University of Nottingham.

The data provided by the networks is used by the Agency as background material for in-house or outsourced comparative analysis. The FRALEX experts in particular are to deliver a variety of reports and studies as well as a quarterly Bulletin, based on objective, reliable and comparable data of a *legal* and also a *social* nature. As noted above, the first thematic study undertaken by the FRALEX experts was Part I of the Homophobia Report.<sup>135</sup>

These networks replaced a previously existing network: the NIE. The NIE was set up in September 2002 by the Commission<sup>136</sup> at the request of the European Parliament, initially to assist the Parliament in researching whether and how various rights in the Charter were being implemented by the EU and by the Member States. The NIE was the product of a series of events that took place in 2000 when Member States became concerned about the entry of the explicitly racist Freedom Party of Austria into the Austrian government and questions arose as to the applicability of Article 7 TEU to the situation. The Report of the *comité des sages* that followed six months later suggested that a human rights agency should be set up to monitor human rights situations in Member States. It was pursuant to this that the European Parliament recommended, in its Resolution of 15 July 2001 on the situation of fundamental rights in the European Union, that a network of legal experts who are authorities on human rights with a high degree of expertise be set up. This would enable the Parliament to receive an assessment of the implementation of the rights in the Charter, taking into account the case law of the Strasbourg and Luxembourg courts and of the Member States' national and constitutional

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<sup>135</sup> (n 2).

<sup>136</sup> Directorate General Justice and Home Affairs.



courts. The Network consisted of 26 independent members acting in their own capacity, and a coordinator.<sup>137</sup> The experts were to be individuals of integrity and independence, holding an expertise of at least 10 years at a high level in the fundamental rights field. Between 2002 and 2006, the Network monitored the situation of fundamental rights in the EU and in the Member States, with the Charter as its mandate. It published annual reports on the observance of fundamental rights in the Member States, thematic reports on selected topics and various other detailed reports, opinions on specific issues (on its own initiative and at the request of the Commission – e.g., on ethnic profiling), and a lengthy commentary on the Charter.<sup>138</sup>

In the institutional debate leading up to the adoption of the Regulation establishing the FRA, there was discussion of the NIE's days being numbered. The Commission stressed that the NIE had no permanent legal basis or status and was created on a purely contractual basis.<sup>139</sup> Indeed, an NIE Position Paper highlighted that the Network could be justified in the short term only, as an experimental project on the feasibility of the monitoring of the situation of fundamental rights in the Union by independent experts.<sup>140</sup> The continued need for such a network was discussed, with the Commission recognising the NIE's valuable contribution, but nevertheless maintaining that its continued existence was difficult to justify given the imminent birth of the FRA and the fact that

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<sup>137</sup> Professor Olivier de Schutter.

<sup>138</sup> See for example EU Network of Independent Experts on Fundamental Rights, 'Report on the Situation of Fundamental Rights in the European Union in 2004', April 2005; EU Network of Independent Experts on Fundamental Rights, 'Report on the Situation of Fundamental Rights in the European Union in 2005: Conclusions and Recommendations', March 2006, CFR-CDF/Conclusions 2005.

<sup>139</sup> (n 18) 37-41.

<sup>140</sup> EU Network of Independent Experts in Fundamental Rights, Position Paper on the Fundamental Rights Agency, 16 December 2004, para 39.

there was no need for two parallel mechanisms monitoring fundamental rights within the EU.<sup>141</sup>

### **C. Cooperation: ‘Other’ Bodies**

Aside from the bodies of the Agency and the national level networks, the FRA is to work with a variety of ‘other’ bodies that form part of the Agency’s structure. They are bodies with which the FRA is to ‘cooperate’ and exist at the EU, regional, national and international levels.

At the EU level, these ‘other’ bodies are the Union institutions, and offices and agencies of the Community.<sup>142</sup> At the regional level, the Regulation makes special mention of cooperation with the Council of Europe.<sup>143</sup> The national level bodies referred to are: the Member States themselves; research centres; NGOs (dealing with human rights); National Liaison Officers; NHRIs; trade unions and employers’ organisations; relevant social and professional organisations; churches, religious, philosophical and non-confessional organisations; and universities.<sup>144</sup> At the international level, the Regulation refers to the Organisation for Security and Cooperation in Europe (OSCE), the UN and ‘other international organisations’.<sup>145</sup> Some of these ‘other’ bodies come together in a structure called the ‘Fundamental Rights Platform’ (FRP). This is described in the Regulation as a ‘cooperation network’ and consists of NGOs dealing with human rights, trade unions and employer’s organisations, relevant social and professional organisations, churches, religious,

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<sup>141</sup> (n 26) 17.

<sup>142</sup> (n 1) art 4.

<sup>143</sup> *Ibid* arts 4 and 9.

<sup>144</sup> *Ibid* arts 4, 8 and 10

<sup>145</sup> *Ibid* arts 8 and 10.

philosophical and non-confessional organisations, universities, and other qualified experts of European and international bodies and organisations.<sup>146</sup>

## V. ACADEMIC COMMENT

It remains to examine scholarship on the FRA and is not surprising, given the Agency's recent inception, that there is not a vast amount of extant literature. In what follows, I provide an overview of this literature. I mention, first, literature that appeared during the proposal stages of the FRA's formation and then go on to examine more recent contributions that came after the FRA was established. This shows that a critical, governmentality perspective on the FRA is not in evidence and, consequently, that this thesis makes a valuable contribution to the literature.

### A. The Proposal Stages

The most notable and comprehensive account of the FRA is an edited collection by Philip Alston and Olivier de Schutter in 2005, entitled *Monitoring Fundamental Rights in the EU*.<sup>147</sup> The volume is the first to critically examine the proposals put forward by the Community in October 2004 on the creation of a fundamental rights agency. Leading scholars in EU and international law contributed to the volume, to analyse the contribution the FRA might make to improve the monitoring of fundamental rights in the Union.

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<sup>146</sup> *Ibid* art 10.

<sup>147</sup> Alston and de Schutter (n 55).

The collection provides a good insight into the Agency's earlier days and the role that was being debated for it during this formative time – i.e., the role of *monitoring*. Within the monitoring context, the authors contributing to the collection discussed issues such as the background to the decision to create the Agency, the suspicion surrounding the 'sudden' decision of the European Council to create an Agency, and the cautious approach to the establishment and remit of the Agency taken by the Commission in its resultant Communication.<sup>148</sup> The background to and definition of 'monitoring' was also explored, as were comparisons with monitoring at the UN level.<sup>149</sup> Further, the wider implications of the FRA were debated. The implications of the mandate for the FRA (i.e., the Charter) were examined and suggestions were given for a new mandate of the FRA, a new 'private international law of human rights'.<sup>150</sup> What contribution, it was asked, will the FRA make to the promotion of human rights in the EU?<sup>151</sup> The FRA could have a facilitating role with respect to mainstreaming human rights, that is in the integration of human rights into all policy areas. There was also focus on future challenges and the FRA in the context of external relations.<sup>152</sup> I develop the FRA's monitoring role and return to these contributions in Chapter 5.

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<sup>148</sup> de Búrca (n 10) 25.

<sup>149</sup> M Scheinin, 'The Relationship Between the Agency and the Network of Independent Experts', in P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU* (Hart, Oxford 2005) 73.

<sup>150</sup> R Lawson, 'The Contribution of the Agency to the Implementation in the EU of International and European Human Rights Instruments' in P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU* (Hart, Oxford 2005) 229, 251.

<sup>151</sup> O de Schutter, 'Mainstreaming Human Rights in the European Union', in P Alston and O de Schutter (eds) *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart: Oxford 2005) 37.

<sup>152</sup> *Ibid*; M Bulterman, 'The Contribution of the Agency to the External Policies of the European Union' in P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU* (Hart, Oxford 2005) 253.

The editors of the collection clearly had high hopes for the FRA, stating that ‘the Fundamental Rights Agency... has immense potential to ensure effective monitoring of fundamental rights in the EU, and to ensure a unified strategy for their promotion in EU law and policy’.<sup>153</sup> Some of the contributors were perhaps more cautious in their optimism: ‘One can only hope that there is not also a political wish to maintain for the new agency the relatively low profile, low impact and under-resourced character of the EUMC.’<sup>154</sup>

Interestingly for this thesis, which seeks to intervene in the EU’s governance discourses using a different analytical frame (governmentality), the FRA was also talked about in the context of rights and governance. De Búrca examined agencies as an element of emerging new modes of governance in the EU,<sup>155</sup> focusing on the FRA and its rights discourse, and contrasted a ‘rights model’ to a ‘governance model’. On a similar theme, de Schutter, in a 2007 article, argued for the transformation of the approach to fundamental rights in the EU into an approach that focused on ‘a form of permanent learning’ between Member States (situating this within features of governance), in order to encourage progress towards the further realisation of fundamental rights in the EU.<sup>156</sup> The FRA, de Schutter argued, could provide a unique opportunity to launch such a reconceived fundamental rights policy were it to act as a research body, or a specialised think-tank. The fulfilment of this role would promote the overall goal of deliberation and interdependence between the Member States. I

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<sup>153</sup> P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU* (Hart, Oxford 2005).

<sup>154</sup> de Búrca (n 10) 35.

<sup>155</sup> *Ibid.*

<sup>156</sup> O de Schutter, ‘Fundamental Rights and the Transformation of Governance in the European Union’ (2007) 5 *Cambridge Yearbook on European Legal Studies* 133.

elaborate on my perspective on the relation between the FRA, rights and governance in Chapter 6.

The FRA has also been considered in terms of its contribution to a credible human rights policy for the EU. Andrew Williams undertook an analysis of the war in Iraq which mentioned the FRA.<sup>157</sup> Much of Williams' discussion focused on the nature and background of Article 7 TEU and on explaining the invasion and occupation of Iraq. The FRA was used to make an important point with respect to the possibility of achieving a 'credible human rights policy' for the EU: Williams argued that leaving Article 7 out of the mandate of the FRA in the final Impact Assessment renders Article 7 'an empty gesture' of indifference. This in turn, Williams argued, revealed that the Union favours a politics of indifference in terms of the violations of human rights principles by its Member States (an assertion supported by his case study of the invasion of Iraq and the alleged serial abuse of the principle in Article 6(2) of the TEU by the UK). Consequently, judging by the EU's approach to rights at the internal level, Williams concluded that a credible human rights policy for the EU was out of reach.

There are a number of other articles which problematised the FRA at its proposal stages in terms of its role and functions, questioning whether it is a necessary addition to the human rights structure of the EU. These have been concerned with, once again, the FRA's monitoring role, together with its

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<sup>157</sup> A Williams, 'The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's Invasion of Iraq' (2006) 31 *European Law Review* 3.

relations with inter-governmental organisations,<sup>158</sup> or more generally with its key features and responsibilities,<sup>159</sup> or its potential based on an analysis of the advantages and disadvantages of the Agency.<sup>160</sup> The need for the FRA has also been questioned. Thus Roger Smith examined the proposals to establish the FRA in terms of whether the Agency is necessary to advance the effect of the Charter.<sup>161</sup> Moreover, Anthony Arnall has asked whether Europe requires a fundamental rights agency.<sup>162</sup> Arnall focused also on monitoring, on how the FRA's authority would be conceptualised and on how its jurisdiction would be established. An editorial piece in the same journal a year later similarly questioned the authority of the FRA, in terms of its jurisdiction and the legal force of its opinions in particular.<sup>163</sup>

## **B. Later Contributions**

In an article in the FRA's *Equal Voices* magazine in 2007, de Schutter returns to and reconceptualises the monitoring mission of the FRA in the context of how its role has evolved since the pre-proposal stages. He states that the 'monitoring mission' may initially have been regarded as the main task of the FRA but it was not highlighted in the discussions in the latter part of 2007.<sup>164</sup> Monitoring was, rather, replaced with two other roles that reflect a similar 'type of' mission, namely 'collective learning process' and 'guidance'.

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<sup>158</sup> M Goldberg, 'Fundamental Rights Agency: Utility or Futility?' (2005) 2 *Justice Journal* 67.

<sup>159</sup> M Bulterman, 'European Union: The Fundamental Rights Agency' (2005) 23 *Netherlands Quarterly of Human Rights* 283.

<sup>160</sup> E Howard, 'The European Agency for Fundamental Rights' (2006) 4 *European Human Rights Law Review* 445.

<sup>161</sup> R Smith, 'Fundamentally Right' (2005) *New Law Journal* 229.

<sup>162</sup> A Arnall, 'Editorial: Does Europe Need a Fundamental Rights Agency?' (2006) 31 *European Law Review* 285.

<sup>163</sup> 'Editorial: The Nebulous Authority of Fundamental Rights in the EU' (2007) 32 *European Law Review* 155.

<sup>164</sup> O de Schutter, 'The Added Value of the European Union Agency for Fundamental Rights' (2007) 21 *Equal Voices* 27.

Another recent account of the *de jure* role of the FRA and its *de facto* potential is given by Gabriel Toggenburg, in 2008.<sup>165</sup> Toggenburg uses a model of a pyramid of legal-political layers. The normative framework of the Agency, the first layer, is laid down in the 2007 Regulation. The second layer is the MAF, defining the thematic focus of the FRA's activities. And the final layer is made up of the institutional practice as exercised by the Agency itself. Toggenburg's analysis subsumes the eight tasks of the Agency identified in the Regulation into three major functions: data collection (or, the Agency acting as an 'information switch board'); the production of expert opinions; and the establishment of a communication strategy. He asserts the value of the work that the Agency is doing and the role it will fulfil, arguing that fundamental rights are both *fundamental* and *rights*. Toggenburg quotes a comment made regarding the discussion of fundamental rights in Europe which compared the discussion to that of the elites in medieval Constantinople: 'As the Ottoman Turks were approaching Constantinople, the elites, within the walls, were debating the sex of angels.'<sup>166</sup> His point is, of course, that fundamental rights are about more than the 'sex of angels' and that the role of the FRA concerns basic legal protections for the individual.

One final point regarding academic comment on the FRA is that the Agency features within the 'fundamental rights' sections of recent editions of EU law textbooks. So, for example, the fourth edition of Paul Craig and Gráinne de

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<sup>165</sup> G Toggenburg, 'The Role of the New EU Fundamental Rights Agency: Debating the "Sex of Angels" or Improving Europe's Human Rights Performance?' (2008) 33 *European Law Review* 385.

<sup>166</sup> S Prodi, 'Focus on What Really Matters', in *EU: The Next Fifty Years*, special issue of the *Financial Times* (March 2007), quoted in Toggenburg, *ibid* 398.



Búrca's, *EU Law* (2008) refers to the FRA in the context of 'new human rights instruments and institutions', a heading within the chapter 'Human Rights in the EU'.<sup>167</sup> The few short paragraphs in this section provide a brief history of the FRA, focusing primarily on its predecessor, the EUMC. They refer also to the debate over the powers that the FRA should have, in particular whether these should include monitoring Member States for the purposes of Article 7 TEU, and offer a summary of the current mandate of the FRA. Another textbook, Damian Chalmers et al's, *European Union Law* (2006),<sup>168</sup> mentions the FRA in the context of the 'development of an internal fundamental rights policy'. This is significant because it indicates how important the FRA is becoming and its increased prominence heightens the need for a critical perspective on the Agency.

## VI. CONCLUSION

This chapter has described the FRA in terms of its origins, its tasks and activities, and its organisation. The chapter has highlighted the main and most interesting products of the Agency (the annual and thematic reports, and the survey), and has also given an account of how the FRA has been conceptualised in academic scholarship – which reveals that critical examinations of the Agency are lacking. This points, moreover, to the space that exists for a governmentality perspective on the FRA.

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<sup>167</sup> P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (4<sup>th</sup> edn OUP, Oxford 2008).

<sup>168</sup> D Chalmers et al, *European Union Law* (1<sup>st</sup> edn CUP, Cambridge, 2006).

As a new institution of human rights protection for the EU, the new characteristics which the FRA exhibits, as this chapter has described, lie in its structure, role and functions. Its structure is network-based and made up of a multiplicity of actors. Its role can be conceptualised as providing ‘assistance and expertise’ (i.e., it is advisory) and its functions include collecting reliable, comparable information and data obtained through socio-legal research. When the Agency began life in 2007, it was as a more extensive replacement to the EUMC that dealt with a wider range of fundamental rights issues (as compared with the more limited remit of racism, xenophobia and related intolerance of the EUMC) but the old title of a ‘monitoring’ agency lingered over the FRA during the transitional years.

The next chapters analyse the earlier emphasis on the FRA as a monitoring agency and the more recent shift of focus to a role of providing ‘assistance and expertise’ to the EU institutions. Chapter 5 examines the earlier conception of the FRA’s role as a monitoring one and describes how the FRA’s functions can still be examined as a type of monitoring, where monitoring is understood in the Foucauldian sense of surveillance, even though the Agency’s mission is now labelled as ‘assistance and expertise’. What is central is how to interpret the power relations within the FRA model. Chapter 6 develops this analysis by situating the FRA in the EU’s governance discourses and examining the Agency’s structure and operating processes from a governmentality perspective, focusing on the features of actors, experts and statistics. Chapter 7 takes the governmentality analysis further by examining how the FRA perpetuates self-government. The analysis in Chapters 5-7 is important for the

implications it has for the FRA's rights discourse, which are significant not least of all because they question the pomp and ceremony that surrounded the establishment of this new institution for rights protection, and the perhaps unreflective optimism of statements such as that made by the FRA's Director: 'I would like the FRA to become a beacon on fundamental rights'.<sup>169</sup>

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<sup>169</sup> "'FRA Should Become a European Beacon on Fundamental Rights': Interview with Morten Kjaerum, FRA's New Director' (2008) 23 *Equal Voices* 4, 4.

## *Monitoring as Surveillance*

### I. INTRODUCTION

The previous chapter highlighted that the objective of the FRA, as laid down in Regulation 168/2007, is to provide ‘assistance and expertise’ to the relevant institutions of the Community and the Member States, when implementing EU law.<sup>1</sup> The FRA, consequently, is described as having an ‘advisory mission’.<sup>2</sup> However, other possible missions were contemplated during the discussions that led up to the Regulation, as highlighted in Chapter 4. At the early stages of proposal and negotiation, *monitoring* was regarded as one of the new Agency’s main tasks. However, the monitoring role was not highlighted in the later months of discussion preceding the Regulation (late 2006, early 2007). Following the Regulation, the FRA can be appealed to in the context of Article 7 TEU but it does not have the power to monitor the Member States for the purposes of Article 7.<sup>3</sup> Moreover, the Agency is to advise the institutions at their request; it is not to act as a watchdog, advising on its own initiative as to risks of potential infringements of fundamental rights. The FRA, it seems, was deliberately not modelled on a warning system idea that would sound the alarm when legal developments ran the risk of violating fundamental rights.

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<sup>1</sup> Council Regulation 168/2007/EC of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1, art 2.

<sup>2</sup> O de Schutter, ‘The Added Value of the European Union Agency for Fundamental Rights’ (2007) 21 *Equal Voices* 27, 27.

<sup>3</sup> This is not mentioned in the Regulation itself (n 1) but in an annexed declaration.

In this chapter, however, I argue that, through its advisory function, the FRA does carry out a type of monitoring. I refer not only to monitoring understood as the observation of compliance with human rights norms but to a critical conception of monitoring understood as ‘surveillance’, in a Foucauldian sense. Surveillance connotes practices of disciplinary power. Examining the FRA through a Foucauldian lens, I analyse the disciplinary potential of its processes – i.e., I analyse the power relations within the FRA as *discipline*, or disciplinary power. It is important, I therefore suggest, to take note of the FRA’s ‘monitoring’ mission since this has three significant implications: first, it allows for the FRA’s rights discourse to be recognised as a disciplinary code of conduct. Second, a Foucauldian perspective allows us to see that disciplinary power operates without a ‘supervisor’; it is, in other words, an automatic and permanent power. And, finally, it shows the target of disciplinary power to be the Member States and the citizens of the Union. The analysis in this chapter, focusing on disciplinary power, is crucially part of a governmentality perspective. In the coming chapters, I talk more of ‘governmentality’ rather than ‘discipline’ but this is not because government replaces discipline. Rather, as discussed in Chapter 3, power as government retains from disciplinary power the notion of ‘disciplines’ (a concern with minor processes and techniques): there is therefore a triangle, sovereignty-discipline-government, which explains how discipline and government together reflect a ‘governmentality perspective’. Moreover, power as government remains interested in the same type of questioning: asking the ‘how’ question.

Part III of this chapter explains the Foucauldian connotations of ‘surveillance’. First, however, in Part II I examine how the ‘monitoring’ mission of the FRA is conceptualised in the institutional and academic literature, so as to highlight the shift that has taken place away from ‘monitoring’ towards an ‘advisory’ function. I argue that previous conceptions of the FRA’s role as an ‘observatory’ *and* the role the Agency has today as an ‘advisory’ body in fact reveal processes of ‘monitoring’ – where monitoring is understood as ‘surveillance’. Part IV then discusses the implications this has for the FRA and its rights discourse. Finally, Part V reiterates why the analysis in this chapter needs to be seen as a component of a governmentality perspective on the rights discourse of the FRA.

## VI. ‘MONITORING’ AND THE FRA: A QUESTION OF SEMANTICS?

The association of the FRA with ‘monitoring’ probably comes from a link to its predecessor, the European *Monitoring* Centre on Racism and Xenophobia. The original proposal for a human rights agency, made in 1998, was for a *monitoring* agency. Philip Alston and JHH Weiler made the proposal in a study prepared for the *comité des sages* that issued the report entitled: ‘Leading By Example: A Human Rights Agenda for the European Union for the Year 2000’.<sup>4</sup> Alston and Weiler’s study called for a monitoring agency but did not describe in detail what this might involve. They drew attention to the lack of an

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<sup>4</sup> P Alston and JHH Weiler, ‘An “Ever-Closer Union” in Need of a Human Rights Policy’ (1998) *European Journal of International Law* 658. ‘Leading By Example: A Human Rights Agenda for the European Union for the Year 2000’, Florence, European University Institute, 1998. The *comité des sages* was made up of Antonio Cassese, Catherine Lalumière, Peter Leuprecht and Mary Robinson.

agency that was empowered to provide or collect information in a regular, ongoing and systematic fashion – in other words, the lack of an information base on which to rely when making legislative and policy decisions. The report of the *comité* proposed the establishment of a monitoring agency as one element in a four-part plan to ensure effective action on the part of the Union to promote respect for human rights.

The report was launched at a major conference in Vienna but it remained dormant until the meeting of the European Council in December 2003, where the decision was made to establish a ‘Human Rights Agency’. The European Council stressed ‘the importance of human rights data collection and analysis with a view to defining Union policy in this field’<sup>5</sup> and agreed to extending the mandate of the EUMC to human rights. The word ‘monitoring’, argues Manfred Nowak, was deliberately omitted from the title of the FRA.<sup>6</sup> The Commission had already attempted a response to the need for a monitoring body. In 2002 it answered a request by the European Parliament (which had recognised that a monitoring agency was unpopular with the Commission) for a less formal monitoring body by establishing the NIE. The NIE is no longer in existence and so no longer undertakes this monitoring function. Moreover, the Commission had acknowledged, in the proposal for legislation on a European Union Agency for Fundamental Rights, the need for ‘*systematic and regular observation* of how the institutions, bodies, offices and agencies of the Community and the Union both respect standards with respect to fundamental

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<sup>5</sup> Brussels European Council 12-13 December 2003, Presidency Conclusions, Brussels, 5 February 2004.

<sup>6</sup> M Nowak, ‘The Agency and National Institutions for the Promotion and Protection of Human Rights’ in P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart, Oxford 2005) 91, 96.

rights on the ground and promote awareness of fundamental rights on the ground'. It had also recognised the need for '*systematic and regular observation* of how Member States both respect and promote fundamental rights standards in practice when implementing EU law and policies'.<sup>7</sup> The Commission pointed out that there is a difference between 'monitoring in a legal sense' and 'observatory monitoring'.<sup>8</sup> The former function is to be assumed by the Commission, which described 'monitoring in a legal sense' as the legal control of the correct application of EC law. Such monitoring cannot be delegated to a Community agency in the interests of maintaining the institutional balance of power.<sup>9</sup> The FRA would carry out observatory monitoring. The focus on 'systematic and regular observation' of the Union and the Member States (when they are acting to implement EU law) did not, however, make it to the final text of the Regulation.

The FRA was, nonetheless, perceived at the academic level as a human rights monitoring body. According to Philip Alston, 'monitoring' was 'used as a sort of shorthand'<sup>10</sup> to describe the functions of the FRA. Alston's account was part of an edited collection with Olivier de Schutter of 2005, entitled *Monitoring Fundamental Rights in the EU*, which, as Chapter 4 recounted, provides the most detailed and comprehensive academic text on the FRA to date. It is of

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<sup>7</sup> Commission (EC), Proposal for a Council Regulation establishing a European Agency for Fundamental Rights, Proposal for a Council Decision empowering the European Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, COM (2005) 280 final, 30 June 2005, 38. Emphasis added.

<sup>8</sup> European Policy Evaluation Consortium (EPEC), 'Preparatory Study for the Impact Assessment and Ex-Ante Evaluation of Fundamental Rights Agency: Final Report', February 2005, 14.

<sup>9</sup> As per the '*Meroni doctrine*', see Chapter 4 (n 43).

<sup>10</sup> P Alston, 'The Contribution of the EU Fundamental Rights Agency to the Realization of Economic and Social Rights' in P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart, Oxford 2005) 159, 176.



particular interest because of the extent to which it problematised the Agency's monitoring role. The general direction of the collection was to examine the proposed new agency as a mechanism, a central authority, which would enforce human rights (by 'monitoring').

Thus Martin Scheinin argued that there is such a thing as the 'legal normative nature of true monitoring', which he described as something quite distinct from the profile of the new Agency.<sup>11</sup> He explained that monitoring in the normative, more *demanding* sense, was typically a function of independent, expert bodies entrusted with one or more mechanisms of a judicial or quasi-judicial nature, allowing for the normative assessment of the compliance by states or other entities under a firm set of substantive norms on fundamental rights. He gave the illustration of international human rights monitoring, where a normative assessment is undertaken by treaty-based human rights courts or expert bodies.<sup>12</sup> This mandate belonged, he claimed, to the (now redundant) NIE. Turning his attention to the FRA, normative assessment of this type cannot 'be reduced', he claimed, to the collection of information.<sup>13</sup> The FRA's role of collection and analysis of data is what the *real* monitoring function has been *reduced to*. I disagree with his view: I propose that the collection and analysis of data allows the FRA to undertake *surveillance*.

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<sup>11</sup> M Scheinin, 'The Relationship between the Agency and the Network of Independent Experts' in P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart, Oxford 2005) 73, 73.

<sup>12</sup> For example, the European Court of Human Rights, which is entrusted by Article 19 of the ECHR to 'ensure the observance of the engagements undertaken by High Contracting Parties in the Convention and Protocols thereto'. The role of the Court in this respect is described by the Court itself as a 'supervisory' function. The case Scheinin, *ibid* 75, refers to is *Refah Partisi (Welfare Party) and Others v Turkey* (App nos 41340/98, 41342/98, 41343/98, and 41344/98) (2003) 37 EHRR 1 [100].

<sup>13</sup> Scheinin (n 11) 83.

Moreover, I disagree also with Alston, whose analysis rests on semantics. Alston compared ‘monitoring’ to an array of terms that describe types of activity that might be undertaken to establish the element of *accountability* (this, he claimed, is the underlying principle of human rights monitoring). Alston substantiated this claim by comparing the terms ‘supervision’, ‘verification’, ‘surveillance’ and ‘follow-up’ with ‘monitoring’. Different terms are preferred by different entities, he explained: the European Court of Human Rights favours ‘supervision’, whereas ‘verification’ is favoured in the area of weapons control and disarmament (e.g., Chemical Weapons Convention 1992). ‘Surveillance’ is the activity undertaken by the International Monetary Fund to ensure government compliance with policies, whilst ‘follow-up’ is the preferred term in the UN system, relating to measures that will be taken to give effect to programmes of action, international declarations, etc.<sup>14</sup> Alston explains ‘monitoring’ using the Oxford English Dictionary definition of the term and its ‘general usage’: ‘to observe, supervise, or keep under review; to measure or test at intervals, esp. for the purpose of regulation or control’.<sup>15</sup> This definition, he concluded, was quite an accurate description of the FRA’s role, at least up until the phrase ‘which moves us closer to the assumptions that seem to underlie some of the other concepts, perhaps even including “supervision”’.<sup>16</sup>

However, I argue to the contrary that the type of monitoring which the FRA engages in is a type of ‘*supervision*’ – a generalised surveillance. Scheinin had also remarked that the FRA ‘resembles more an “observatory” than an

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<sup>14</sup> Alston (n 10) 178.

<sup>15</sup> *Ibid* 179.

<sup>16</sup> *Ibid* 179.

international expert body making a normative assessment’ to support the assertion that the FRA does not engage in true, legal, normative monitoring.<sup>17</sup> This comment does not realise its Foucauldian connotations and the importance of an ‘observatory’. As an observatory, or mechanism of *surveillance*, the FRA is a model of the exercise of disciplinary power.

The Regulation establishing the FRA describes, as I outlined in Chapter 4, the Agency’s main objective as providing ‘assistance and expertise’ relating to fundamental rights to the relevant institutions, bodies and agencies of the Union (Article 2). It describes the main task of the Agency as, to ‘collect, record, analyse and disseminate, relevant, objective and reliable and comparable information and data’ (Article 4(1)(a)). Some reference to monitoring is made in the Regulation – although no definition of the term is given and no attempt is made at elaboration. For instance, the Management Board is described as the ‘planning and monitoring body’ of the Agency in Article 12(6). Also, Article 15(4)(f) mentions that the Director’s role includes reporting to the Management Board on the ‘results of the monitoring system’. The current institutional discourse therefore shows that the FRA’s role is not strictly labelled as ‘monitoring’ (at least not in terms of what the Commission calls ‘monitoring in a legal sense’). The FRA’s role was intended to be ‘observatory monitoring’ and today manifests itself in the Regulation as ‘assistance and expertise’. It is the Foucauldian implications of ‘observatory monitoring’ and of ‘assistance and expertise’ that are interesting for this thesis. I explore this in Parts III and IV.

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<sup>17</sup> Scheinin (n 11) 73.

In a recent article in the FRA's magazine, *Equal Voices*, de Schutter reviews the new, post-Regulation role of the FRA – which he describes as ‘collective learning’ and ‘guidance’ – and relates this new role to the FRA's original monitoring mission.<sup>18</sup> Collective learning is not clearly distinguished from monitoring, he argues, and he describes ‘guidance’ as a ‘type of’ monitoring. Given its mandate as per the Regulation, the FRA can act as a mechanism to promote ‘collective learning’ about fundamental rights in Member States by comparing their respective experiences in the field and by identifying best practice. Through ‘guidance’, the Agency will act as a tool that ought to enable the EU to exercise its powers in an informed manner and in line with the principles of subsidiarity and proportionality. De Schutter is making the point that it is not only through monitoring, given the ‘strict, classical meaning’,<sup>19</sup> that the Agency can contribute to guaranteeing fundamental rights in the EU. He seems to be taking the same position as Nowak, who previously articulated a similar perception of the FRA's advisory function. Advice, Nowak said, requires a normative assessment of the respective situation and is therefore monitoring of a sort.<sup>20</sup> Using a Foucauldian analysis based on disciplinary power and surveillance allows me to develop Nowak's point. Neither he nor de Schutter critically analyse the advisory, or collective learning and guidance, roles and *how* they are a type of monitoring. I go on to do this now.

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<sup>18</sup> de Schutter (n 2) 27.

<sup>19</sup> *Ibid* 28.

<sup>20</sup> Nowak (n 6).

## VII. 'DISCIPLINE AND SURVEY': A FOUCAULDIAN UNDERSTANDING OF MONITORING AS SURVEILLANCE

Surveillance necessitates an understanding of disciplinary power. The characteristics of disciplinary power were described in Chapter 3 as the following: power as surveillance; power as process; the power/knowledge dyad; and power as productive. Discipline is, therefore, a specific technique of power. Moreover, it operates in an understated way: discipline is 'not a triumphant power ... it is a modest, suspicious power, which functions as a calculated and pure economy'.<sup>21</sup> I will now elaborate on the techniques of disciplinary power in order to elicit a clearer understanding of the concept and its relevance to the notion of 'monitoring' in the context of human rights and the FRA.

Foucault's overarching objective in his projects was, he claimed, to 'create a history of the different modes by which, in our culture, human beings are made subjects'.<sup>22</sup> His studies led him to unpack the notion of discipline/disciplinary power as the technique that enabled the production of a knowledge about the subject.<sup>23</sup> In *Discipline and Punish*, he describes how the success of disciplinary power is achieved through simple techniques: hierarchical observation, normalisation and production of knowledge about the object

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<sup>21</sup> M Foucault, *Discipline and Punish: The Birth of the Prison* (A Sheridan, trs) (Penguin, London 1991) 170.

<sup>22</sup> M Foucault, 'The Subject and Power' in M Foucault, *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion, ed; R Hurley, trs) (Penguin, London 2002) 326, 326.

<sup>23</sup> I focus here on *Discipline and Punish* (n 21) and M Foucault, *The History of Sexuality: Volume 1: The Will To Knowledge* (R Hurley, trs) (Penguin, London 1998). See also M Foucault, *Abnormal: Lectures at the Collège de France 1974-1975* (V Marchetti and A Salomoni, eds; G Burchell, trs) (Picador, New York 2003).

through examination.<sup>24</sup> Discipline is thus tied in with the notion of surveillance or observation – or that which in his earlier work he called ‘the gaze’;<sup>25</sup> ‘discipline presupposes a mechanism that coerces by means of *observation*’<sup>26</sup> and it has an ‘infinitely scrupulous concern with *surveillance*’.<sup>27</sup>

*Discipline and Punish* is intended to be a presentation of the ‘history of the modern soul and of a new power to judge’.<sup>28</sup> In it, Foucault focused on the topics of torture, punishment, discipline and the prison. The book opens with a graphic portrayal of the public execution of ‘Damien the regicide’, a scene that is followed by a description of ‘rules for the House of young prisoners in Paris’. The point of the shocking contrast was to show the striking reform that had taken place within the system of penal justice; the disappearance of torture as a public spectacle and the disappearance of the body as the major target of penal repression. In place of the ‘spectacle of the scaffold’<sup>29</sup> and the body as the target and object of power, there appeared a new character within penal judgment: ‘a whole set of assessing, diagnostic, prognostic, normative judgments concerning the criminal’.<sup>30</sup> The new character was discipline. What became important was *knowledge* about the criminal, so that the target was no longer the body but the soul. That is, a whole new system of truth about the subject was produced, that became entangled with the practice of the power to

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<sup>24</sup> Foucault (n 21) 170-187.

<sup>25</sup> M Foucault, *The Birth of the Clinic* (A Sheridan, trs) (Routledge: Abingdon). The term also appears in *Discipline and Punish* (n 21) – see for example pp. 171, 195 and 241, where he describes a power that is permanent, exhaustive, omnipresent, exercised by surveillance and capable of making all visible as a ‘faceless gaze’.

<sup>26</sup> Foucault (n 21) 170. Emphasis added.

<sup>27</sup> *Ibid* 175. Emphasis added.

<sup>28</sup> *Ibid* 23.

<sup>29</sup> *Ibid*, the title of Part One (2).

<sup>30</sup> *Ibid* 19.

punish. This system operated as a ‘micro-physics of power’.<sup>31</sup> A micro-physics,

presupposes that power exercised on the body is conceived of not as property but as strategy, that its effects of domination are attributed not to ‘appropriation’, but to dispositions, manoeuvres, tactics, techniques, functionings; that one should decipher in it a network of relations, constantly in tension, in activity, rather than a privilege one might possess.<sup>32</sup>

The new power became associated with reform:

And reform, in the strict sense, as it was formulated in the theories of law or as it was outlined in the various projects, was ... to make of the punishment and repression of illegalities a regular function, co-extensive with society; *not to punish less but to punish better*; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body.<sup>33</sup>

The focus of Foucault’s work at this time was, as I have said, the subject and he drew attention to how discipline constructed the ‘docile body’, the subjected and practised body. The body as the object and target of power had in fact been discovered in the classical age and the central notion that made the body able

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<sup>31</sup> *Ibid* 26.

<sup>32</sup> *Ibid* 26.

<sup>33</sup> *Ibid* 82. Emphasis added.

to be ‘subjected, used, transformed and improved’<sup>34</sup> was docility. The body of the soldier provided an example. The soldier had become something that could be constructed and made useful. The new element in the eighteenth century projects of docility was, according to Foucault, the *disciplines* – they created new relations of docility-utility. The discovery of disciplines was not a sudden and marked event, rather they formed a ‘multiplicity of often minor processes’, which ‘gradually led to the blueprint of a general method’.<sup>35</sup> Examples could be found not only in the military organisation but also in hospitals and in primary schools – places where ‘meticulous, often minute techniques’, ‘a whole set of techniques, a whole corpus of methods and knowledge, descriptions, plans and data’ were used ‘for the control and use of men’.<sup>36</sup> Techniques as simple as, for example, the timetable which was a means of controlling activity. This monastic inheritance was soon to be found in hospitals, schools and workshops. Similarly, there were techniques of discipline that correlated the body and the gesture, good handwriting being one example. The efficient gesture produces the disciplined body. Discipline is thus ‘a political anatomy of detail’.<sup>37</sup> Moreover, discipline organises a particular analytical space – a political space, an enclosure, or a functional site (for example, the hospital). The summary method of discipline is thus *tactics*.

An ideal model showing the tactics of this power that functions by means of surveillance is the panopticon, as referred to previously in Chapter 3. Foucault provided a critical assessment of Jeremy Bentham’s idea of the panopticon in

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<sup>34</sup> *Ibid* 136.

<sup>35</sup> *Ibid* 138.

<sup>36</sup> *Ibid* 138-41.

<sup>37</sup> *Ibid* 139.



the context of his study on the prison and punishment in *Discipline and Punish*.<sup>38</sup> The architectural figure of the panopticon consists of a central tower surrounded by an annular building around the periphery. The tower is pierced with windows that see out from the inner centre of the ring. The peripheral building is divided into cells, with a window on either side, one letting in the light from the outside and the other looking out towards the tower. A supervisor is placed in the central tower and in each cell one could place the condemned man, the madman, the patient, the worker, the schoolboy. The design of the building means that the supervisor can observe each of the cells at any time, which are 'like so many cages, so many small theatres, in which each actor is alone, perfectly individualised and constantly visible'.<sup>39</sup> Not only this, but each individual within the cells can be seen but cannot see; he does not know when or if he is being observed, giving the impression of an invisible and constant surveillance. 'And this invisibility is the guarantee of order.'<sup>40</sup> If, for example, the cells contain convicts, there is no danger of a plot for a collective escape, no planning of new crimes; if madmen, there is no risk of their committing violence upon one another; if patients, no danger of contagion; if workers, no theft, no disorder, no slowing down of the rate of work; if schoolchildren, no copying, no noise, no chatter, no wasting of time.

Thus, the major effect of the panopticon is 'to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of

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<sup>38</sup> Foucault makes reference to J Bentham, *The Works of Jeremy Bentham* (Bowring, ed) 1843, *ibid* 200.

<sup>39</sup> *Ibid* 200.

<sup>40</sup> *Ibid* 200.

power’.<sup>41</sup> Bentham imagined a wide range of uses for the panoptic model. In Foucault’s application of the model, the panoptic schema could be used to reform prisoners, to confine the insane, to supervise workers, to instruct schoolchildren. It is, in essence a ‘type of location of bodies in space, of distribution of individuals in relation to one another, of hierarchical organisation, of disposition of centres and channels of power, of definition of the instruments and modes of intervention of power, which can be implemented in hospitals, workshops, schools, prisons’.<sup>42</sup> It is ‘applicable to all establishments whatsoever’<sup>43</sup> and can be integrated into any function. Consequently, it is ‘a great new instrument of government’.<sup>44</sup>

As such, the panoptic schema was destined to spread throughout the social body. Panopticism reflected a new political anatomy of power that operated by means of relations of discipline, not the relations of sovereignty. Discipline infiltrated the social field, so that there was a historical transformation towards a ‘generalised surveillance’<sup>45</sup> and, in turn, a transformation towards a disciplinary society. Disciplinary power was thus a generalised mechanism of panopticism. Furthermore, ‘discipline’ ‘may not be identified with an institution or an apparatus; it is a type of power, a modality for its exercise, comprising a whole set of instruments, techniques, procedures, levels of application, targets. It is a “physics” or an “anatomy” of power, a technology.’<sup>46</sup>

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<sup>41</sup> *Ibid* 201.

<sup>42</sup> *Ibid* 205.

<sup>43</sup> Foucault quoting Bentham, Foucault (n 21) 206.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid* 209.

<sup>46</sup> *Ibid* 215.

By the 1830s, Foucault reflects, the panopticon became the architectural mould of most prison projects. Panopticism – i.e., techniques of disciplinary power – operated to produce a certain type of individual, the *delinquent*, and to produce in turn *delinquency*. The ‘delinquent’ represented a character other than the offender, in that what defines him is not his crime but his life. Disciplinary power targets not only the crime but the soul of the delinquent, under the authority of criminology, medicine or psychology. In this way, offences are not eliminated, they are distinguished, labelled and distributed. A certain, usable category of illegality is produced – ‘delinquency’. This specification of a delinquency is the success of the prison – why else, given its many failures, does it continue to thrive? Critics of the prison recognise these failures as, for example, the following: prisons do not diminish crime; detention causes recidivism; prison cannot but produce delinquents – that ‘other’, unnatural and dangerous category of existence.<sup>47</sup>

The reason that Foucault describes the specification of a category of delinquency as the success of the prison is because this type of illegality – supervised, disarmed and concentrated – is directly useful and advantageous from a political point of view. Delinquency makes it possible to supervise a relatively small and identifiable group. Moreover, delinquency ‘makes it possible to supervise, through the delinquents, the *whole social field*’.<sup>48</sup> In other words, delinquency functions as a ‘political observatory’<sup>49</sup> through which it is possible to regulate the behaviours of other groups within society. The

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<sup>47</sup> *Ibid* 265-68.

<sup>48</sup> *Ibid* 281.

<sup>49</sup> *Ibid* 281.

police-prison-delinquency circuit, in Foucault's example, functions in an uninterrupted and regulatory fashion. To summarise, Foucault was describing how disciplinary power operates as a power of normalisation, to produce knowledge (of individuals, or groups of individuals) in society – it is this knowledge that is useful.

In a similar way, in his studies on the history of sexuality, Foucault describes the operation of discipline to create the category of 'perversions' within the discourse on sex in eighteenth century Western societies. Perversions were determined by 'the order of desires',<sup>50</sup> one of two Western systems for governing sex – the other being the law of marriage. The emergence of these deviant sexualities did not represent, in Foucault's analysis, so much an exclusion as a new ('medico-sexual',<sup>51</sup>) regime that represented a 'new specification of individuals'.<sup>52</sup> For example, Foucault contemplates how the nineteenth century homosexual became a personage, a species, and everything that went into his personage was defined by his sexuality. In other words, the machinery of this type of power that disciplines was not to suppress the homosexual but to give the category a 'permanent and visible reality'.<sup>53</sup>

The steady recognition of these categories – i.e., delinquency, perversions – was only possible due to one, often unacknowledged, event: the proliferation of discourses on punishment and sexuality respectively. In *The History of*

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<sup>50</sup> M Foucault, *The History of Sexuality: Volume 1: The Will To Knowledge* (R Hurley, trs) (Penguin, London 1998) 39-40.

<sup>51</sup> *Ibid* 42.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid* 44.

*Sexuality*, Foucault introduces the idea of an ‘incitement to discourse’.<sup>54</sup> He describes how, contrary to the ‘repressive hypothesis’, which proposed that the seventeenth century was the age of sexual repression, there was in fact a multiplication of discourses on sex: ‘an incitement to speak about it, and to do so more and more; a determination on the part of the agencies of power to hear it spoken about and to cause *it* to speak through explicit articulation and endlessly accumulated detail.’<sup>55</sup> He describes how power operated in such a way that the discourse on sex became *essential*. And it was talked about ‘in the form of analysis, stocktaking, classification, specification, of quantitative or causal studies’.<sup>56</sup>

What occurred during this period of the multiplication of discourses on sexuality was the transformation of the knowledge about sex into a ‘science of sexuality’.<sup>57</sup> One of the great innovations in the techniques of power in the eighteenth century was the emergence of ‘population’ as an economic and political problem. Population was one of the centres that began to produce discourses on sex in the eighteenth and nineteenth centuries.<sup>58</sup> To explain further, governments became concerned not just with subjects, or even ‘people’ but with ‘population’ – i.e., with ‘specific phenomena and peculiar variables: birth and death rates, life expectancy, fertility, state of health, frequency of illness, patterns of diet and habitation’.<sup>59</sup> This shift in Foucault’s later work from the subject and the body to ‘population’ is a particularly interesting

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<sup>54</sup> *Ibid* 17.

<sup>55</sup> *Ibid* 18.

<sup>56</sup> *Ibid* 23-4.

<sup>57</sup> *Ibid* 13.

<sup>58</sup> Others included medicine and psychiatry.

<sup>59</sup> Foucault (n 50) 25.

feature in the development of his notion of disciplinary power, not least because it makes his methodology more readily applicable to other analyses that examine the distribution of individuals in a particular (political) space – such as, in this thesis, to the FRA of the EU.

Similarly, in his study of the prison and punishment, a multiplication and transformation in the discourse on punishment took place – one that, as I have described above, removed punishment as a spectacle. What is interesting is *how* this transformation took place. How is it that punishment came to target the soul and not the body? How is it that the discourse on sex became essential, bringing with it perversions and a scientific connotation? Moreover, why do we tend to ignore these transformations? With respect to the disappearance of torture as punishment, perhaps we too readily associate the development with a process of ‘humanization’ that then removes the need and desire for further analysis.<sup>60</sup> We associate the evolution with ‘progress’, rather than with techniques of normalisation and control.<sup>61</sup> The Foucauldian message is, instead, to question these processes, which function as the machinery of disciplinary power.

## VIII. ‘DISCIPLINE AND MONITOR’

I now turn to uncovering the workings of disciplinary power within the FRA’s processes. In the first instance, the relations of disciplinary power have led to a multiplication of discourse on fundamental rights. We already know this and

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<sup>60</sup> Foucault (n 21) 7.

<sup>61</sup> *Ibid* 160.

have been over the details of this multiplication in previous chapters. So far in this chapter I have described how – according to the institutional and academic literature – the FRA exercises ‘observatory monitoring’ (according to the Commission), provides ‘assistance and expertise’ relating to fundamental rights (per the Regulation), or offers ‘collective learning’ and ‘guidance’ (says de Schutter). I now explain how these processes are in fact a type of ‘monitoring’, understood as ‘surveillance’. I thereby suggest that features of panopticism are identifiable in how the FRA operates and also identify the power of normalisation that is inherent in these features. I further discuss the implications that this has for the FRA and its rights discourse.

#### **A. Panopticism and the FRA**

As I have shown, the panopticon is described in Foucault’s analysis as ‘a great new instrument of government’ that is ‘applicable to all establishments whatsoever’.<sup>62</sup> According to Foucault’s interpretation, the panoptic schema could be applied to a range of institutions – prisons, schools, etc. I propose that it can also be applied to the FRA. The FRA is a particular analytical space, enclosure or functional site in which disciplinary power operates via ‘*tactics*, techniques and functionings’.<sup>63</sup> These are visible at the level of its structure, working methods and products. Structurally, the Agency operates through nodes of experts at the EU and national level. Its output and working methods entail gathering data and information in the form of, most importantly, the three main publications examined in the last chapter: the annual reports, the thematic reports (e.g., the Homophobia Report) and the survey (i.e., EU-

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<sup>62</sup> *Ibid* 206.

<sup>63</sup> *Ibid* 26. Emphasis added.

MIDIS). I examine how the latter two are ideal representations of panopticism. I look especially at the following three features of the panoptic model: first, the code of conduct within the models; second, the role of the supervisor in the tower; and third, the target of disciplinary power.

First, the *code of conduct* within the FRA model is not correct (as opposed to criminal) behaviour (as it was in the panoptic schema of the prison) but (respecting, protecting and upholding) human rights. Human rights is the discourse which is operating via disciplinary power. The code locates its meaning and mandate in the Charter and Article 6(1) TEU (as per the Regulation, in recital 2 and 9). As a code of conduct, rights discourse is associated with progress. Because of this, we do not question the multiplication in the rights discourse of the FRA, or the increase in the FRA's output (for example, why a survey on minorities and discrimination needs to be conducted, and/or how), since we associate the evolution with progress rather than with strategies of normalisation. We accept the code of conduct and the need for more and better human rights data because this, as the FRA's Director tells us, 'will help us to better understand what is needed to *change the situation for the better*'.<sup>64</sup>

Second, the role of the *supervisor* is interesting. The supervisor is, within the panoptic model, situated within a central tower. In the FRA model, there is no equivalent tower, nor a resultant, single authoritative figure because this model does not resemble a top-down administration of authority but, rather, a

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<sup>64</sup> 'Speaking Points for EU-MIDIS Press Conference', Press Conference Speech by Morten Kjaerum, 5 <[http://fra.europa.eu/fraWebsite.eu-midis.index\\_en.htm](http://fra.europa.eu/fraWebsite.eu-midis.index_en.htm)> accessed 24 April 2009. Emphasis added.



complex web of networks that operate in a way that conceals the exercise of power. This structure is thus much more complex than Foucault's model of a central tower surrounded by cells; the same principle applies, however. Were there a tower in the FRA model, it would have to consist of all the *experts* that make up the structure of the FRA at both the EU and national levels: for instance, the Director, the Management Board, the Executive Board, the Scientific Committee, and the RAXEN and FRALEX networks. It would also contain the 'other actors' with which the FRA works, since these actors *cooperate with* the FRA and aid it in its task of providing assistance and expertise<sup>65</sup> – i.e., organisations at the Member State level (i.e., National Liaison Officers, NHRIs), organisations at the international level (e.g., the OSCE, the UN), the Council of Europe,<sup>66</sup> NGOs and other civil society organisations. However, the complexity of the FRA structure makes drawing this parallel between the two models awkward. It does, on the other hand, lead to an important discovery: that, developing on Foucault's interpretation of the panoptic schema, it is not necessary even to label a supervisor. It does not matter, in other words, whether there is 'a' single, identifiable supervisor, or supervising body/ies, in the tower or that there is *no* 'centre' of power – since the central premise is that disciplinary power operates within the model

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<sup>65</sup> (n 1) art 7-10.

<sup>66</sup> The Council of Europe can be separated out from the other actors in this list. It has its own rights discourse and is governed by its own tactics (e.g., the discourse is located in the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights). This means that, whilst it does fit into the analysis that I am making here – i.e., the actors with which the FRA cooperates could be conceptualised as supervisors in the tower in the panopticon illustration – the Council of Europe has an intensified supervisory role because of its recognised position as an already established human rights body within the region of Europe. It is not within the scope of my project to explore the Council of Europe's rights discourse but I do recognise both the Council of Europe as a separate actor in the FRA's discourse and its relationship of cooperation with the FRA (Regulation 168/2007 (n 1) art 9).

regardless. The principle that explains this is *panopticism*, rather than the panopticon *per se*.

We can see panopticism at work in the EU-MIDIS survey and in the Homophobia Report. These products require a permanent and constant observation of the fundamental rights situation (which is not lessened by the limitation that the FRA can only observe where the Member State is applying EU law and within the boundaries of the MAF). Through both the survey and the homophobia studies the Member States are being observed. Because of how intricate and multifarious the expert networks of the FRA are (as described in Chapter 4, these networks exist at the EU, national and ‘other’ levels), this surveillance is invisible as well as constant. The thematic reports and the survey can, moreover, be conceptualised as tools of collective learning and guidance since, for instance, they highlight examples of good practice and contain the FRA’s opinions on what further action can be taken at the national and Community levels. This collective learning and guidance is, effectively, surveillance. The Member States are being observed by experts. Moreover, it is not only the Member States that are observed but also the Union citizens and the other actors with which the FRA cooperates, for example NGOs. Through this observation, a knowledge is gathered about these subjects: in terms of the Member State, a knowledge of the national human rights situation is acquired through observation, for example the FRA discovers whether there is an equality body present within the Member State (as seen through the collection of information and data for the annual and thematic reports). In terms of the citizen, the FRA acquires a knowledge about their experiences of

discrimination (as seen through the survey). This knowledge becomes a means of disciplining the society of the EU and thus a guarantee of order – I explain further, below. Not only this but the Member States and citizens observe *each other* and thereby educate each other on the situation of human rights within their territories, identifying and disseminating best practice.

A central feature of panopticism, therefore, is that the power relation is *self-reinforcing*. It operates in a similar way to the confession: through the penal confession, the accused himself took part in the ritual of producing penal truth – admitting that the crime took place, that he committed it and thereby supporting the operation of punishment.<sup>67</sup> In this spirit, the Member States of the EU ‘confess’ by opening themselves up to scrutiny under the eyes of the experts and by accepting the terms of scrutiny (agreeing to the FRA and the standard of the Charter). The same is true of the Union citizens, and indeed of the other actors. The observation of the citizen can be illustrated using the EU-MIDIS survey.<sup>68</sup> The individuals approached by the FRA for the purposes of collecting data for the survey accept the terms of the rights discourse which the FRA sets. The individual responds to pre-determined questions that ask for a limited, and often prompted, response. For example, one of the questions in the survey questionnaire, on experiences of crime, asks: ‘Do you think [this incident/any of these incidents] in the last 12 months happened partly or completely because of your immigrant/minority background?’<sup>69</sup> This question

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<sup>67</sup> Foucault (n 21) 38-9.

<sup>68</sup> I come back to the other actors of the FRA in Chapter 7, where I examine their involvement in the FRA’s rights discourse from a governmentality perspective.

<sup>69</sup> European Union Agency for Fundamental Rights (FRA), ‘EU-MIDIS European Union Minorities and Discrimination Survey: Questionnaire’, 2009, 28

prompts the respondent to assume the identity of ‘immigrant/minority’. It also encourages the idea that certain experiences of crime are linked to these identities. The FRA also sets the terms of the rights discourse by defining the key terms it uses. The questionnaire, therefore, when asking about discrimination in general gives a definition of discrimination: ‘By discrimination we mean when someone is treated less favourably than others because of a specific personal feature, such as age, gender or minority background.’<sup>70</sup> In this way, the Member States and their citizens take part in producing the rights discourse of the FRA. This discourse in turn becomes the ‘truth’ about human rights in the EU as it will be recounted by the FRA. The ritual of the confession is thus *self-disciplining*. The Member States and citizens are also reinforcing the normalising power of discipline. This is the triumph of disciplinary power, operating as panopticism: to function as an automatic, permanent, invisible and *self-disciplining* power.

In terms of the third feature of panopticism, the *target* of disciplinary power is therefore not literally ‘the body’ but a slightly different subject is ‘subjected, used, transformed and improved’.<sup>71</sup> the Member State and the citizen. The other actors with which the FRA has a relation of cooperation and, to a lesser extent, the Union institutions are also targets. The institutions are referred to as ‘to a lesser extent’ since the Commission in particular is heavily involved in the structural and working methods of the FRA.<sup>72</sup> The Member States are, therefore, within the cells surrounding the central tower, which resemble ‘small

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<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)>  
accessed 24 April 2009.

<sup>70</sup> *Ibid* 4.

<sup>71</sup> Foucault (n 21) 136.

<sup>72</sup> See Chapter 4, Part IV for details.

theatres'<sup>73</sup> – an image that evokes their visibility and the extent to which they are under a constant and automatic surveillance from the experts, each other and relevant stakeholders. This continuous observation is invisible to the extent that is not intrusive. (It is not invisible in the sense that transparency is risked and we cannot know who these experts are and when they are producing these reports; this information is available.) Detail and a knowledge about the subject, the Member State (and the human rights situation therein) and the citizen, is the machinery of disciplinary power.

Disciplinary power targets the Member States and citizens in two ways: it creates on the one hand a category of 'victim' of human rights violation and, simultaneously and on the other hand, it creates a safe and secure space ('Europe') for those who are not victims. For instance, the results of the EU-MIDIS survey clearly identify discrimination against 'minorities'.<sup>74</sup> The citizen belonging to a 'minority' is therefore categorised as 'victim'. Moreover, of all the minority groups surveyed, the Roma emerge as the group most vulnerable to discrimination.<sup>75</sup> The Roma are therefore categorised as 'the most vulnerable victims' in this discourse. The FRA's Director, in a speech for a press conference on the latest results of the survey, paints a vivid scene. He tells how he asked the FRA statisticians to draw up a picture of the experience of the

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<sup>73</sup> Foucault (n 21) 200.

<sup>74</sup> European Union Agency for Fundamental Rights (FRA), 'EU-MIDIS European Union Minorities and Discrimination Survey: Technical Report: Methodology, Sampling and Fieldwork', 2009  
<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)>  
accessed 24 April 2009, highlights that the labels used for the groups that were sampled are: 'immigrants', 'ethnic minorities' and 'national minorities'.

<sup>75</sup> European Union Agency for Fundamental Rights (FRA), 'EU-MIDIS European Union Minorities and Discrimination Survey: Data in Focus Report: The Roma', 2009  
<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)>  
accessed 24 April 2009.

‘average Roma person’ with racism. He then described, ‘this is how the past 12 months would have been for you, if you had been born a Roma in one of the EU countries we surveyed’, and listed a number of statistics, for instance: ‘you would have been discriminated against 5 times’; ‘these incidents would have most likely happened when you were looking for work or at a shop, or being denied service in a restaurant, café or bar’; ‘you would not have reported these incidents to any organisation because you felt that nothing would have changed by reporting, or because you did not know how or where to report’; ‘in addition, you would have been a victim of 1 in-person crime in the past 12 months’. Similarly, the Homophobia Report creates another category of victim: the LGBT victim. The Second Part of the Report on ‘The Social Situation’ produces statistics to show that, ‘[h]omophobic statements by political and religious figures appear in the media. In such statements, LGBT persons are often depicted as unnatural, diseased, deviant, linked to crime, immoral or socially destabilising.’<sup>76</sup>

These categories of victim – the ‘minority citizen’, the ‘Roma’ and the ‘LGBT person’ – are created as a result of panopticism. The creation of the victim category is interesting because, similarly to the category of ‘delinquency’ which Foucault described in his studies on the prison, it is politically useful. The victim creates a category against which the rest of the society can define itself, and makes it possible to supervise ‘the whole social field’. That is, it makes it possible to regulate, or discipline, the society of the EU by painting a

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<sup>76</sup> European Union Agency for Fundamental Rights (FRA), ‘Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part II: The Social Situation’, 31 March 2009, 11  
<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_p2\\_0309\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm)> accessed 24 April 2009.

‘vision of a European Union where all members of society are treated with respect, where they can access their right to equality, and where they can feel *safe*’<sup>77</sup> in opposition to the victim label. A safe and secure, victim-less society for all is the promise of the FRA’s rights discourse – and this promise is reliant on the victim category and its constant production.

## **B. Discipline and Normalisation**

Disciplinary power, as it operates via surveillance, or panopticism, is a normalising power. A number of norms are produced in relation to the panoptic schema of the FRA. First, the norm of the FRA, and by implication the EU, as a promoter and protector of human rights. Second, the norm of the space of the EU as safe and secure. Third, the safe society is produced in opposition to something, to that which is ‘other’, the ‘abnormal’. In Foucault’s studies of the prison and of sexuality, which I have focused on, the ‘abnormal’ was the delinquent or the pervert. Disciplinary power operated, he explained, so as to create politically useful illegalities: delinquency and perversions – against which to discipline society and in opposition to which society came to want to discipline itself. A similar politically useful category of a type of ‘delinquency’ has been created in the EU’s rights discourse: the ‘victim’ of human rights violation, or discrimination. There is, in addition, a fourth category that compares to ‘delinquency’: the violator of human rights.

The need for a monitoring mechanism (and the stimulus for a NIE) was recognised by the European Parliament in 2000 following the entry of the far-

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<sup>77</sup> (n 64) 5. Emphasis added.

right Freedom Party into the Austrian government, the views of which Party were considered by some to call into question the respect for common European values, such as the rights of immigrants and minorities. Austria was thus labelled the ‘delinquent’ state and the issue of whether Article 7 TEU ought to be enforced arose. In their speeches at the opening ceremony of the FRA in March 2007, neither the Federal Chancellor of Austria nor its Foreign Minister<sup>78</sup> made reference to the previous dark time of 2000, indicating that the label of ‘delinquent’ need not be permanent. The category of the delinquent was nevertheless firmly established in the discourse by these past events and delinquency is that which is to be avoided.

Recent events in Austria suggest that the ‘delinquent’ may be threatening to re-offend. In the legislative elections held on 28 September 2008, the country’s two far-right parties succeeded in taking a total of 29 percent of the vote between them.<sup>79</sup> A BBC correspondent commented, ‘the resurgent far right can be attributed to a mixture of anti-European sentiment, some anti-immigrant positions and a general sense of discontent with the two traditional centrist parties’.<sup>80</sup> The response of the abstract ‘tower’ – i.e., the national level networks of experts of the FRA, the NHRIs, NGOs, etc. – will be fascinating to

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<sup>78</sup> Respectively, Alfred Gusenbauer and Ursula Plassnik.

<sup>79</sup> The more popular Freedom Party and the Alliance for the Future of Austria – data obtained from *BBC News* < <http://news.bbc.co.uk/2/hi/europe/7641563.stm> > accessed 6 October 2008 and ‘Far Right Gains in Austria’, *BBC News* < <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/7639805.stm> > accessed 6 October 2008.

<sup>80</sup> ‘Far Right Gains in Austria’, *BBC News* < <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/7639805.stm> > accessed 6 October 2006. See also D Cesarani, ‘The Limits of Free Speech’ *The Guardian* (London 3 October 2008) <<http://www.guardian.co.uk/commentisfree/2008/oct/03/race.austria>>; M Gavenda, ‘Austria’s Fragile Middle’ *The Guardian* (London 30 September 2008) <<http://www.guardian.co.uk/commentisfree/2008/sep/30/austria.thefarright>> accessed 6 October 2008.



witness. Moreover, it is interesting to note that the FRA is now housed in Vienna.<sup>81</sup> According to this arrangement, the ‘tower’ can monitor the delinquent state most closely and most intensely – placing it under a constant, invisible and permanent inspection and at the same time setting an example to other potential offenders. Such close observation is the ultimate guarantee of discipline and order.

Thus, disciplinary power operates at the level of the FRA as a constant and automatic surveillance (panopticism) that functions by being able to develop a knowledge about its subject (i.e., the Member States and the citizens of the EU). It is a normalising power that reinforces the norm of ‘the FRA as a promoter and protector of human rights’, the norm of ‘the EU as a safe and secure society’, the ‘victim’ of discrimination and the ‘violation of human rights’.

## IX. CONCLUSION

This chapter has sought to examine the ‘monitoring’ function of the FRA under a Foucauldian lens using the tool of ‘discipline’. It has unravelled the institutional and academic discourse on the FRA to show that ‘monitoring’ was not ever considered monitoring ‘in the legal sense of the term’. Rather, it was understood as ‘observatory monitoring’ and has now been replaced by ‘assistance and expertise’, or ‘collective learning and guidance’. I have considered the Foucauldian implications of these terms to reveal how the

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<sup>81</sup> This was the old home of the EUMC.

FRA's current role reveals processes of *surveillance*. An understanding of the FRA's role as surveillance highlights the nature of the FRA's rights discourse as a disciplinary and normalising discourse. I have, therefore, tried to emphasise that the 'monitoring' (surveillance) function of the FRA is important and on-going; it should not be overlooked simply because it has been rephrased in the Regulation and in academic literature.

The FRA's disciplinary and normalising discourse regulates through surveillance tactics, as manifested in, for example, the EU-MIDIS survey and the Homophobia Report. The FRA therefore displays features of panopticism. The code of conduct within this panoptic model is human rights, which acts as a disciplinary discourse. Panopticism operates even in the absence of a centre of power ('a' supervisor), meaning that the nature of this disciplinary discourse is self-perpetuating. The targets of this disciplinary discourse are the Member States, the citizens of the EU and other bodies of the Agency. In this chapter I have explored the Member States and citizens as targets (the other bodies will be explored in Chapter 7, where I will also return to the individual citizen's role in the FRA's rights discourse). Moreover, a further implication of a Foucauldian understanding of the FRA's advisory role is recognising the normalising power of rights as a disciplinary discourse. The normalisation is fourfold: the *identity of the FRA* as a promoter and protector of human rights is normalised, as is the understanding of the *EU as a safe and secure society*. The categories of the *victim* of discrimination and of the *violation* of human rights are also normalised.

This analysis can be taken further by examining power as governmentality. It is crucial to understand that disciplinary power is part of a governmentality *perspective*. Governmentality takes the analysis of power relations further by making more visible the tactics and technologies via which the FRA operates and understanding these not only as disciplinary but as exercising a form of government. Further, governmentality allows for more speculation on the role of the individual citizen and other actors in the FRA's rights discourse, viewing them as essential to the workings of the power relations in the discourse. Governmentality also reinforces and expands the implications of a Foucauldian critique of the FRA's rights discourse which this chapter has brought to light (i.e., the normalising processes that are occurring through the operation of disciplinary power). For instance, governmentality expands these beyond the regulation of groups of individuals – for example, 'minorities' – to the population of the EU as a whole. I go on now to examine the FRA from the perspective of power as government, in Chapters 6 and 7.

## *Governance as Governmentality*

### I. INTRODUCTION

In the previous chapter, I described how the FRA's role of providing 'assistance and expertise' to the Member States, Union institutions and other bodies can be summed up as an advisory role. I used a Foucauldian analysis based on disciplinary power to demonstrate that the advisory role shows characteristics of surveillance – a type of monitoring which has Foucauldian connotations. This, I explained, is interesting because it reveals that the rights discourse of the FRA is a disciplinary and normalising discourse. Chapter 6 takes this analysis further. I illustrate that the FRA's advisory role is increasingly referred to as guidance and collective learning, and that these functions are defining features of (new modes of) *governance*. This chapter is, therefore, concerned with examining the FRA and its rights discourse in the context of the EU's governance discourses.

The FRA is part of the governance trend that has swept across the EU. The FRA, because it is an *agency*, is a governance structure. It has not, as the last two chapters have shown, been conceived as a traditional human rights monitoring body and because of the increased focus on its governance-related functions, it is important to examine the FRA from the point of view of governance discourses. I critically examine certain governance-related features of the FRA, namely: the presence of actors, experts and the role of statistics in

data collection. Using a governmentality perspective, I show that these *governance* features of the FRA are features of *governmentality*. In other words I highlight that, rather than being part of no more than apolitical processes of *governance*, the FRA's rights discourse displays problematic operations of power as *governmentality*. A governmentality critique therefore shows that the FRA's rights discourse is a discourse of governmentality. This is important because it furthers the claims made in the previous chapter as to the normalising power of the FRA's rights discourse, emphasising that a governmentality analysis reveals more and deeper insights into the nature of this discourse. The implications of a governmentality perspective are that it illuminates processes of both 'governing rights' (the governing of rights discourse) and 'governing through rights' (the capacity of rights discourse to govern).

This chapter therefore has two objectives: first, to describe the significance of governance talk in the EU and to substantiate how the FRA, as a rights agency, fits into this discourse. I address this in Part II. Second, to show how certain 'governance' features of the FRA – namely the presence of actors, experts and the use of statistics – are actually features of governmentality. I do this in Part III, where I also deal with the implications that this has for the FRA's rights discourse.

## II. GOVERNANCE TALK

### A. New Modes of Governance

Governance in today's EU is undoubtedly 'a fashionable word with glittering connotations'.<sup>1</sup> The many variants of governance talk include 'new modes of governance', 'new governance', 'world governance', 'European governance', and 'good governance'. Typically phrased in terms of 'new modes of governance', governance talk in the Union signals a move away from reliance on hierarchical modes of *government* (i.e., reliance on the institutions) towards more flexible modes, which are seen as *better methods* of governing.<sup>2</sup> In this respect, the move towards new governance in the EU reflects a similar pattern in domestic and international systems.<sup>3</sup>

According to Joanne Scott and David Trubek, the features of new governance in the EU include power sharing, multi-level integration, decentralisation, deliberation, participation, flexibility and knowledge-creation.<sup>4</sup> Paul Craig and Gráinne de Búrca, in their account of new modes of governance, focus on three

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<sup>1</sup> C Joerges, "Economic Order" – "Technical Realisation" – "The Hour of the Executive": Some legal historical observations on the Commission White Paper on European Governance' in C Joerges et al (eds), 'Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance' (European University Institute – Robert Schumann Centre/NYU School of Law – Jean Monnet Centre, 2002)

<<http://www.jeanmonnetprogram.org/papers/01/010601.htm>> accessed 15 January 2007.

<sup>2</sup> Note that this thesis refers only to 'governance' in an EU context. Examining the concept of 'governance' by exploring the wider, Anglo-American literature is outside the scope of this project.

<sup>3</sup> For example, evidence of this can be found in the UK context of constitutional reform: see Secretary of State for Justice and Lord Chancellor, *Governance of Britain* Green Paper, 3 July 2007, Cm 7170. For comment on the general subject matter see J Morison, 'Modernising Government and the E-Government Revolution: Technologies of Government and Technologies of Democracy' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart, Oxford 2003) 131.

<sup>4</sup> J Scott and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 *European Law Journal* 1.

examples of new governance instruments and methods:<sup>5</sup> the ‘new approach to harmonisation’, the ‘open method of coordination’ (OMC) and a number of EU governance reform initiatives. Within these initiatives they include the introduction and elaboration of the subsidiarity and proportionality principles, the ‘better regulation’ initiative and the White Paper on European Governance<sup>6</sup> (the White Paper).

The ‘better regulation’ initiative, which stemmed from the guidelines on subsidiarity and proportionality (initially contained in the European Council Conclusions at Edinburgh 1992), formed part of the Commission’s broader governance reform agenda in the late 1990s. It addressed issues such as the simplification of the legislative environment, conducting regulatory impact assessments and the use of alternatives to regulation. The broader governance reform agenda was behind the drafting of the White Paper in 2001, after several years of discussion on the need for reform of EU governance. In 2003, there followed an Inter-Institutional Agreement between the Commission, Council and European Parliament on better law-making.<sup>7</sup> This latter document discussed the need for greater transparency of formal law-making processes, the need for respecting the principles of subsidiarity and proportionality, and for democracy. A section of the Agreement focused on ‘alternative methods of regulation’, in particular the practices of ‘co-regulation’ and ‘self-regulation’. Co-regulation entrusts the attainment of the objectives of a Community act to *other parties*, such as ‘economic operators, the social partners, non-

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<sup>5</sup> P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (4<sup>th</sup> edn OUP, Oxford 2008) Chapter 5.

<sup>6</sup> Commission (EC), ‘European Governance: A White Paper’, COM (2001) 428 final, 25 July 2001.

<sup>7</sup> [2003] OJ C 321/01.

governmental organisations or associations’ (para. 18). Self-regulation allows these *other actors* the possibility of adopting amongst themselves and for themselves common guidelines at the European level (for example and in particular, codes of practice or sectoral agreements, para. 22). In what follows, I focus on the White Paper rather than the Agreement, given that the White Paper provides ‘the most explicit use of governance in the European context’.<sup>8</sup>

## **B. The White Paper on European Governance**

The White Paper was adopted subsequent to the presentation of the programme of the Prodi Commission<sup>9</sup> to the European Parliament in February 2000, where the ‘promotion of new forms of governance’ was identified as one of four strategic objectives. The White Paper has been the stimulus for an extensive range of governance-related activity within or attributed to the EU institutional structure, including a variety of projects, studies and papers,<sup>10</sup> debates and speeches,<sup>11</sup> and extensive academic contributions.<sup>12</sup> I examine, below, what the White Paper talks about and why, and situate the FRA in the discussion.

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<sup>8</sup> C Möllers, ‘European Governance: Meaning and Value of a Concept’ (2006) 43 1 *Common Market Law Review* 313, 324. Note that the promotion of good governance/global governance features in the new Lisbon Treaty (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community) art 1(24) (proposing new art 10 A(2)(h)) to be added to the Treaty of European Union) and art 2(28) (proposing new art 16 A(a)(1)) to be added to the Treaty Establishing the European Community.

<sup>9</sup> Romano Prodi, President of the European Commission September 1999-October 2004.

<sup>10</sup> For example: New Modes of Governance Project <<http://www.eu-newgov.org/>>, European Governance Papers <<http://www.connex-network.org/eurogov/>>, Living Reviews in European Governance <<http://europeangovernance.livingreviews.org/>> accessed January 2007.

<sup>11</sup> See ‘Governance Lunchtime Debates’ and ‘Other Documents’ (‘Speeches’) <[http://ec.europa.eu/governance/docs/index\\_en.htm](http://ec.europa.eu/governance/docs/index_en.htm)> accessed 24 January 2007.

<sup>12</sup> For example: the collection of papers resulting from the symposium: C Georges et al (eds), ‘Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance’ (European University Institute – Robert Schumann Centre/NYU School of Law – Jean Monnet Centre, 2002), available <<http://www.jeanmonnetprogram.org/papers/01/010601.htm>> accessed 15 January 2007; Möllers (n 8); Scott and Trubek (n 4).



i. *What Is Talked About: How To 'Govern Better'*

The White Paper states (though, oddly, in a footnote) that 'governance means' the following: 'rules, procedures and behaviour that affect the way in which *powers* are exercised at the European level, and particularly as regards *openness, participation, accountability, effectiveness* and *coherence*.'<sup>13</sup> These terms are identified as the 'principles of *good* governance' and so the Paper gives the distinct impression that *European* governance is *good* governance. A later report of the Commission makes this point explicitly: analysing public opinion on the White Paper, it determines the general response to be supportive of the 'five principles definition' of *EU* governance as *good* governance.<sup>14</sup> Furthermore, a dichotomy is drawn between 'good' and 'bad' governance in a report by a working group which pre-dates the White Paper. 'Bad' governance, or 'absence of good governance', is evidenced according to this report in 'our partner countries in the developing world'.<sup>15</sup> These 'others' do not share in the kind of positive, progressive governance that the EU promotes.

Progress is implicit in the good governance principles, which in effect provide guidance on reform proposals. 'Reform' is meant in the sense that 'we need to *govern ourselves better, together*',<sup>16</sup> as described by the Commission a year after the White Paper. To whom the 'we' refers is unclear but there is a definite sense of promoting an 'identity with' the Union; 'we' the citizens, not simply 'we' the bureaucrats, 'we' the institutions. Consider for a moment the

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<sup>13</sup> (n 6) 8, footnote 1. Emphasis added.

<sup>14</sup> Commission (EC), Report from the Commission on European Governance, 2003.

<sup>15</sup> Report of the Working Group, 'Strengthening Europe's Contribution to World Governance', (Group 5) May 2001, 10.

<sup>16</sup> Communication from the Commission, 'European Governance: Better Lawmaking', COM (2002) 275 final, 5 June 2002, 2.

following description of the reform of punishment in Foucault's *Discipline and Punish*; there are significant parallels with the Commission's attitude:

‘[R]eform’, in the strict sense, as it was formulated in the theories of law or as it was outlined in the various projects, was ... to make of the punishment and repression of illegalities a regular function, co-extensive with society; *not to punish less, but to punish better*; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; *to insert the power to punish more deeply into the social body*.<sup>17</sup>

The EU's objective is not to govern *less* but to govern *better* – meaning to ingrain the power to govern more deeply into the social body. A governmentality perspective allows us to better analyse *how* better government has been made possible. It encourages us to examine the tactics and practices that operate under the umbrella of ‘governance’ and it means we can understand the verb ‘govern’ as referring to a process of government, where government is understood in the Foucauldian sense of the term – i.e., more accurately, as governmentality.

The Commission is, however, promoting the motto ‘good governance means less government’,<sup>18</sup> as evidenced through the White Paper and the website on European governance created by the Commission subsequent to the White

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<sup>17</sup> M Foucault, *Discipline and Punish: The Birth of the Prison* (A Sheridan, trs) (Penguin, London 1991), 82. Emphasis added.

<sup>18</sup> N Rose, *Powers of Freedom: Reframing Political Thought* (CUP, Cambridge 1999) 16.

Paper.<sup>19</sup> The website has links to various reform proposals, including reports on ‘better regulation’ and ‘better lawmaking’. The EU-sponsored ‘New Modes of Governance Project’ sums up this understanding of ‘governance’ succinctly as ‘governance *without government*’.<sup>20</sup> I suggest, to the contrary, that the processes which the Commission labels as ‘(new) governance’ are in fact processes of governmentality. Here, governmentality describes ‘a whole range of technologies connecting multiple centres of power within an exercise of government that is wider and more complex than that which is contained within traditional understandings of the role of government and the nature of the state’.<sup>21</sup> Thus, what we have is ‘less governance’ and ‘more government’.<sup>22</sup>

The adjective ‘new’ commonly placed in front of governance is, moreover, questionable. Governance is promoted as a novel concept, a counter-concept to government which outshines the outdated-ness of government. However, governance and government not only have the same etymological roots but, as Möllers highlights, ‘governance does not substitute for government, rather it complements it. There is *no governance without government*’.<sup>23</sup> Möllers encourages us to be sceptical of the governance master-narrative that is becoming increasingly dominant because, if not understood within its

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<sup>19</sup> <[http://ec.europa.eu/governance/index\\_en.htm](http://ec.europa.eu/governance/index_en.htm)> accessed 15 January 2007.

<sup>20</sup> An integrated project coordinated by the European University Institute and funded by the EU under its Sixth Framework Programme, 2004-2008 <<http://www.eu-newgov.org/index.asp>> accessed 26 January 2007.

<sup>21</sup> Morison (n 3) 131-2.

<sup>22</sup> C Scott, ‘The Governance of the European Union: The Potential for Multi-Level Control’ (2002) 8 *European Law Journal* 59 makes the point that, simply going on the facts, the Commission’s actions reveal quite the opposite; the Commission favours the ‘Community method’ and the exercise of hierarchical power. Its concept of governance focuses almost exclusively, Scott argues, on public institutions exercising legislative and executive power, i.e. institutions of *government*.

<sup>23</sup> Möllers (n 8) 336. Emphasis added.

institutional context, governance becomes a ‘self-fulfilling prophecy’.<sup>24</sup> It is this kind of scepticism that I am building on.<sup>25</sup> I take issue with the notion that governance is prophetic and consequently the ‘natural’ course events should take; that it is self-fulfilling, a sort of unquestionable ‘good’ that we do not need to interrogate.

Governing *better* (and not *less*) is what is implicit in the proposals for reform suggested in the White Paper. These are set out under four tidy headings: ‘better involvement’, ‘better policies, regulation and delivery’, ‘the EU’s contribution to global governance’ and ‘refocused political institutions’. Through ‘better involvement’, the Commission recognises a need to reinforce a ‘culture of consultation and of dialogue’ between the institutions and the Union’s citizens, so as to generate a ‘sense of belonging’ within the European space. The target for reform seems, therefore, to be an entire *population* one might say, within a specific area and at a specific time. Second, through ‘better policies, regulation and delivery’, the Commission, having recognised that EU policies and legislation are becoming increasingly and unnecessarily complex, promotes ‘better implementation and enforcement’ of legislation. It calls for ‘better and faster regulation’ towards improving the quality, effectiveness and simplicity of regulatory acts, using recognised ‘governance’ techniques

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<sup>24</sup> *Ibid* 319.

<sup>25</sup> Other opinions are not so troubled by the claim to ‘newness’ and are satisfied to analyse ‘new governance’ as different levels of departure from the ‘classic community method’ (CCM); Scott and Trubek (n 4) 4-5 identify two categories, one being *departures* from the CCM (they call this ‘new, *old* governance’) and the other being alternatives to CCM (the four new governance methods of: 1) partnership, 2) social dialogue, 3) the Open Method of Coordination and 4) the concept of ‘Environmental Policy Integration’).

including self-regulation, the co-regulation framework and the OMC.<sup>26</sup> The Commission also calls for the ‘better application of rules’ through regulatory agencies.

The FRA, though not identified by name in the White Paper, is one such regulatory agency.<sup>27</sup> Academic comment on the elaborate but cautious role which the White Paper gives regulatory agencies incites further curiosity. The White Paper states that regulatory agencies ought to have the power to take individual decisions on application of regulatory measures, operate with a degree of independence and within a clear framework set out by the legislature. It then lays out four conditions intended to respect the balance of powers between the institutions, including that ‘agencies cannot be granted decision-making powers in areas in which they would have to arbitrate between conflicting public interests, exercise political discretion, or carry out complex economic assessments’.<sup>28</sup> Scott and Trubek note the impossibility of actually structuring regulatory agencies in this way given that approximately 50 years of experience with independent regulatory bodies in the United States and Europe show that arbitrating conflicting interests, exercising discretion and carrying out complex economic assessments are vital tasks that ought to be

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<sup>26</sup> *Ibid.* See also B Lange and N Alexiadou, ‘New Forms of European Union Governance in the Education Sector? A Preliminary Analysis of the Open Method of Co-ordination’ (2007) 6 *European Educational Research Journal* 321.

<sup>27</sup> The Commission identifies two main categories of agencies in its Communication ‘The Operating Framework for the European Regulatory Agencies’ COM (2002) 718 final, 11 December 2002: ‘executive’ and ‘regulatory’ agencies. There are in turn three types of regulatory agencies: 1) those that provide assistance in the form of opinions and recommendations, help decision-making through their expertise and in particular by pooling the information available at the national level, 2) those that provide assistance by helping the Commission exercise its supervisory mission as guardian of EC law and, 3) those that adopt legally binding decisions on individual parties. The FRA, given its role of providing ‘information, advice and expertise’ to the Community institutions, would fit under the first of these.

<sup>28</sup> (n 6) 24.

performed in a transparent and participatory manner.<sup>29</sup> Christian Joerges supports this assertion, saying that existing agencies do not have ‘regulatory’ powers in the legal sense and as such resemble the committee system more than their name suggests – i.e., they are less accessible, visible and autonomous than agencies *de facto*.<sup>30</sup> Scott, moreover, notes that it is unlikely that the EU will see the US form of independent agency taking hold. Such a framework is, he argues, alien to the political culture of the majority of the EU’s Member States.<sup>31</sup>

The powers of the FRA are, notably, limited by constitutional constraints, namely general limitations with respect to agency construction and restrictions on the Community’s competence with respect to fundamental rights protection, as per the *Meroni* doctrine.<sup>32</sup> For some, this symbolises an ‘untenable and unjustified rigidity in the institutional evolution of the EU’.<sup>33</sup> But what is interesting for our purposes is to probe the functions of the FRA as they are – i.e., the collection, recording, analysing and dissemination of relevant, objective, reliable and comparable information and data. These functions reveal processes of governmentality. The point of interest is thus not solely the ‘law’ on the FRA – i.e., the rules and regulations dictating its make-up and role – but *how* it operates; that is, all the mundane *practices* that actually take place in its everyday operation. I elaborate in Part III.

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<sup>29</sup> Scott and Trubek (n 4) 16.

<sup>30</sup> Joerges (n 1) 14.

<sup>31</sup> Scott (n 22) 68.

<sup>32</sup> Case 9/56 *Meroni v High Authority* [1957-8] ECR 133. The *Meroni* doctrine was discussed in Chapter 4, pp. 109 and (n 43).

<sup>33</sup> X Yataganas, ‘Delegation of Regulatory Authority in the European Union: The Relevance of the American Model of Independent Agencies’, *Jean Monnet Working Paper 3/01* <<http://www.jeanmonnetprogram.org/papers/papers01.html>> accessed 15 January 2007.

It is worth noting that there has been much academic criticism directed at the White Paper. In particular, the White Paper's definition of 'governance' has been disparaged. So, for example, the logical question, 'why these five values and not others?' has been asked by Neil Walker.<sup>34</sup> The White Paper's definition of governance, Walker asserts, is both loaded and inadequate. It is loaded because it gives the (false) impression that it is 'a magic cure for everything'<sup>35</sup> and it is inadequate to understand the more general, broader orientation of governance discourse. He looks past the five chosen values and defines governance as 'the intentional regulation of social relationships and the underlying conflicts by reliable means and institution, instead of the direct use of power and violence'.<sup>36</sup> In a similar vein, Scott and Trubek have described the White Paper's discussion of new forms of governance as 'sketchy'.<sup>37</sup> The White Paper has also been described as a 'modest affair'<sup>38</sup> and in some respects an unfocused document.

## ii. *Why Governance Is Talked About: Representing Credibility*

The White Paper begins by asking the question 'why reform European Governance?' which it then answers in part by referring to an image of a happy family of Europe which ought to be cultivated. The fact that 'many Europeans

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<sup>34</sup> Moellers, 'Politics, Policy or Political Theory?' in C Jeorges et al (eds), 'Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance' (European University Institute – Robert Schumann Centre/NYU School of Law – Jean Monnet Centre, 2002), 5 <<http://www.jeanmonnetprogram.org/papers/01/010601.htm>> accessed 15 January 2007.

<sup>35</sup> N Walker, 'The White Paper in a Constitutional Context' in C Jeorges et al (eds), 'Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance' (European University Institute – Robert Schumann Centre/NYU School of Law – Jean Monnet Centre, 2002), 1 <<http://www.jeanmonnetprogram.org/papers/01/010601.htm>> accessed 15 January 2007.

<sup>36</sup> *Ibid* 28.

<sup>37</sup> Scott and Trubek (n 4) 15.

<sup>38</sup> Scott (n 22) 61.

feel alienated from the Union's work' and that they have 'disappointed expectations' means that reform must start now via the governance method, which allows for speedier change without reform of the Treaties.<sup>39</sup> Reform will also secure 'the future of Europe', since the five principles of good governance will, the Commission hopes, enhance dialogue with civil society, open up the EU's multi-disciplinary system to public scrutiny and debate, and set out the conditions for the establishment of EU regulatory agencies.

However, the reasons the Commission wants so much to talk of 'governance' are more than this. First, it admits elsewhere a 'selfish interest' in the governance debate,<sup>40</sup> a concern to secure *credibility*,<sup>41</sup> of the Union. Romano Prodi, in a 2002 speech to the Presidents of the Regions of Europe on Governance and the Convention, uses the word 'credibility' directly; he encourages the use of governance approaches to make immediate changes to the system without waiting for Treaty reform since 'this is the best way to restore our *credibility* in the eyes of our fellow citizens'.<sup>42</sup> Just a month earlier, the Commission had agreed that '[t]he ultimate goal is to ensure a high level of legal certainty across the EU ... thus helping to strengthen the Community's credibility in the eyes of its citizens.'<sup>43</sup> The White Paper itself affirms that legitimacy (which I am defining as synonymous with credibility) of the Union 'depends on' the five principles of good governance.

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<sup>39</sup> (n 6) 7-8.

<sup>40</sup> (n 15) 24.

<sup>41</sup> Elsewhere, 'legitimacy'. I avoid the term legitimacy, however, since it has multiple connotations.

<sup>42</sup> Romano Prodi, President of the European Commission, 'The role of the regions in building the Europe of tomorrow Governance and the Convention', Speech at the Meeting with the Presidents of the Regions of Europe, Bellagio 15 July 2002. Emphasis added.

<sup>43</sup> Communication from the Commission, 'Action Plan "Simplifying and Improving the Regulatory Environment"', COM (2002) 278 final, 5 June 2002, 3.



Second, the White Paper makes the broader claim that the EU is concerned not only with ‘European governance’ but also with ‘global governance’. This is the path to the ‘future of Europe’, which sees an involvement in influencing global developments. In its explanation, the Paper spells out an equally serious concern with promoting security: ‘[g]overnance beyond the EU’s borders affects not only the rest of the world but has an important influence on the EU’s own security.’<sup>44</sup>

It is significant that the EU’s governance talk is explicitly tied to the issue of credibility. Governance discourse allows the EU to represent itself as denouncing ‘more government’ and allowing citizens to ‘govern themselves’ under a flag of ‘new governance’ and also as actively working towards a credible human rights policy – as illustrated by the creation of a new institution for the protection and promotion of these rights, the FRA. The EU’s concern with credibility, represented through governance talk, inadvertently resembles governmentality (not only governance) in action.

### III. GOVERNANCE AND RIGHTS: THE FRA

‘New governance’ talk within the EU reflects ‘a new process of governing; or a changed condition of ordered rule; or the new method by which society is governed’.<sup>45</sup> This new process involves the use of *agencies* to govern. The concept of the ‘agency’ is not, however, ‘new’ to the Union. The first

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<sup>44</sup> (n 6) 5, 9 and 30.

<sup>45</sup> R Rhodes, ‘The New Governance: Governing Without Government’ (1996) 44 *Political Studies* 652, 653.

Community agencies date from the 1970s.<sup>46</sup> A ‘second generation’ of agencies developed in the 1990s and the most recent, ‘third generation’ came about in 2003.<sup>47</sup> A governmentality analysis of the Fundamental Rights Agency, however, reveals a *new perspective* on governance and on the implications that this has for the FRA’s rights discourse.

The crucial features which reveal the Agency as being a tool of *governmentality* rather than simply *governance* are the following: first, the *actors* that make up the Agency’s structure; second, the classification of these actors as *experts*; and third, the use of *statistics* in the collection of data and information.

#### **A. Actors**

The FRA, as a governance structure, resembles a ‘self-organising, inter-organisational [network]’.<sup>48</sup> A feature of the network is that it is made up of *actors*. These are characterised by two things: on the one hand, their *independence* and, on the other, their *expertise*. In the discussion of actors here, I refer to the FRA bodies at the supranational (i.e., EU) level and the national level. Discussion of the ‘other bodies’ of the Agency<sup>49</sup> is left until Chapter 7, for reasons that will become apparent.

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<sup>46</sup> The European Centre for the Development of Vocational Training and the Foundation for the Improvement of Living and Working Conditions.

<sup>47</sup> Examples of Community agencies today include: the Community Fisheries Control Agency and the European Environment Agency. See further at: <[http://www.europa.eu/agencies/community\\_agencies/index\\_en.htm](http://www.europa.eu/agencies/community_agencies/index_en.htm)> accessed 3 November 2007.

<sup>48</sup> Rhodes (n 45) 652, 656.

<sup>49</sup> See Chapter 4, Part IV for a description of the organisation of the FRA.

The 2007 Regulation emphasises the requirement of *independence* of actors at the supranational level of the FRA's structure (from the Community institutions) in Article 16, which specifies that '[t]he Agency shall fulfil its tasks in complete independence'. The Article ties the independence requirement to the public interest. Moreover, the genuine independency of the Agency was found to be a main concern amongst external participants as evidenced by the public hearing report at the formative stages of the FRA's development. Yet, whether the current structure is actually a move away from the internal contradictions regarding independence evident in earlier documents is debateable.<sup>50</sup> The institutions, the Commission in particular, are heavily involved in selecting the actors that make up the FRA's bodies.

At the supranational level, according to the Regulation,<sup>51</sup> the Management Board of the Agency should be composed of one *independent* expert appointed by each Member State as well as one independent person appointed by the Council of Europe. It does, nevertheless, include two representatives of the Commission. The six members of the Executive Board include four Management Board Members, a representative from the Council of Europe and, again, one of the representatives of the Commission that sits on the

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<sup>50</sup> Council Regulation 168/2007/EC of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1, art 16 and arts 11-15; Communication from the Commission, 'The Fundamental Rights Agency Public Consultation Document', COM (2004) 693 final, 25 October 2004. The Communication, on the one hand, stated that the FRA would be independent of all those with whom it comes into contact (the Commission, the European Parliament, the Council, Member States and civil society) but, on the other, it suggested that the 'representatives appointed by' these entities (and the Council of Europe) would participate in the management bodies of the Agency (10). For comment on this and the necessary role of the now redundant Network of Independent Experts, see: M Scheinin, 'The Relationship between the Agency and the Network of Independent Experts' in P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart, Oxford 2005) 87.

<sup>51</sup> (n 50) recital 20 and art 12(1)(a).

Management board. The Scientific Committee is perhaps the most strictly ‘independent’ of the three bodies. Appointed by the Management Board, after consultation with the relevant committee of the European Parliament, it consists of ‘eleven independent persons’.<sup>52</sup> The appointment of the Director also involves the participation of the Commission, the Council and the competent European Parliament Committee through the cooperation procedure referred to in Article 2 of the Regulation. The national level of actors – the National Liaison Officers, the RAXEN and FRALEX networks – are also made up of *independent* experts who are selected by the FRA through an open call for tender.

The independence criterion has an element of transparency attached to it. The Regulation specifies that members of the FRA’s bodies are to be made public.<sup>53</sup> However, deciphering the ‘who’s who’ at the national level of actors becomes more complicated. Here, speaking of the RAXEN and FRALEX networks, the nodal points become more intricate and entangled. The RAXEN National Focal Points are listed on the FRA website, along with links to the relevant national institutions. Of the FRALEX members, the website provides information on the Senior FRALEX expert for each Member State. Detail on the individual contractors at the national level for each Agency project is not, however, given on the website.<sup>54</sup>

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<sup>52</sup> *Ibid* art 14(1). Note the emphasis in art 14(2) on lack of independence constituting a criterion for dismissal of a member.

<sup>53</sup> A list of members of the Management Board, Executive Board and Scientific Committee is available on the Agency’s website (along with, in some cases, access to their curricula vitae) <<http://fra.europa.eu/fra/index.php>> accessed 16 November 2008.

<sup>54</sup> <<http://fra.europa.eu/fra>> accessed 1 December 2008.

## B. Experts

The second characteristic of the actors, *expertise* – another governance feature of the FRA – deserves closer examination. The actors referred to share the characteristic of expertise and are thus *experts* on fundamental rights issues. ‘Expertise’ describes a distinct field of knowledge known only to experts – i.e., ‘expert knowledge’.<sup>55</sup> This knowledge resembles a shared disciplinary sensibility. According to David Kennedy, experts share a set of assumptions, an intellectual history, a vocabulary of arguments, issues about which they disagree and a style or consciousness.<sup>56</sup>

Viewed from a governmentality perspective, experts also share a ‘pastoralism’.<sup>57</sup> In other words, the power relations within which experts operate, in their decision-making capacity, can be described as ‘pastoral’. In the sense used by Foucault, this refers to a type of power concerned with the welfare of the population (or ‘flock’) as a whole and is not administered through the state. This type of power operates, rather, through codes of practice, statistical data and empirical findings, assessment tests developed by organisations, etc. Nikolas Rose has argued that within the practices of pastoral power, ‘ethical principles are translated into a range of *micro-technologies* for the management of communication and information’.<sup>58</sup> It is through these micro-technologies that experts *govern*.

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<sup>55</sup> D Kennedy, ‘Challenging the Expert Rule: The Politics of Global Governance’, *The Julius Stone Memorial Address 2004*, Thursday 17 June 2004, 13

<<http://www.law.harvard.edu/faculty/dkenedy/publications/>> accessed 15 May 2007.

<sup>56</sup> *Ibid.*

<sup>57</sup> Rose, ‘The Politics of Life Itself’ (2001) 18 *Theory, Culture and Society* 1, 9.

<sup>58</sup> *Ibid* 10. Emphasis added.

Kennedy has challenged ‘the expert rule’, observing that the world is covered in law and we are increasingly governed by (legal) experts. A governmentality perspective allows us to better understand the meaning of what it is to govern, who does the governing and who is governed. By saying that experts govern, what I refer to is their involvement in a form of government – in the control of the ‘conduct of conduct’. To ‘govern’ thus means to engage in ‘education, control, influence, regulation, administration, management, therapy, reformation, guidance’.<sup>59</sup> The ‘will to govern’<sup>60</sup> (referring more to the process of governing than to a conscious desire to govern) is enacted through programmes, strategies, technologies, tactics, techniques, calculations and persuasions that are aimed at regulating the conduct of groups of individuals. The FRA operates using these methods of government, which are found in its operating procedures (the selection of experts), in its working methods (defined by the Annual Work Programme) and in the work it produces to show its output of activity (the annual and thematic reports, surveys, studies and other publications including the magazine, newsletters and documentation resources). The governmentality perspective thus stresses looking beyond the (‘hard’) law – the Treaty, the Regulation, etc. – towards practices at a lower level than the institutional and observing how the experts operate and the language they use to do so. Perhaps the most significant of the practices employed by the FRA is the use of *statistics*, which I consider in section C, below.

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<sup>59</sup> Rose’s definition of ‘governing’ in Rose (n 18) 4.

<sup>60</sup> *Ibid* 5.

The central question then, with respect to experts, is *how do experts govern?* They govern, first, through the exercise of expertise. In terms of the case study of this thesis, experts are ‘*governing rights*’. They are defining and determining the rights discourse of the Agency – i.e., experts govern by influencing the dominant discourse on the subject matter. The ‘information and advice’ provided by the experts who make up the Agency becomes the dominant discourse describing how human rights are promoted and protected by the FRA, which reflects the bigger picture: how they are protected and promoted in the EU. Analysing the relevance of statistical data (section C, below) helps illustrate this point more clearly. This ‘information and advice’ is in the form of the products released by the Agency: the annual reports and comparative thematic studies, which provide a comparative analysis of the human rights situation across the 27 Member States and a comparative account of research into the thematic areas of the MAF.<sup>61</sup> Other publications of the Agency include: surveys, opinions, rapid responses, studies and discussion papers, statements, the newsletter and the magazine, which amongst other things outline the FRA’s past and future activities and research findings. In this way, the expert structure represents what can be termed an ‘analytics of government’, which is ‘a matter of analysing what counts as truth, who has the power to define truth, the role of different authorities of truth, and the epistemological, institutional and technical conditions for the production and circulation of truths’.<sup>62</sup> This discourse in turn is interpreted so as to define what ‘progress’ in the field of human rights is, hence impacting on the development

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<sup>61</sup> And potentially areas that fall outside the MAF where a request is made to this effect by the European Parliament, Council or the Commission under Regulation 168/2007 (n 50) art 4(1)(c) and (d), and art 5(3).

<sup>62</sup> Rose (n 57) 29.

of human rights policy in the EU and charging experts with the added responsibility of (inadvertently) being involved in what counts as ‘progress’.

Second, as the example of rights discourse shows, experts ‘*govern through rights*’. Here rights have to be understood as ‘technologies of freedom’.<sup>63</sup> Experts regulate the conduct of groups of individuals ‘by binding individuals into shared moral norms and values: governing through the self-steering forces of honour and shame, or propriety, obligation, trust, fidelity and commitment to others’<sup>64</sup> that help maintain order and obedience. Fundamental rights represent such ‘shared moral norms and values’. Moreover, third and related to this, experts govern through these technologies of freedom ‘at a distance’.<sup>65</sup> They govern, in other words, through relatively independent entities with which the individuals have limited, little or no direct contact. And the means of government, as I have said, are standards, statistics, strategies – which also serve to maintain a distance, and a blurring of the line, between ‘the governed’ and ‘the governor’.<sup>66</sup>

In the fourth instance, the technologies of freedom support government by becoming linked with our own aspirations. For example, in the context in which Rose was writing, the ‘values’ of crime control and health become entwined with the hopes and desires of the people themselves. We want a safe and secure society for all and we want access to healthcare. Similarly, human

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<sup>63</sup> Rose, ‘Government and Control’ 2000 40(2) *British Journal of Criminology* 321, 324.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> Although, Chapter 7 reveals the extent to which governor/governed is a false dichotomy under a governmentality analysis.



rights have come to be ‘that which we cannot not want’<sup>67</sup> and as such they also resemble control practices, or techniques of government. I will return to this fourth point in Chapter 7.

Therefore, taking a governmentality perspective, what we can see – in addition to the panoptic model that was explained in the previous chapter and the exercise of power as surveillance – is that the FRA, through its experts, is ‘*governing by information, advice, persuasion and learning*’.<sup>68</sup> It is governing, in other words, through *expertise*. It is also governing through the techniques and strategies by which this information, advice, persuasion and learning is communicated: *statistics*.

### C. Statistics

Governmentality, as I outlined earlier,<sup>69</sup> refers to an ‘ensemble formed by the institutions, procedures, analyses, reflections, calculations and *tactics* that allow the exercise of this very specific albeit complex form of power, which has as its target population’.<sup>70</sup> These procedures and tactics form the *practices*, or *technologies* of government – and statistics is a form of the technologies of government. Statistics represented, for Foucault, ‘a set of technological knowledges’<sup>71</sup> that described a reality – they made possible a *knowledge* of the

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<sup>67</sup> G Chakravorty Spivak, quoted by W Brown, ‘Suffering the Paradoxes of Rights’ in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Duke University Press, London 2002) 420, 420.

<sup>68</sup> G De Burca, ‘New Modes of Governance and the Protection of Human Rights’ in P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart, Oxford 2005), 36.

<sup>69</sup> See Chapter 3.

<sup>70</sup> M Foucault, *Security, Territory, Population* (M Senellart, ed; G Burchell, trs) (Palgrave Macmillan, Basingstoke 2007) 219-20. Emphasis added.

<sup>71</sup> *Ibid* 274.

population. Statistics were in fact ‘the secrets of power’<sup>72</sup> that the sovereign did not divulge, since they enabled the specific phenomena of the population to be qualified and managed. This knowledge of the population consisted of, for example, its quantity, mortality and natality; the various categories of individuals within a state; their wealth and wealth in circulation. The ‘technological’ refers to:

that domain of practical mechanisms, devices, calculations, procedures, apparatuses, and documents through which authorities seek to shape and instrumentalize human conduct. It is that complex of techniques, instruments and agents that endeavours to translate thought into practice and thus actualize political rationalities and abstract programs.<sup>73</sup>

The most important technological instruments are to be found nowhere more than in the mundane practices that make up the business of governing everyday social and political life. That is, ‘all the mundane tools – surveys, reports, statistical methodologies, pamphlets, manuals, architectural plans, written reports, drawings, pictures, numbers, bureaucratic rules and guidelines, charts, graphs, *statistics*, and so forth – that represent events and phenomena as information, data and knowledge’.<sup>74</sup> These are the processes through which the FRA performs its advisory function and which would be associated with ‘governance’ processes in the EU’s institutional discourse. They do not operate

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<sup>72</sup> *Ibid* 275.

<sup>73</sup> JX Inda, *Targeting Immigrants: Government, Technology, and Ethics* (Blackwell, Oxford 2006) 6.

<sup>74</sup> *Ibid* 7. Emphasis added.

via a top-down hierarchy of control but through networks of actors and experts. These mundane practices are important not only because they make possible a knowledge of the subject but also because they thereby make objects *visible*, shaping them into forms that are calculable and able to be regulated.<sup>75</sup> They translate reality into documentary form.<sup>76</sup> These practices resemble, in other words, the modern form of the power/knowledge relation. The analysis in this chapter is thereby a development of the analysis based on disciplinary power undertaken in Chapter 5. Statistics bring to light a new type of power/knowledge relation: governmentality – and this has important implications for the FRA’s rights discourse.

In relation to the FRA, the Agency’s use of statistics as part of its working practices has served to create a knowledge about fundamental rights discourse. Statistics have created a reality of the EU as a promoter and protector of human rights, and of the citizen as the rights holder. This is made possible by the mundane practices which infiltrate every aspect of the Agency’s work – these practices being, most importantly, the production of annual and thematic reports and the EU-MIDIS survey<sup>77</sup> but also other publications of the Agency, including opinions, rapid responses, studies and discussion papers, statements, the newsletter and the magazine. The Agency’s main task of collecting, recording, analysing and disseminating relevant, objective, reliable and comparable information and data is achieved by the gathering of statistics. This statistical information and data takes the form of annual and thematic reports,

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<sup>75</sup> In Foucault’s analysis the object was the population.

<sup>76</sup> Inda (n 73) 65. Inda provides an interesting account of the importance of ‘government and numbers’ to how illegal immigrants have been problematised as objects of knowledge and governmental intervention.

<sup>77</sup> <[http://fra.europa.eu/fraWebsite/eu-midis/index\\_en.htm](http://fra.europa.eu/fraWebsite/eu-midis/index_en.htm)> accessed 30 April 2009.

surveys, etc. I concentrate here on the examples of the annual reports (i.e., the Annual Report 2008<sup>78</sup>), the comparative reports (i.e., the Homophobia Report<sup>79</sup>) and the EU-MIDIS survey, since they are the most detailed and comprehensive documents in terms of geographic and thematic scope (sections i-iii). I identify, under each section, which statistics are important and why. After having examined all three publications, I develop on the implications this has for the FRA's rights discourse.

#### *i. The Annual Reports*

The FRA has produced one annual report to date, the Annual Report 2008.<sup>80</sup> The Report aims to assimilate comparable information and data across the 27 Member States. The FRA further describes its data collection and research roles as 'complementary' in the Annual Report. That is, the 'socio-legal information' collected by the FRA is to complement the 'more formal' material collected by other bodies.<sup>81</sup>

The information and data is communicated in the form of statistics. The statistics are collected at the national level in an ongoing fashion by the 27 RAXEN National Focal Points, each of which must produce a 'National Data

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<sup>78</sup> European Union Agency for Fundamental Rights (FRA), 'Annual Report 2008', 2009 <[http://fra.europa.eu/fra/material/pub/ar08/ar08\\_en.pdf](http://fra.europa.eu/fra/material/pub/ar08/ar08_en.pdf)> accessed 16 November 2008.

<sup>79</sup> European Union Agency for Fundamental Rights (FRA), 'Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part I: Legal Analysis', 30 June 2008 and European Union Agency for Fundamental Rights (FRA), 'Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part II: The Social Situation', 31 March 2009 <[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_p2\\_0309\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm)> accessed 24 April 2009.

<sup>80</sup> (n 78) 113.

<sup>81</sup> *Ibid* 113, para 6.6.1. The Report gives an example of 'another body' as the Migrant Integration Policy Index (MIPEX), which is used to measure policies to integrate migrants in 25 EU Member States (and in three non-EU countries), using over 100 policy indicators.

Collection Report'. It is from the information and data contained in these Reports that the thematic chapters of the Annual Report are produced. The thematic area of the 2008 Annual Report was limited to racism, xenophobia and related intolerance and the main subject was whether there has been successful implementation of the relevant Community legislation, the Race Equality Directive.<sup>82</sup> The chapters of the Report, divided into thematic topic areas (e.g., Chapter 2, 'racism and discrimination'; Chapter 3, 'racist violence and crime') reflect trends within the Member States in these areas. These trends are communicated through a number of statistical devices – numbers, tables, graphs and maps.

The Report is saturated with numbers, from the number of Member States that were obliged to transpose the Race Equality Directive by 2003, through to how many applied sanctions in cases of ethnic or racial discrimination and of what amount. The comparative results on these and other issues then appear in tabulated form throughout the report. For instance, under Chapter 3, 'racist violence and crime', table 3.1 records the 'data on racist violence/crime, and related activities, reported by official criminal justice sources at national level in the EU-27 for the year 2006 (most complete year for data comparison)'.<sup>83</sup> It lists results for 17 Member States – quoting in alphabetical order, for Belgium for example, that in 2006 there were '1,355 incidents under general "racism and xenophobia" discrimination, of which 54 were specifically criminal offences'. Graphs are used to provide comparative overviews. For instance, in the same chapter, Figure 3.3 records the 'anti-Semitic crime index trend 2001-

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<sup>82</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

<sup>83</sup> (n 78) 28.

2006 and index average ... comparative overview for four Member States'.<sup>84</sup> A map, in the previous chapter, on 'racism and discrimination', illustrates the 'status of equality bodies in EU Member States by the end of 2007' – i.e., whether these bodies are functioning, ineffective, recently established, or altogether absent, with each category being represented by a particular form of shading on the map of EU. The overall conclusion of the Annual Report is that discriminatory behaviour and racist violence persist across the EU. In many countries these phenomena are not yet effectively addressed through the means provided for in current EC legislation – i.e., the Race Equality Directive, which makes proportionate sanctions as a response to ethnic or racial discrimination mandatory. The Report also stresses the importance of equality bodies to implementing sanctions. The statistics enable a comparative analysis and by consequence are used to draw conclusions on the overall human rights situation within the particular area that is being researched. Statistics are used, moreover, as indicators of good practice, to define 'progress' in the relevant area, to issue recommendations on the part of the FRA, and to inform court decisions.

In terms of good practice indicators, each of the substantive chapters (Chapters 2-4) ends with a section on examples of good practice, where individual countries are listed against the data that supports 'good practice'. The Executive Summary to the Report begins by highlighting an exemplary case of good practice, using statistics on the issuing of sanctions to point out that, in the EU, the UK has most effectively applied legislation to combat ethnic

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<sup>84</sup> *Ibid* 34.

discrimination. Statistics show that the UK leads the Member State table as regards both the annual amount of sanctions and the range of sanctions issued in racial or ethnic discrimination cases.<sup>85</sup>

As for defining progress, this is implicit in the Report. Progress is the inevitable goal of issuing statistics identifying evidence of discrimination, pointing to differences between the Member States and highlighting examples of good practice. The FRA offers suggestions towards progress through its ‘opinions’, which appear in the final chapter of the Report. For example, the opinions stress the importance of sanctions in raising public awareness about the legislation and that imposing sanctions is part of the role of equality bodies.<sup>86</sup> The opinions are written in the form ‘Member States should ensure’, for example, that equality bodies are well resourced and sufficiently independent to carry out this vital function.

Finally, as to informing court decisions, the Annual Report notes that another practical value of the statistics gathered in the Report is that they are available to be drawn on in court decisions. The Report refers to the example of the European Court of Human Rights which delivered a judgment in 2007 against the Czech Republic in which it referred to information collected by the FRA’s predecessor, the EUMC, on the educational situation of the Roma.<sup>87</sup>

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<sup>85</sup> *Ibid* 7.

<sup>86</sup> *Ibid* 115.

<sup>87</sup> *Ibid* 113, para 6.6.2.

ii. *The Thematic Reports*

To date the FRA has produced one comparative thematic study, the two-part Homophobia Report ('Part I: Legal Analysis' and 'Part II: The Social Situation').<sup>88</sup> As I discussed in Chapter 4, both Parts of the comparative Report point to a lack of statistics and a significant data gap; this issue is specifically addressed in Part II.<sup>89</sup> Interestingly, by highlighting the lack of statistical data, the FRA sets out an 'urgent need for better information'<sup>90</sup> and thereby rationalises the fact that it is gathering its own statistics through socio-legal research techniques. Part I of the Homophobia Report consists of data put together by the FRALEX teams, i.e. the legal experts. Part II is a record of the data collected by expert sociologists and includes fieldwork research consisting of interviews and roundtable discussions with relevant key actors, carried out by the DIHR and COWI.<sup>91</sup>

In Part I of the Homophobia Report, statistics are used to provide examples of good practice and to draw conclusions on the overall situation. Part I therefore examines current Community legislation enacted in the area of anti-discrimination – i.e., the Race Equality Directive and the Employment Equality Directive – and finds that the principle of equal treatment is applied 'unequally' through these measures, creating an artificial hierarchy of grounds of discrimination where one ground is protected more comprehensively than

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<sup>88</sup> (n 79).

<sup>89</sup> 'Part I: The Legal Analysis' (n 79) 7 and 'Part II: The Social Situation' (n 79) 131.

<sup>90</sup> FRA media release, 'EU survey of minorities and immigrants sheds new light on the extent of racism in the EU' (Vienna/Brussels 22 April 2009) <[http://fra.europa.eu/fraWebsite.eu-midis.index\\_en.htm](http://fra.europa.eu/fraWebsite.eu-midis.index_en.htm)> accessed 24 April 2009.

<sup>91</sup> European Union Agency for Fundamental Rights (FRA), 'Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part II: The Social Situation', 31 March 2009, 8 <[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_p2\\_0309\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm)> accessed 24 April 2009.



another. So, for instance, under the Employment Equality Directive, statistics show that in 18 Member States the implementation of the Directive has gone beyond minimum standards as regards discrimination on the grounds of sexual orientation. In 18 of the Member States, there is an equality body competent to deal with discrimination on the grounds of sexual orientation. Part I of the Report also examines ‘good practice’ in chapter 9, where four sets of good practices are considered: two of these are the means to overcome the underreporting of discrimination on the grounds of sexual orientation, or the lack of reliable statistical data on this subject; a third set of good practices covers the proactive policies undertaken by public authorities to promote the visibility of homosexuality and various gender identities. A final set relates to the need to protect transgendered individuals from investigations into their past, particularly in the context of employment. The FRA has drawn the general conclusion that there should be one horizontal directive covering all of the discrimination grounds mentioned in Article 13 EC, with the same extended level of protection as regards scope and institutional guarantees as provided for the grounds of race and ethnic origin in the Racial Equality Directive.

In Part II of the Report, the FRA through its opinions supports the horizontal directive on all discrimination grounds. The FRA’s opinions also suggest, for example, strengthening the implementation of anti-discrimination legislation by encouraging Member States to extend the scope of equality bodies to include discrimination on grounds of sexual orientation within their remit. The FRA, furthermore, encourages Member States to combat hate crime by

developing simple and inclusive operational definitions of hate crime for use by the public in reporting such crimes and the police in recording them.<sup>92</sup> The FRA's opinions are based on data and information collected from interviews with stakeholders (i.e., LGBT NGOs, public authorities and National Equality Bodies), questionnaires, country reports drafted by national researchers, and existing research and data.<sup>93</sup>

Each section of Part II of the Report is split into specific and cross-cutting themes, including for example, attitudes towards LGBT persons, hate crime and hate speech, and freedom of assembly. Within each section the statistics are obtained from examples within studies, surveys, and official figures or single cases from various Member States.<sup>94</sup> For example, in Chapter I.1 of the Report, 'Attitudes towards LGBT people', the information is gathered through surveys conducted at the European or national level. The Report explains that the latest Eurobarometer survey from 2008 asked, 'how would you personally feel about having a (gay man or lesbian woman) as a neighbour?'<sup>95</sup> The responses were recorded on a scale of 1 to 10 ('1' for very uncomfortable) and then put together as figures and in a map to show, for instance, that 11% said that they would be uncomfortable having a homosexual as a neighbour (answering 1-3 on the scale) and 67% said they would be comfortable (answering 7-10 on the scale). The map identified countries where the highest proportion of respondents were un/comfortable having a homosexual neighbour. As a result, the FRA was able to identify examples of good practice

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<sup>92</sup> *Ibid* especially 17-22.

<sup>93</sup> *Ibid* 24 (a list of the national researchers is available in Annex 1 of the Report).

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid* 31.

– for example, in Poland the first awareness-raising campaign promoting acceptance of gays and lesbians was organised in 2003 by the group Campaign Against Homophobia.

Using the statistics from Parts I and II of the Homophobia Report, the FRA can therefore construct a discourse through which it identifies good practice and the ‘good’ Member States, as it did through the Annual Report. Moreover, the discourse also labels the LGBT person as a non-ideal citizen, a citizen suffering discrimination, a *victim* (this is emphasised especially clearly in section I.11 of the Report, where quotations taken from LGBT persons suffering ‘multiple discrimination’ are highlighted in boxes – for example: ‘Depending on which part of Berlin I go to, in one I get punched in the mouth because I’m a foreigner and in the other because I’m a queen’ and ‘[i]t is really difficult sometimes being gay and having a disability, especially when it comes to accessibility ... It is obviously quite difficult to become part of a community you can’t access’<sup>96</sup>).

### *iii. Surveys: EU-MIDIS*

As Chapter 4 outlined, EU-MIDIS is the largest EU-wide survey on ‘immigrant and ethnic minority groups’ experiences of discrimination and victimisation in everyday life’.<sup>97</sup> The results of the survey are being released over the period 2009-2010. The FRA has so far released an ‘EU-MIDIS at a glance’ report (introducing the survey and key findings),<sup>98</sup> a full technical

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<sup>96</sup> *Ibid* 106-11.

<sup>97</sup> (n 77).

<sup>98</sup> European Union Agency for Fundamental Rights (FRA), ‘EU-MIDIS at a Glance: Introduction to the FRA’s EU-wide Discrimination Survey’, 2009, 14-15

report (outlining the methodology)<sup>99</sup> and the first of a series of ‘Data in Focus’ Reports, which give details on selected themes to emerge from the research, on ‘The Roma’.<sup>100</sup>

The Roma were chosen as the first group on which to focus because the survey showed that, of all the groups surveyed, the Roma reported the highest levels of being discriminated against. The FRA selected the groups for sampling under the headings of ‘immigrants’, ‘ethnic minorities’ and ‘national minorities’ on the basis of the following statistics: consideration of whether the group is vulnerable or at risk of discriminatory treatment or victimisation (so, for example, groups not considered at risk included British immigrants in Spain); the available population data on the largest immigrant or ethnic minority groups in each member state; the minimum overall size of the community sufficient for sampling (e.g., 5%); and common shared characteristics, namely socially, economically, and/or politically marginalised status when compared with the majority.<sup>101</sup>

The FRA therefore decides, on the basis of statistical data, both which groups will be labelled ‘minority’ groups and which group is the most vulnerable and will become the focus of a more detailed study, acquiring further information

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<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)>  
accessed 24 April 2009.

<sup>99</sup> European Union Agency for Fundamental Rights (FRA), ‘EU-MIDIS European Union Minorities and Discrimination Survey: Technical Report: Methodology, Sampling and Fieldwork’, 2009

<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)>  
accessed 24 April 2009.

<sup>100</sup> European Union Agency for Fundamental Rights (FRA), ‘EU-MIDIS European Union Minorities and Discrimination Survey: Data in Focus Report: The Roma’, 2009

<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)>  
accessed 24 April 2009.

<sup>101</sup> (n 99) 11.

on this group. The FRA determined, according to data supplied to it by the RAXEN networks, that the largest minority groups include, for example, the following: Asians (Cyprus), Central and Eastern Europeans (Ireland, UK), Roma (Bulgaria, Czech Republic, Greece, Hungary, Poland, Romania and Slovakia) and North Africans (Belgium, France, Italy, Malta, Netherlands and Spain).<sup>102</sup> It further determined that the Roma are the group most vulnerable to discrimination, finding that on average for the seven member States where the Roma were surveyed and with respect to nine different areas of discrimination (e.g., at work, by healthcare personnel), 47% of all respondents stated that they had been victims of discrimination based on their ethnicity in the previous 12 months.<sup>103</sup> The FRA therefore constructs a discourse through which the ‘most vulnerable’ citizens of the EU can be identified – in terms of their minority group and in terms of individuals belonging to the most vulnerable minority group. These can be labelled as ‘victims’. The extent to which the individual participates in the survey and hence perpetuates this discourse is a point deserving closer examination. I go on to do this in the next chapter.

The reports containing the survey results put across this information in an efficient way. The ‘EU-MIDIS at a Glance’ Report, for instance, contains the main figures and these are neatly presented in bullet points, as percentages, in graphs and tables, and with summaries on each section given in boxes.<sup>104</sup> The information is, therefore, made as accessible as possible, fulfilling the objectives of education, administration, and guidance, which I earlier identified as the charge of the FRA’s experts.

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<sup>102</sup> For a full list, and definitions of the groups, see (n 98).

<sup>103</sup> (n 100) 4.

<sup>104</sup> (n 98).

Considering all three of these publications – the Annual Report 2008, the Homophobia Report and the EU-MIDIS survey – there are a number of reasons why the statistics they produce are significant from a governmentality perspective. As we saw above in relation to experts, statistics are techniques of government which ‘govern rights’ and ‘govern through rights’.

Statistics ‘govern rights’ because, first, their impact affects the rights discourse of the FRA. Interpreting statistics makes the FRA’s discourse on rights visible. There is also a broader impact of statistics as tools of government, which is that the rights discourse they help to define extends beyond the rights discourse *of the FRA* to the rights discourse *of the EU*. Thus, both the FRA *and* the EU are constructed as promoters of rights discourse: the FRA is represented as the EU’s institution for rights protection and the EU is represented as a human rights organisation. I return to how the impact of the FRA’s statistical data can be measured and how this impacts on the EU’s rights discourse in Chapter 8.

Second, the knowledge which the FRA acquires through statistics is linked to progress, or reform. The opinions of the FRA which appear in the final sections of the Annual Report and the Homophobia Report are suggestions for reform and, by implication, progress. The Homophobia Report: Part II, for instance, emphasises that political leaders at the EU and national level need to take a firm stance against homophobia and discrimination against LGBT and transgender persons, ‘contributing in this way to a positive change in public

attitudes and behaviour'.<sup>105</sup> I have already pointed out how the Director of the FRA has phrased the impact of EU-MIDIS as: working towards a safe European Union for all Members of society. The normalising power of rights discourse is not realised in this vision of a secure Europe, nor are the governing (through) rights processes that are occurring.

In terms of 'governing through rights', statistics, first, produce a knowledge about the subject – here the FRA, and by implication the EU, and the citizen. A governmentality perspective recognises statistics as a set of technological knowledges and identifies which knowledges are being created. Statistics create, on the one hand, a knowledge about the Member State and the internal human rights situation, as we saw with both reports and the survey (the reports identified examples of good practice and the 'good' Member State – for example, the Annual Report 2008 identified the UK as the 'good' Member State with respect to the amount and range of sanctions issued in racial or ethnic discrimination cases). On the other hand, statistics create a knowledge of the citizen. Moreover, they create a category of 'victim'. The statistical data in the Homophobia Report creates the category of the 'LGBT victim'. Statements from prominent individuals are included in the Report to emphasise the point, such as: 'Homophobia is a prejudice that I consider to be particularly revolting and unjustified'.<sup>106</sup> The EU-MIDIS survey uses statistical data to support the creation of the 'minority' citizen (i.e., the citizen belonging to a minority group) and the Roma as categories of victim. This is significant because, as pointed out in Chapter 5, the victim – whether the LGBT person, the person

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<sup>105</sup> (n 91) 4.

<sup>106</sup> Vladimir Spidla, EU Commissioner for Employment, Social Affairs and Equal Opportunities, (n 91) 23.

belonging to a minority group or the person of Roma origin – is a politically useful category. It is useful because in contrast to the victim, the identity of the citizen as the benefactor and object of rights discourse is created. This in turn reinforces the image of a safe and secure Europe. The FRA's Director confirms this as he presents the EU-MIDIS results and speaks of 'our vision of a European Union where all members of society are treated with respect, where they can access their right to equality, and where they can feel safe.'<sup>107</sup> The EU becomes a space of security. I explained in Chapter 3 the link between governmentality and technologies of security – the population becomes the subject and the object of the mechanisms of security. In the model of the FRA, therefore, human rights operate as technologies of security through the mechanisms of actors, experts and statistics.

Second, with respect to 'governing through rights', a governmentality perspective extends the analysis from Chapter 5 by showing that this observation applies to the population as a whole – the results of the Homophobia Report are said to reflect 'general tendencies'<sup>108</sup> within the EU and EU-MIDIS is described as a 'major representative survey'.<sup>109</sup> Statistics govern through rights to make possible the government of the whole population of the EU. This is different from the disciplinary type of normalisation identified in Chapter 5, since it extends normalisation beyond groups of individuals (e.g., 'victims') to the population as a whole. I come back to this idea of the representation of the population through statistics, and/or

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<sup>107</sup> 'Speaking Points for EU-MIDIS Press Conference', Press Conference Speech by Morten Kjaerum, 5 <[http://fra.europa.eu/fraWebsite.eu-midis.index\\_en.htm](http://fra.europa.eu/fraWebsite.eu-midis.index_en.htm)> accessed 24 April 2009.

<sup>108</sup> (n 91) 25.

<sup>109</sup> (n 77).



small numbers of individuals, as a tactic of governmentality in the next two chapters. In Chapter 8, I also explain that the recognition of the processes of ‘governing rights’ and ‘governing through rights’ are part of the *advantages* of a governmentality perspective.

The overall aim, therefore, of placing this amount of emphasis on statistics, and examining the Annual Report, the Homophobia Report and the EU-MIDIS survey, has been to show statistics as tactics by which governmentality operates and to provide evidence for de Búrca’s observation that the FRA is ‘governing by information, advice, persuasion and learning’<sup>110</sup> – i.e., through features commonly associated with ‘governance’. It is also interesting to note how this power relation reinforces itself in the sense that the FRA recognises that there is a lack of statistical data in gathering information and data for both the Homophobia Report and the EU-MIDIS survey. It points to the need for data and statistics – and this also then becomes part of the progressive human rights discourse that is being constructed.

The focus on statistics, experts and actors has developed the analysis in Chapter 5, which examined the FRA’s functions as surveillance showing characteristics of discipline. Using a governmentality perspective, I examined disciplinary power as the power relation visible in the FRA’s monitoring role. Chapter 6 has focused on power as government and taken the governmentality analysis further by probing the mundane practices of the FRA. These practices have been commonly associated with governance at an institutional and

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<sup>110</sup> De Búrca (n 68) 36.

academic level. Hence governmentality intervenes in the FRA's rights and governance discourses to show how processes of governing rights and governing through rights are occurring.

It is worth mentioning that emphasis on statistics is a feature of sophisticated studies on human rights measurement indicators at both an academic and institutional (i.e., UN) level.<sup>111</sup> Measurement indicators are considered useful in relation to human rights for the overarching reason that they 'provide a methodology for monitoring progressive realisation'<sup>112</sup> of human rights, to their highest attainable standard. In other words, measurement indicators make it possible to make progress in relation to rights in two ways, according to Paul Hunt and Gillian McNaughton: first, they help the state to monitor its progress over time and, second, they help hold the state to account in relation to its responsibilities in that particular field. The aim of research on measurement indicators is thus to present the difference between 'rights in principle' and 'rights in practice',<sup>113</sup> and to try to bring actual human rights practices in line with the expectations laid out in the international human rights regime.<sup>114</sup>

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<sup>111</sup> See for example S Fukuda-Parr, 'Indicators of Human Rights and Human Development: Overlaps and Differences' (2001) 2 *Statistical Journal of the United Nations Economic Commission for Europe* 239; T Landman, *Studying Human Rights* (Routledge, Abingdon 2006); T Landman, 'Comparative Politics and Human Rights' (2002) 24 *Human Rights Quarterly* 890; N Mitchell and J MacCormick, 'Economic and Political Implications of Human Rights Violations' (1988) 40 *World Politics* 476. UN human rights bodies have also been preparing reports on the topic – see for instance Report on Indicators for Monitoring Compliance with International Human Rights Instruments, 11 May 2006, HRI/MC/2006/7; United Nations Development Programme (UNDP), *Human Development Report 2000: Human Rights Development*, especially Chapter 5 <[http://hdr.undp.org/en/media/HDR\\_2000\\_EN.pdf](http://hdr.undp.org/en/media/HDR_2000_EN.pdf)> accessed 20 March 2009.

<sup>112</sup> P Hunt and G McNaughton, 'A Human-Rights Based Approach to Health Indicators' in MA Baderin and R McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP, Oxford 2007) 303, 303.

<sup>113</sup> J Foweraker and T Landman, *Citizenship Rights and Social Movements: A Comparative and Statistical Analysis* (OUP, Oxford 1997).

<sup>114</sup> T Landman, 'Measuring Human Rights: Principle, Practice and Policy' (2004) 26 *Human Rights Quarterly* 906.

Todd Landman discusses *forms* of measurement of human rights, saying they include the coding of formal legal documents, data that is events-based, standards-based and survey-based, and aggregate indicators.<sup>115</sup> The focus on measurement indicators of human rights may be on *statistics*. The use of statistical data as a powerful tool in the struggle for human rights has been identified by the United Nations Development Programme (UNDP).<sup>116</sup> Statistics are here understood in a purely empirical sense, as ‘a tool for analysis’ – rights could never be measured fully merely by statistics, the UNDP claims.<sup>117</sup> An intriguing methodological problem to which Landman<sup>118</sup> draws attention relates to the comparability of statistical data due to, for instance, the absence of an upper limit of violations, or truncating the variation of human rights protection across different countries for the ease of drawing a graph.

Whilst work on measurement indicators draws attention to assumptions and problems in the use of statistical data, it is limited in how it interprets ‘statistics’ (i.e., not as technologies of government). I have highlighted the analyses of human rights measurement indicators to show that interesting work is being done on the use of statistics to map human rights discourse. However, what is not in evidence is the use of this information to analyse the process of governmentality, rather than simply governance, that is taking place – and that is what this thesis aims to do, in the context of the FRA.

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<sup>115</sup> *Ibid.*

<sup>116</sup> Hunt and McNaughton (n 112) 315 draw attention to a fundamental difficulty: there is a multiplicity of terms used to describe indicators and the sheer number, and overlap between the terms, is confusing. The authors describe the terms as: performance, statistical, variable, process, conduct, outcome, output, result, achievement, structural, screening, qualitative, quantitative, core and rated as the categories and labels for indicators that can be found.

<sup>117</sup> UNDP, *Human Development Report 2000* (n 111) 90.

<sup>118</sup> Landman (n 114).

#### IV. CONCLUSION

This chapter has satisfied two objectives. The first was to situate the FRA within the EU's governance discourse and describe not only what governance talk in the EU is about and why it is talked about, but also to illustrate how the working methods of the FRA would be conceived of as governance within a traditional analytical framework. The second objective was to analyse certain features of the FRA's working methods from a governmentality perspective and to thereby show that the Agency exhibits features of governmentality, not only of governance. The features discussed were: the *actors* making up the Agency's structure, the classification of these actors as *experts* and the use of *statistics* in the FRA's task of collecting information and data. Examined from a point of view which thinks about how these features affect the nature and practice of government, the chapter showed how actors, experts and statistics are techniques which allow the FRA to 'govern by information' – where 'govern' refers to the processes of 'governing rights' on the one hand, and 'governing through rights' on the other.

The analysis in this chapter therefore takes the analysis in Chapter 5 further. Chapter 5 concluded that the FRA's advisory role shows features of monitoring, or disciplinary power – which revealed the normalising power of the FRA's rights discourse. This chapter extends the analysis by identifying a different type of normalising power, which operates through tactics (of security). It intervenes in the FRA's rights and *governance* discourses to show

that governance features reveal processes of governmentality and that this impacts on the FRA's rights discourse. The importance of revealing the FRA's processes as governmentality rather than simply governance is that it unveils operations of power which 'governance talk', and its uncritical conceptualisation of the FRA, tries to hide.

A governmentality perspective brings new power relations to light, showing how actors, experts and statistics, the FRA's everyday mundane features and practices that are represented as 'governance' processes, operate within the political space of the FRA and are thereby the (disciplinary) techniques through which the FRA governs (through) rights. The processes of governing (through) rights affect the rights discourse of the FRA and the EU and what is defined as progress. The progress is toward a safe and secure society for all and the mechanism which drives the FRA is a concern with security. A governmentality perspective therefore shows that human rights operate as technologies of security. The processes of governing (through) rights also influence the creation of victim categories. Together these tactics make possible the government of a whole population (i.e., the society of the EU) and not only the regulation of groups of individuals (for example the 'minorities' group, as we saw in Chapter 5).

The next chapters expand on this analysis in two main ways. Chapter 7, first, adds to the idea of who is 'governed' when the FRA's rights and governance discourses are examined under a governmentality lens. It examines 'other actors' involved in the FRA's rights discourse besides the 'experts', including

the individual. The objective of exploring the role of other actors is to take the governmentality analysis full circle and to explain how governmentality necessarily involves *self-government*. Second, Chapter 8 articulates how the analysis undertaken here points to the advantages of a governmentality perspective, in terms of the implications that this critique has for the FRA's rights discourse, the FRA's rights-related identity, the EU's rights-related identity and the identity of the citizen as a rights holder.

## *Governmentality as Self-Government*

### I. INTRODUCTION

Chapter 6 explained how the FRA's rights discourse is a discourse of governmentality. In this chapter, I show how governmentality necessarily involves *self-government*. In other words, how the actors within the FRA's rights and governance discourses *govern themselves*. The actors which Chapter 6 examined were the 'experts'. Here, I focus on actors which would not necessarily fit under this label. The category of 'expert' encourages a governor/governed dichotomy; the experts govern and the targets of governmentality are governed. In this chapter I show that governor/governed is a false dichotomy. The actors on which I focus are those actors which, within the (misleading) governor/governed dichotomy, would be labelled as the 'governed'. They are the *individual* and the *non-governmental organisation*. In relation to the experts, they are the 'other actors' of the FRA. They are 'other' because they are not part of the FRA's EU level or national level bodies. Rather, they are actors with whom the FRA has a relationship of 'cooperation' according to Regulation 168/2007 (they are, therefore, integral to the FRA's structure).<sup>1</sup> The FRA's cooperation with NGOs is specifically mentioned in Article 10. The individual is not referred to in the Regulation.

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<sup>1</sup> Council Regulation 168/2007/EC of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1, arts 7-10.

The reasons why I focus on these two ‘other actors’ are, first, that they both come under the label of ‘civil society’. Second, the individual, despite not being mentioned in the Regulation, is central to rights discourse. The very nature of fundamental rights necessitates the individual as subject – in this case the subject is the citizen of the EU. The centrality of the citizen to the Union as it has evolved from a ‘Community’ has, moreover, been firmly reiterated since 1992, when the TEU announced ‘a new stage in the process of creating an ever-closer union among the *peoples* of Europe’ (Article 1) and began conceptualising the people of the EU as more than economic entities, or workers, focusing on citizenship and the rights of the *citizen*. Third, the very idea of ‘Community’ (at the heart of the former European Union’s original project) necessitates a role for the individual in collective life. Emmanuel Decaux has argued that the part played by the individual in collective life is enriched through the various forms of civil society that participate in its making.<sup>2</sup> The ‘community’ is thus incomplete without the ‘individual’ and the ‘NGO’.

The Regulation mentions a number of other ‘other actors’, namely Community bodies, offices and agencies; organisations at Member State and international level (specifically National Liaison Officers, NHRIs, the OSCE and the UN); the Council of Europe; and civil society in general. The civil society organisations are referred to as a cooperation network collectively forming the ‘Fundamental Rights Platform’ (FRP). This consists of non-governmental organisations dealing with human rights, trade unions and employers’

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<sup>2</sup> E Decaux, ‘Human Rights and Civil Society’ in P Alston et al (eds), *The EU and Human Rights* (OUP, Oxford 1999) 899.



organisations, relevant social and professional organisations, churches, religious, philosophical and non-confessional organisations, universities and other qualified experts of European and international bodies and organisations.<sup>3</sup>

I have not dismissed the other ‘others’ to which the Regulation has made reference without consideration, for instance, the NHRI. It is true that an examination of the role of the NHRI would have provided an equally poignant insight into the workings of ‘self-government’. The same can be said of an examination of the role of the European Parliament in the FRA’s rights discourse. Another significant ‘other’ is the Council of Europe. The FRA clearly cannot be separated from this pre-existing human rights organisation and indeed it has repeatedly stressed a relationship of cooperation and mutual reliance with the Council of Europe.<sup>4</sup> Another actor noticeably missing from the discussion (missing from the Regulation in fact) is the ECJ. The Court has been largely responsible for the development of the rights discourse of the

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<sup>3</sup> (n 1) art 10.

<sup>4</sup> *Ibid* recital 18, art 6(2)(b) and art 9. The ‘Factsheet on the FRA’ mentions in the opening paragraph that the FRA ‘cooperates ... *in particular with* the Council of Europe’ <[http://fra.europa.eu/fraWebsite/attachments/factsheet\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/factsheet_en.pdf)> accessed 20 March 2009. On the home page of the FRA’s website, under ‘FAQ’, Question 8 is: ‘How does FRA cooperate with organisations at Member State and international level, the Council of Europe in particular?’ <[http://fra.europa.eu/fraWebsite/faq/faq\\_en.htm](http://fra.europa.eu/fraWebsite/faq/faq_en.htm)> accessed 20 March 2009. Moreover, the FRA releases joint statements on fundamental rights issues with the Council of Europe, see for example ‘Joint Statement of the EU Fundamental Rights Agency and the Council of Europe’s Commissioner for Human Rights on the Durban review conference’ <[http://fra.europa.eu/fra/material/pub/speeches/JointStat-Durban-Review-conf-051208\\_en.pdf](http://fra.europa.eu/fra/material/pub/speeches/JointStat-Durban-Review-conf-051208_en.pdf)> accessed 5 December 2008. The Council of Europe arguably merits closer examination than I have given it here. It can be separated out from the other ‘other’ actors I have mentioned since it has its own rights discourse, governed by its own tactics (e.g., the discourse is located in the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights). Nevertheless, it is both accurate and sufficient to the analysis I am making here to recognise the Council of Europe as an actor with which the FRA has an amplified relationship of cooperation. See also Chapter 1 (n 52) and Chapter 5 (n 66).

Union from the 1970s onwards<sup>5</sup> and there is already extensive comment to be found on the ECJ's role in this respect.<sup>6</sup> Whilst the roles of these other 'others' would merit examination from a governmentality perspective, the strength in delimiting this study to an exploration of the role of the individual citizen and the NGO as other actors is that they are, I believe, more readily misidentified as 'the governed' in the false dichotomy of governor/governed.

Overall then, the aim of this chapter is to extend the governmentality analysis presented thus far in the thesis. Previously, I have referred to governmentality as the 'conduct of conduct' – i.e., an activity or practice that aims to shape, guide or affect the conduct of some person or persons. It is important to understand the meaning of 'conduct' to understand self-government. 'Conduct' (*conduite*), a term that stems from the pastoral power we have encountered in previous chapters, refers to two things: it is, on the one hand, the activity of conducting (the verb *conduire* means to conduct) or of conduction (*la conduction*). But, on the other hand and equally, it is also the way in which one conducts oneself (*se conduire*), lets oneself be conducted (*se laisse conduire*), is conducted (*est conduit*), and the way in which one behaves (*se comporter*) as an effect of a form of conduct.<sup>7</sup> A Foucauldian perspective on government concerns itself principally *but not exclusively* with government in the political

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<sup>5</sup> Note in particular: Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 4/73 *Nold v Commission* [1974] ECR 491; Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219; Case C-36/02 *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin des Bundesstadt Bonn* [2004] ECR I-9609.

<sup>6</sup> For example J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 12 *Legal Studies* 227; J Weiler and N Lockhart "'Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights Jurisprudence' (1995) 32 *Common Market Law Review* 51.

<sup>7</sup> M Foucault, *Security, Territory, Population* (M Senellart, ed; G Burchell, trs) (Palgrave Macmillan, Basingstoke 2007) 193.

domain. Government as an activity could concern the government of one's *self* and of others. Such reasoning suggests that to describe government as a relation between the 'governed' and the 'governor' is inaccurate. There can consequently be no neat category of 'the governed'. Rather, the so-called 'governed' is at once governed and the governor, exercising a form of government of the self. In the context of this study, the 'selves' that I refer to are two specific 'others' of the FRA: the individual and the NGO.

This chapter therefore shows how governmentality, as it has been described in the previous chapters, comes full circle so that a process of self-government is identifiable. That is, the chapter reveals that governmentality refers not only to a technology of power but also to a technology of the *self*. In doing so, this chapter provides a more complete understanding of the process of 'governing through rights', which I described previously in Chapter 6. It extends the proposition to show how, as well as 'governing through rights' – meaning that the individual is governed through rights discourse by being classed as, or in opposition to, the 'victim' – individuals and NGOs *govern themselves*. This extension serves to strengthen the hypothesis that the FRA's rights discourse is a discourse of governmentality since it shows how the techniques of government are exercised not only by abstract experts over the governed and via statistics – but the 'so-called' governed govern themselves, thereby reinforcing and strengthening government.

I proceed by outlining, in Part II, the meaning of the term 'self-government'. Part III examines the 'individual as other' and the 'NGO as other',

respectively. It focuses on the characteristics that qualify these entities as ‘actors’ and how these characteristics form part of an equation that equals self-government.

## II. SELF-GOVERNMENT

### A. From Discipline to Government, to Self-Government

As he reiterated many times throughout his writings, lectures and interviews, Foucault’s project was to ‘create a history of the different modes by which, in our culture, human beings are made subjects’.<sup>8</sup> This focus led him to examine the specific techniques, or ‘truth games’, that human beings use to understand themselves.<sup>9</sup> He distinguished four such techniques, or ‘technologies’: 1) technologies of production – that enable the production, transformation or manipulation of things; 2) technologies of sign systems, which allow us to use signs, meanings and symbols; 3) technologies of power, which determine the conduct of individuals, submitting them to domination or to certain ends, thereby objectivising the subject; and 4) technologies of the self, ‘which permit individuals to effect by their own means or with the help of others a certain number of operations on their own bodies and souls, thoughts, conduct, and a way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection or immortality’.<sup>10</sup> It is the latter two – the technologies of power or domination and the technologies of the self – that

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<sup>8</sup> M Foucault, ‘The Subject and Power’ in M Foucault, *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion, ed; R Hurley, trs) (Penguin, London 2002) 326, 326.

<sup>9</sup> M Foucault, ‘Technologies of the Self’ in L Martin et al (eds), *Technologies of the Self: A Seminar With Michel Foucault* (University of Massachusetts Press, Amherst 1988) 16, 18.

<sup>10</sup> *Ibid.*

Foucault was most interested in. He termed the contact between these two technologies ‘governmentality’.

Foucault confessed that he had perhaps ‘insisted too much’ on the technologies of domination and power. By the early 1980s, he had become ‘more and more interested in the interaction between oneself and others in the technologies of individual domination, the history of how one individual acts upon himself, in the technology of the self’.<sup>11</sup> He had already begun to introduce the concept of government of the self in his lectures *Security, Territory, Population*.<sup>12</sup> Here, he described ‘governmentality’ as the general problem of government, which could be broken down into many different problems. He listed, first and foremost, the ‘*government of oneself*’ (describing a sixteenth century return to Stoicism and the problem of how to govern oneself).<sup>13</sup> He also mentioned the problem of government of *souls and conduct* (the problem of Catholic or Protestant pastoral doctrine), the government of *children* (the emergence of the problem of pedagogy in the sixteenth century) and, lastly, the government of *the state* by the prince. These problems of government could thus be understood as: ‘How to govern *oneself*, how to be governed, by whom should we accept to be governed, how to be the best possible governor?’<sup>14</sup>

Foucault described all his work as fragmentary and forming no coherent whole<sup>15</sup> but in respect of the technology of the self, given his early death, his

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<sup>11</sup> *Ibid* 19.

<sup>12</sup> Foucault (n 7).

<sup>13</sup> *Ibid* 88.

<sup>14</sup> *Ibid* 88.

<sup>15</sup> M Foucault, ‘Two Lectures’ in M Foucault, *Power/Knowledge* (C Gordon, ed; C Gordon and others, trs) (Longman, London 1980) 78, 78-79.

work remained more unfinished. The fragments that exist nevertheless reveal an interesting extended perspective on government and have been applied to that ‘new sub-discipline’<sup>16</sup> of studies in governmentality (identified in Chapter 3) across the human sciences.<sup>17</sup>

## **B. Care of the Self**

To explore his interest in the government of oneself, and to remain true to his methodology of genealogical analysis, Foucault examined the development of the technology of the self in two different contexts which he saw as historically adjacent: Greco-Roman philosophy and Christian spirituality.<sup>18</sup> A main interest behind this examination was to analyse the relation between the *care* of the self and *knowledge* of the self. Much of Foucault’s discussion in this respect focused on how the obligation to ‘know oneself’ has obscured ‘take care of yourself’, representing an inversion of the hierarchy of the two principles of antiquity, ‘take care of yourself’ and ‘know thyself’. The reasons for this included, first, a transformation in the moral principles of Western society: we have inherited the principles of Christian morality, which makes taking care of ourselves an immorality, since the condition of salvation is taught as self-renunciation. Second, the influences of theoretical philosophy have meant that

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<sup>16</sup> M Dean, *Governmentality: Power and Rule in Modern Society* (Sage, London 1999) 2.

<sup>17</sup> In Part III, I refer to the work of Nikolas Rose in particular: N Rose, *Powers of Freedom: Reframing Political Thought* (CUP, Cambridge 1999); N Rose, ‘Government and Control’ (2000) 40 *British Journal of Criminology* 321; N Rose, ‘The Politics of Life Itself’ (2001) 18 *Theory, Culture and Society* 1; N Rose, *The Politics of Life Itself* (Princeton University Press, Princeton 2007); N Rose et al, ‘Governmentality’ (2006) 2 *Annual Review of Law and Social Science* 83.

<sup>18</sup> Foucault (n 9); M Foucault, ‘On the Government of the Living’ in M Foucault, *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion, ed; R Hurley, trs) (Penguin, London 2002) 81; M Foucault, ‘The Hermeneutic of the Subject’ in M Foucault, *Power: Volume 3: Essential Works of Foucault 1954-1984* (J Faubion, ed; R Hurley, trs) (Penguin, London 2002) 93.

the knowledge of the self (the thinking subject) constitutes the most fundamental principle in a theory of knowledge.

A government-of-the-self perspective privileges the idea of *care* of the self. What did Foucault mean by the terms ‘care’ and ‘self’? The ‘self’, he claimed, referred ‘not [to] clothing, tools or possessions. It is to be found in the principle which uses these tools, a principle not of the body but of the soul. You have to worry about your soul – that is the principal activity of caring for yourself.’<sup>19</sup> ‘Care’ of oneself consists of the activity of knowing and examining the soul/self. Foucault’s analysis considered the works of Plato (particularly *Alcibiades I*) and explained the background to and the problems that endured throughout antiquity with the concept of ‘taking care of oneself’. But to contemplate these issues, though fascinating, is not especially relevant to my study. It is, rather, more important simply to note that the preoccupation with the care of the self meant that Foucault’s later work has become classified as a novel approach to *ethics*.<sup>20</sup> His focus on the ‘subject’ turned to analysing subjectivity in terms of ethics. He understood ‘ethics’ as ‘technologies of the self – ways in which human beings come to understand and act upon themselves within certain regimes of authority and knowledge, and by means of certain techniques directed to self-improvement’.<sup>21</sup> Therefore, government becomes ethical when it is self-government – i.e., when it engages with how the ‘governors’ and the ‘governed’ *regulate themselves*. Further, an examination of self-government reveals that the governor and the governed are aspects of the one actor. Government necessarily concerns practices of the self

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<sup>19</sup> Foucault (n 9) 25.

<sup>20</sup> Rose et al, ‘Governmentality’ (2006) 2 *Annual Review of Law and Social Science* 83, 89.

<sup>21</sup> *Ibid* 90. My emphasis.

since it engages with those practices which try to shape, guide and affect the desires, aspirations, needs and lifestyles of individuals and groups of individuals.

Foucault held what Colin Gordon has described as a ‘Sisyphean optimism’ that the governed could themselves become engaged in government, without the assumption of compliance and complicity. That is, he hoped to reach a point of analysis which showed that ‘[t]o work with a government implies neither subjection or global acceptance. One can simultaneously work and be restive. I even think that the two go together.’<sup>22</sup> Gordon states that in this respect Foucault’s hopes have been disappointed. Yet, while this may be the case, Foucault’s contributions have been taken up by scholars of governmentality studies to produce valuable insights into their respective fields. I use some of these in my analysis, below.

### **C. Self-Government In Action**

Throughout this thesis, I have used a number of Nikolas Rose’s contributions to support my work. I find it useful here to draw on Rose’s *The Politics of Life Itself*,<sup>23</sup> where he introduces the concept of ‘ethopolitics’. The term extends Foucault’s notion of ‘biopower’ to the very ethos of human existence (‘the sentiments, moral nature or guiding beliefs of persons, groups or institutions’<sup>24</sup>). Rose describes the twenty-first century as a ‘biotech century’;

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<sup>22</sup> C Gordon, ‘Governmental Rationality: An Introduction’ in G Burchell et al (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, Chicago 1991) 1, 48 (quoting Foucault, ‘*Est-il donc nécessaire de penser?*’).

<sup>23</sup> N Rose, *The Politics of Life Itself* (Princeton University Press, Princeton 2007); N Rose, ‘The Politics of Life Itself’ (2001) 18(6) *Theory, Culture and Society* 1.

<sup>24</sup> N Rose, ‘The Politics of Life Itself’ (2001) 18(6) *Theory, Culture and Society* 1, 18.



‘an age of marvellous yet troubling new medical possibilities’.<sup>25</sup> Whereas in the eighteenth and nineteenth centuries, he observes, the vital politics was a ‘politics of health’ (i.e., concerned with rates of birth, death, with diseases etc.), the vital politics of the twenty-first century is concerned with a politics of ‘life itself’ – with how to ‘control, manage, engineer, reshape and modulate the very vital capacity of human beings as living creatures’.<sup>26</sup>

In the context of health, an ethopolitics describes how every citizen has become an *active partner* in the drive for health and accepting of their *responsibility* for securing their own well-being. Health has been reshaped as a value that has become entangled with the *aspirations* of the people themselves. An ‘ethopolitics’ reveals how these aspirations provide the medium through which good government becomes connected with the imperatives of self-government. That is, ‘ethopolitics concerns itself with the self-techniques by which human beings should judge themselves and act upon themselves to make themselves better than they are’.<sup>27</sup>

Foucault’s ideas on government and self-government have, moreover, been used by Mitchell Dean to coin the notion of ‘reflexive government’.<sup>28</sup> Dean understands the mechanisms for active participation within the technologies of citizenship to be representative of ‘reflexive government’ – which he describes as sites of self-government, or the ‘governing of government’. That is, reflexive government no longer aims to govern through ‘society’. It aims,

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<sup>25</sup> N Rose, *The Politics of Life Itself* (Princeton University Press, Princeton 2007) 1.

<sup>26</sup> *Ibid* 3.

<sup>27</sup> Rose (n 24) 18.

<sup>28</sup> Dean (n 16) 2.

rather, to transform society and govern through this transformation. It seeks to achieve this transformation through the government of the mechanisms, techniques and agencies of government themselves. In the transformed society, the ‘social’ will be open to dialogue and participation with communities, social groups and movements. It will emphasise the self-management and self-expressed needs of the consumers of expertise and services. I draw on Dean’s and the other contributions in the analysis that follows, where I examine the role of the individual citizen and the NGO.

### III. THE INDIVIDUAL AND THE NGO AS ‘OTHER’

In this section, by ‘individual’, I mean the individual as citizen. The individual is not referred to specifically in the FRA’s Regulation. The FRA does, however, pay direct attention to the individual by asking the question: ‘You have been discriminated against - can FRA help you?’<sup>29</sup> ‘NGO’ refers to an organisation of civil society that is not affiliated with government and is created by private individuals.<sup>30</sup> The FRA’s Regulation singles out the NGO from other institutions of civil society in Article 10(1) on ‘cooperation with civil society’, which states: the ‘Agency shall closely cooperate with non-governmental organisations *and* with institutions of civil society’, therefore mentioning the NGO as a category in its own right. In the list of actors with

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<sup>29</sup> This statement used to appear on the home page of the FRA website (<<http://fra.europa.eu/fra/index.php>> accessed 9 December 2008) but since the refurbishment of the site that took place on 27 January 2009, the question now appears in the list ‘FAQ’ which is accessible on the home page < [http://fra.europa.eu/fraWebsite/home/home\\_en.htm](http://fra.europa.eu/fraWebsite/home/home_en.htm)> accessed 30 January 2009.

<sup>30</sup> ‘Civil society’ is in itself an indistinct term. The Centre for Civil Society, London School of Economics define it as ‘a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power’  
<<http://www.lse.ac.uk/collections/CCS/introduction.htm#generated-subheading2>> accessed 2 March 2008.

whom the Agency is to establish a ‘cooperation network’ which is referred to later in the same Article (i.e., the FRP), the Regulation mentions the NGO first in the list.<sup>31</sup>

I examine here, initially, how the individual and the NGO *interact* with the FRA and then go on to explain how this interaction engages a *responsibility* on the part of these actors. I demonstrate how, together, these elements of interaction (or participation) and responsibility can be said to constitute self-government.

## **A. Participation**

### *i. The Individual*

The individual has had the opportunity of interaction with the FRA since before the Agency’s establishment. In the formative stages of the Agency’s development, the individual was involved in the public consultation process that led up to the enactment of legislation establishing the FRA. That is, the individual was involved in responding to the Commission’s Communication of October 2004.<sup>32</sup> The Communication attracted responses from 94 contributors,

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<sup>31</sup> Furthermore, the old FRA website included a ‘links’ category under which the site offered approximately 800 links to ‘actors’ in the field of work of racism, xenophobia and related areas. The category ‘EU-NGO’ was one out of six listed under ‘links’. (The other categories were: European institutions, inter-governmental organisations, research institutes and universities, EU Member States and other). A further link was ‘EU Member States’ and under each Member State a number of NGOs are listed; under the UK alone there were 34 NGOs listed <<http://www.fra.europa.eu/fra/index.php>> accessed 21 November 2008.

<sup>32</sup> Communication from the Commission, ‘The Fundamental Rights Agency Public Consultation Document’, COM (2004) 693 final 25 October 2004; European Policy Evaluation Consortium (EPEC), ‘Preparatory study for Impact Assessment and Ex-Ante Evaluation of a Fundamental Rights Agency: Analysis of Responses to Public Consultation’, 19 January 2005.

of which 13 were private individuals.<sup>33</sup> That the number is small does not matter to the analysis here. It is not only the actuality of the individual having been directly involved in the formative discourse that is of significance but, more so, the fact that the individual had the *possibility* of being involved. Moreover, even small figures come to be representative of the population of the EU. I come back to this issue.

Since the establishment of the FRA, the individual has had further opportunities for interaction with the Agency. First, through surveys. The most important and detailed example is the EU-MIDIS survey. A total of 23,500 immigrants and ethnic minority people were surveyed face-to-face during 2008 in all 27 Member States. In addition, 5,000 people from the majority population living in the same areas as minorities were interviewed in 10 Member States, so as to allow for comparison of results. The survey used the same standardised questionnaire in all Member States, which is divided into eight categories, namely: general discrimination, rights awareness, discrimination experiences, experience of crime, corruption, police contact, customs and border control, and background information. The questionnaire consists of 150 questions and 300 variables (answers), taking into account what the FRA anticipated as all the possible answers people could give in response to the questions. Each interview lasted for between 20 minutes and one hour.<sup>34</sup>

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<sup>33</sup> A list of the private citizens (12 named and one anonymous) can be found in Annex 1 of the 'Analysis of Responses to Public Consultation', *ibid*.

<sup>34</sup> European Union Agency for Fundamental Rights (FRA), 'EU-MIDIS at a Glance: Introduction to the FRA's EU-wide Discrimination Survey', 2009, 4  
<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)>  
accessed 24 April 2009

The EU-MIDIS survey is illustrative of how the individual directly participates in the rights discourse of the FRA. The responses given by the respondents become part of the rights discourse of the Agency. The FRA collates and comparatively analyses the information attained from the responses and this information becomes the results from the survey. They represent the internal situation in the EU as to ethnic minority discrimination. This is an important point; the individual responses become representative of the population of the EU as a whole. The FRA describes EU-MIDIS as a ‘major representative survey’<sup>35</sup> – and this element of representation is a significant part of self-government. I elaborate on this in section B.

Surveys were also a technique used for gathering information and data in Part II of the Homophobia Report: ‘The Social Situation’.<sup>36</sup> For example, surveys were conducted at European and national level to assess ‘attitudes towards LGBT people’ (section I.1 of the Report). Data from the largest survey of its kind in the United Kingdom was used to compare information and data on homophobia and access to health services (section I.6 of the Report).<sup>37</sup> The results of the surveys become ingrained as statistics in the Homophobia Report. They therefore also come to represent the rights discourse of the FRA. Furthermore, those individuals who were involved in the surveys and interviews, questionnaires, etc. that were used to collect the information and data needed for the Report represent the entire population of the EU. The

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<sup>35</sup> <[http://fra.europa.eu/fraWebsite/eu-midis/eumidis\\_details\\_en.htm](http://fra.europa.eu/fraWebsite/eu-midis/eumidis_details_en.htm)> accessed 23 April 2009.

<sup>36</sup> European Union Agency for Fundamental Rights (FRA), ‘Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part II: The Social Situation’, 31 March 2009

<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_p2\\_0309\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm)> accessed 24 April 2009.

<sup>37</sup> *Ibid* see especially 31 and 80.

FRA's rights discourse is used to provide advice and expertise to the Union institutions – and the results of the Homophobia Report have had the impact of prompting a response from the EU institutions on taking action to combat homophobia and discrimination based on sexual orientation.<sup>38</sup> I discuss the wider implications that this has for the rights discourse of the FRA affecting the rights discourse of the EU in the next and final chapter of the thesis.

The FRA also recently asked the individual for feedback on its new website through a survey (FRA website survey).<sup>39</sup> This was a voluntary exercise, involving a 17-page set of questions on the ease of accessibility, the nature of the information available, etc. on the new website. There was room at the end of each section to make general comments and so the survey did allow for creative and detailed feedback (sections were divided into areas – e.g., accessibility, range of information available). Individuals who had subscribed to the FRA newsletter received an email asking them to participate in the survey.

A second example of how the individual interacts with the FRA is through accessing it voluntarily and on one's own initiative. The website of the FRA asks the individual the question: 'You have been discriminated against – can

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<sup>38</sup> Commission (EC), Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final, 2 July 2008; European Parliament Resolution on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States, INI/2008/2184, 2 April 2009.

<sup>39</sup> <[https://www.surveymonkey.com/s.aspx?sm=Kcd\\_2bGYOIyqG9qjcRgT\\_2bSCQ\\_3d\\_3d](https://www.surveymonkey.com/s.aspx?sm=Kcd_2bGYOIyqG9qjcRgT_2bSCQ_3d_3d)> accessed 3 March 2009.

FRA help you?’<sup>40</sup> The response states that ‘FRA will make people more aware of their fundamental rights. It is not empowered to deal itself with individual complaints but it can refer people to organisations in each Member State where individuals can go for ‘help, advice and also support in legal matters’.<sup>41</sup> The individual is referred to National Equality Bodies<sup>42</sup> and NHRIs.<sup>43</sup> Links to the relevant bodies according to the individual’s Member State are provided on the FRA’s website. The individual is also referred to a document, the ‘Guide for Victims of Discrimination’.<sup>44</sup> The Guide is divided into the following sections: ‘understanding your rights’, ‘what to do if you have suffered discrimination’ and ‘new rights for disabled people’. At the end of the Guide, in large, conspicuous lettering there is reference to another website, the European Commission’s website on anti-discrimination, which claims to serve as a source of information on the EU-wide campaign ‘For Diversity Against Discrimination’.<sup>45</sup> The information covers the Union and in particular the involvement of the Directorate General for Employment, Social Affairs and Equal Opportunities in activities to combat discrimination. It also provides updates on current anti-discrimination issues and activities in all of the Member States. The Guide stresses ‘*you* can now take action’, if you are a victim of discrimination, harassment or victimisation. The emphasis is thus on

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<sup>40</sup> This appears under the FAQ on the FRA’s homepage as of 27 January 2009, when the new FRA website was launched (<[http://fra.europa.eu/fraWebsite/faq/faq\\_en.htm](http://fra.europa.eu/fraWebsite/faq/faq_en.htm)> accessed 20 March 2009). The question previously appeared in a more prominent position, directly on the home page itself (<<http://www.fra.europa.eu/index.php>> accessed 14 December 2008).

<sup>41</sup> *Ibid.*

<sup>42</sup> National Equality Bodies for the UK are: Commission for Equality and Human Rights and the Equality Commission for Northern Ireland.

<sup>43</sup> The NHRI for the UK is Commission for Equality and Human Rights (formerly the Commission for Racial Equality, which merged with two other bodies on 1 October 2007) (<<http://www.equalityhumanrights.com/pages/eocdrccre.aspx>> accessed 4 December 2008).

<sup>44</sup> (<[http://ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/public/factsheet2\\_en.pdf](http://ec.europa.eu/employment_social/fundamental_rights/pdf/public/factsheet2_en.pdf)> accessed 20 March 2009).

<sup>45</sup> (<[www.stop-discrimination.info](http://www.stop-discrimination.info)> accessed 9 December 2008).

the individual taking action for herself. The sentiment is in fact reminiscent of the tone of the governance discourse of the Commission – in the Communication ‘European Governance: Better Lawmaking’ the Commission emphasised that ‘we need to govern *ourselves* better, together’.<sup>46</sup> Furthermore, it is almost as if the Guide is imposing a *responsibility* on the individual, giving a ‘to do’ list under the heading ‘Get to know your legal system’.

Moreover, since the establishment of the Agency the individual has had access to all the FRA’s documentation, including for instance the reports, the FRA Newsletter and the FRA Magazine. All this and more background information on the Agency, case law on fundamental rights discourse of the EU and details on organisations in the field of fundamental rights in the EU is now also available on the FRA’s InfoPortal. The Infoportal is described as a ‘user-friendly information system’<sup>47</sup> that provides free online access to the public. Furthermore, for increased ease of access and a continuous flow of information, the individual can sign up for alerts on the latest activities of the Agency and on the latest issue of the FRA Newsletter. In some instances the individual has the opportunity to comment: the *Equal Voices* magazine welcomes comments and suggestions on issues to be covered. The FRA also aims its publications and events at specific groups of individuals. For example, the *S’Cool Agenda* 2007-2008 was targeted at young people. It was published in three languages (English, French and German) as an awareness-raising tool to help young people to learn about fundamental rights issues in Europe. It included a range of activities, including how to keep track of homework, a

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<sup>46</sup> Communication from the Commission, ‘European Governance: Better Lawmaking’, COM (2002) 275 final, 25 October 2004, 2.

<sup>47</sup> <[http://fra.europa.eu/fraWebsite/products/products\\_en.htm](http://fra.europa.eu/fraWebsite/products/products_en.htm)> accessed 20 March 2009.



‘human rights temperature’ test, and a glossary.<sup>48</sup> Under this same theme, the FRA also organised a Diversity Day on 10 November 2008, which brought together almost 3,000 young people between the ages of 12 and 18, from Austria, Czech Republic, Hungary, Slovakia, Spain and the UK. The participants had the opportunity to participate in workshops, engage in debates, and interact with human rights organisations. More than 40 local NGOs, the European Commission, the European Parliament, Europe Direct, the European Union Stop Discrimination Campaign and the FRA provided information on fundamental rights and diversity.

*ii. Non-Governmental Organisations*

The Regulation describes the relationship between the FRA and NGOs as one of ‘cooperation’. The FRA recognises the importance of engaging with civil society, which it believes will contribute to policy development, information and data collection, research and analysis, awareness raising and outreach, and dissemination of results of activities.<sup>49</sup> The Agency thus acknowledges the importance of civil society in the achievement of its main objective of providing assistance and expertise related to fundamental rights. The cooperation relationship is to work by means of the FRP, which is to act as the ‘main channel’<sup>50</sup> for cooperation with civil society. The Regulation describes it thus, ‘The Fundamental Rights Platform shall constitute a mechanism for the

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<sup>48</sup> See the FRA’s website

<[http://www.fra.europa.eu/fra/index.php?fuseaction=content.dsp\\_cat\\_content&contentid=4875e90c07ad2&catid=3e6c61340870c&lang=EN#materials](http://www.fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&contentid=4875e90c07ad2&catid=3e6c61340870c&lang=EN#materials)> accessed 9 December 2008. A 2009 edition of the *S’Cool Agenda* is also now available.

<sup>49</sup> See the FRA’s website

<[http://fra.europa.eu/fra/index.php?fuseaction=content.dsp\\_cat\\_content&catid=4625da012d8dc](http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=4625da012d8dc)> accessed 5 December 2008.

<sup>50</sup> *Ibid.*

exchange of information and pooling of knowledge.’<sup>51</sup> The Platform is to be composed of ‘all interested and qualified stakeholders’<sup>52</sup> and so consists of more than NGOs. A list of individual members of the FRP is available on the website of the FRA.<sup>53</sup>

The FRA seeks the views of NGOs and other members of civil society in three main ways: first, through meetings of the FRP;<sup>54</sup> second, through public consultations; and third, through interviews and surveys. I examine each of these sites of interaction in turn.

First, via the meetings of the FRP, NGOs can engage in a number of tasks. They can make suggestions on the Annual Work Programme, give feedback and suggest follow-up on the Annual Report, and communicate outcomes and recommendations of conferences, seminars and meetings relevant to the work of the Agency. The first meeting of the Platform took place on 7 and 8 October 2008 in Vienna.<sup>55</sup> Around 100 experts from civil society organisations took part. From the UK, there were seven participants, of which two described themselves as NGOs.<sup>56</sup> The meeting focused on feedback on the Annual Report 2008 and suggestions for the FRA’s Work Programme 2009. There was also the opportunity to discuss the means of communication between the

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<sup>51</sup> (n 1) art 10(2).

<sup>52</sup> *Ibid.*

<sup>53</sup> <[http://fra.europa.eu/fraWebsite/civil\\_society/fr\\_platform/fr\\_platform\\_en.htm](http://fra.europa.eu/fraWebsite/civil_society/fr_platform/fr_platform_en.htm)> accessed 24 April 2009.

<sup>54</sup> Note that the old website of the FRA made reference also to a Round Table Network and to ‘expert meetings’. Post-January 2009, it is not clear whether the Network is outdated.

(Information on the Round Table Network was originally accessed on 21 November 2008 <<http://www.fra.europa.eu/fra>>)

<sup>55</sup> The second FRP meeting took place on 5-6 May 2009

<[http://fra.europa.eu/fraWebsite/civil\\_society/fr\\_platform/frp\\_meetings/frp\\_meetings\\_en.htm](http://fra.europa.eu/fraWebsite/civil_society/fr_platform/frp_meetings/frp_meetings_en.htm)> accessed 1 July 2009.

<sup>56</sup> Mental Health Europe; International Humanist and Ethical Union.

participants of the Platform so as to ensure effective cooperation in the future. A Summary Report of the meeting, compiled for the FRA Management Board and prepared by an Interim FRP Panel which was selected at the meeting, is available online.<sup>57</sup>

The Summary Report states that, in general, the participants warmly welcomed the FRA's commitment to engage with civil society through the FRP. The Report also commented on a number of more specific issues: first, the FRA's Work Programme 2009/2010, highlighting that the Platform did not have in place a clear process through which to collect and represent a coherent perspective on the proposed 2010 Work Programme (excluding the consultation process initiated by the FRA). Second, the Summary Report commented on strategic priorities for the FRA. These included, for example, the following: that 'fundamental rights should be fundamental to EU policies' – in this respect, the Platform put forward the proposition (amongst others) that the FRA should maintain a monitoring role and function as a 'Fundamental Rights watchdog in Europe'.<sup>58</sup> The Platform also made suggestions to do with data collection and research and on the theme of 'rights of all', suggesting topics that should be discussed. Third, the Summary Report of the Platform gave feedback on the Annual Report 2008 and discussed models for information exchange. In terms of the former, some members of the Platform expressed dissatisfaction with data collection and qualitative standards. For example, the Summary Report states that one group were critical of the Annual

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<sup>57</sup> 'Summary Report of the Outcome of the First FRP Meeting of 7-8 October to the FRA Management Board, available <[http://fra.europa.eu/fra/material/pub/civil/FR-platform-Panel-report-to-MB-oct08\\_en.pdf](http://fra.europa.eu/fra/material/pub/civil/FR-platform-Panel-report-to-MB-oct08_en.pdf)> accessed 9 December 2008.

<sup>58</sup> *Ibid* 1.

Report on their country since they believed that the appropriate people were not consulted at the time of preparation. Several participants argued that NGOs had a lot to contribute to data collection and research and the suggestion followed that NGOs could be consulted on draft reports at a national level and asked for their recommendations. There was also comment on how the Annual Report consolidates the different sources of information – recognising these as coming from ‘FRALEX, RAXEN, NGOs, field workers, members of the public and people who have experienced threats to their fundamental rights’.<sup>59</sup>

In terms of the models for information exchange, the Summary Report expressed how the participants of the Platform supported the idea that the FRA could be an information centre for human rights associations. This would necessarily entail a partnership, through the Platform, between the FRA and NGOs. NGOs would provide reports to the FRA, NGO members would share reports amongst themselves, using the Platform as the arena for sharing information, and NGO contacts to media, gatherings and roundtables would be set up and coordinated. This would all be facilitated through the operation of a well managed website. Fourth, the Summary Report talks about the role of the Platform. It suggests that the Platform should establish a permanent structure (including a ‘panel’ of civil society stakeholders) and acknowledges the need for resources to enable, for instance, administrative support for the dissemination of relevant information and data. Moreover, the Summary Report suggests that the FRP representative should have observer status at meetings of the Management Board and Scientific Committee.

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<sup>59</sup> *Ibid* 5.

In addition to the meetings of the FRP, the old FRA website mentioned ‘Expert Meetings’ in which NGOs also took part.<sup>60</sup> This is an interesting label to attach to the meetings, since it suggests that the FRA recognizes NGOs as having expertise (although it was not explained why these were called ‘*expert* meetings’). I come back to the idea of NGO expertise below. Information available on the FRA’s website at the end of 2008 showed that there have been two expert meetings to date, the most recent being the FRA Meeting on Homophobia on 14 November 2008.<sup>61</sup> The Meeting is described as a roundtable, which acted as a follow up to the thematic report on homophobia (i.e., the Homophobia Report). The participants in the Meeting included civil society stakeholders, government representatives, NHRIs, equality bodies, the European Commission and the Council of Europe’s Office of the Commissioner for Human Rights. The list of participants shows 41 actors, including NGOs from across the Community.<sup>62</sup> The overall aims of the meeting were identified as raising awareness on the findings of the FRA report, discussing the follow-up actions, and identifying good practices in the area. The Meeting focused specifically on issues such as: the importance of a horizontal anti-discrimination directive; the need for an EU-wide framework to tackle homophobic and transphobic hate crime and hate speech; and the

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<sup>60</sup> <<http://www.fra.europa.eu/fra>> accessed 21 November 2008. The website does not explain why these are specifically called ‘expert meetings’.

<sup>61</sup> <<http://www.fra.europa.eu/fra>> accessed 21 November 2008.

<sup>62</sup> NGO participants included International Lesbian and Gay Association Europe (EU representation office, Belgium); Counselling Centre for Citizenship, Civil and Human Rights (Czech Republic); European Women Lawyers Association (Ireland); Gay and Lesbian Equality Network (Ireland); Campaign Against Homophobia (Poland). Again, following the refurbishment of the FRA website in January 2009, this information is no longer on the website.

recognition of LGBT families in the context of freedom of movement within the EU. A report of the Meeting is not available.

Second, the FRA interacts with civil society and hence NGOs through public consultations. These are either open or closed and there are currently no open consultations but the new FRA website does provide an overview of closed consultations organised by the FRA in 2008 and the consultation reports.<sup>63</sup> These consultations began in the formative stages of the FRA, prior to the FRA's Regulation – for example, the public consultation on the setting up of the Agency launched by means of the Commission Communication 'The Fundamental Rights Agency Public Consultation Document' of 25 October 2004.<sup>64</sup> The Communication attracted written responses<sup>65</sup> and was followed by a public hearing.<sup>66</sup> Of the 94 contributions in response to the Communication, 55 were listed under 'civil society, non-governmental organisations and other'.<sup>67</sup> At the public hearing, there were more than 200 participants, representing NGOs,<sup>68</sup> the Council of Europe, the EUMC, as well as several Member States. A number of interventions were made during the hearing

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<sup>63</sup> <[http://fra.europa.eu/fraWebsite/civil\\_society/consultations/consultations\\_en.htm](http://fra.europa.eu/fraWebsite/civil_society/consultations/consultations_en.htm)> accessed 20 March 2009.

<sup>64</sup> Communication from the Commission, 'The Fundamental Rights Agency Public Consultation Document', COM (2004) 693 final, 25 October 2004.

<sup>65</sup> European Policy Evaluation Consortium (EPEC), 'Preparatory study for Impact Assessment and Ex-Ante Evaluation of a Fundamental Rights Agency: Analysis of Responses to Public Consultation', 19 January 2005.

<sup>66</sup> European Policy Evaluation Consortium (EPEC), 'Preparatory Study for Impact Assessment and Ex-Ante Evaluation of the Fundamental Rights Agency: Public Hearing Report', February 2005.

<sup>67</sup> (n 65) Annex 1.

<sup>68</sup> Including Amnesty International, European Network Against Racism, Human Rights Watch, amongst many others.

which launched discussion between the participants; one of these was made by an NGO – Amnesty International.<sup>69</sup>

In 2007, a series of public consultations with civil society on the setting up of the FRP were conducted between April and December. A Final Consultation Report setting out the background to the consultations and the main outcomes is available.<sup>70</sup> The forms of consultations were written consultations, expert meetings, online consultation and a final consultative conference. The Report contains a list of participants in these stages in which NGO names are plentiful.<sup>71</sup>

In 2008, there were two public consultations, both of which were online consultations and are now closed. These were a public consultation on the FRA's Work Programme for 2009 and a public consultation on the FRA's Annual Report 2008. The former (from July-August 2008) was aimed at collecting the suggestions of civil society actors on the proposed Work Programme for 2009. 32 individual contributions were received.<sup>72</sup> The latter consultation received a total of 24 contributions. For example, two well-known EU-NGOs contributed to the discussion on the Annual Report 2008 – Amnesty

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<sup>69</sup> The intervention was made by Mr Dick Oosting, Director of Amnesty International, EU Office

<[http://ec.europa.eu/justice\\_home/news/consulting\\_public/fundamental\\_rights\\_agency/news\\_interventions\\_fund\\_rights\\_agency\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/fundamental_rights_agency/news_interventions_fund_rights_agency_en.htm)> accessed 9 December 2008.

<sup>70</sup> 'Enhancing the EU Fundamental Rights Agency's Cooperation with Civil Society', Report on the Public Consultation April-December 2007, May 2008

<[http://fra.europa.eu/fra/material/pub/civil/FRA\\_CS-2007consult-report\\_en.pdf](http://fra.europa.eu/fra/material/pub/civil/FRA_CS-2007consult-report_en.pdf)> accessed 9 December 2008.

<sup>71</sup> See Annex 1 to the Report, *ibid.* To name a few examples from the lengthy lists: Amnesty International (EU Office); European Network Against Racism (Belgium); Human Rights Watch (European Office, Belgium).

<sup>72</sup> Examples of NGO contributions include: Amnesty International (EU Office); European Network Against Racism.

International and the European Network Against Racism (ENAR).<sup>73</sup> The NGOs/participants were asked to comment on: a) the methods and relevance of the research topics of the Annual Report, b) the technical aspects of the Report (its size, content and structure, website presentation, etc.) and, c) suggestions for follow-up action on the Annual Report (which included asking how the particular organisation could contribute to the follow-up of the opinions given in the organisation's report and whether the organisation would need advice or training from the FRA on possible ways of following up). There was, therefore, extensive scope for response.

Amnesty began by making the general comment that the Annual Report fell short of the objective of translating all the information gathered by the various operating networks (the Council of Europe, the UN Treaty Bodies, the NHRIs and NGOs) into an EU framework.<sup>74</sup> The report from ENAR made a significant comment with respect to the extent of interaction of the NGO with the work of the FRA when commenting on issue 'a', the methods and relevance of research topics of the Annual Report.<sup>75</sup> ENAR commented that the FRA should ensure a better balance in its reporting between statistical and empirical data collection and the data resulting from the contribution of civil society experiential research. The NGO, they commented, is a vital alternative

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<sup>73</sup> The old FRA website contained a link to contributions made to the 'Fundamental Rights Platform Consultation on the FRA Annual Report 2008' <<http://fra.europa.eu/index.php>> accessed 21 November 2008. The new website does not appear to contain this information.

<sup>74</sup> 'Fundamental Rights Platform Consultation on the FRA Annual Report 2008', Response of Amnesty International (EU Office), 13 August 2008 <[http://fra.europa.eu/fra/material/pub/civil/consultar08/AmnestyInternational\\_en.pdf](http://fra.europa.eu/fra/material/pub/civil/consultar08/AmnestyInternational_en.pdf)> accessed 21 November 2008.

<sup>75</sup> 'Fundamental Rights Platform Consultation on the FRA Annual Report 2008', Response of European Network Against Racism (ENAR), August 2008, available [http://fra.europa.eu/fra/material/pub/civil/consultar08/ENAR\\_en.pdf](http://fra.europa.eu/fra/material/pub/civil/consultar08/ENAR_en.pdf) accessed 21 November 2008.



source of data that comes from the direct experiences of the individuals and communities who are the victims of racism. ENAR reports thus operate as an alternative to official and academic data, offering a perspective on the ‘realities of racism’ within the EU and its Member States.<sup>76</sup>

Third, NGOs provided information and data for ‘Part II: The Social Situation’ of the Homophobia Report, through interviews forming part of a wider survey.<sup>77</sup> The findings from NGOs are referred to throughout the Report. For example, in section I.2 on ‘Hate Crime and Hate Speech’, NGOs are referred to in terms of their confirmation of previous studies carried out within the Member States on hate crime.<sup>78</sup> NGO interviews provided support for the findings of inadequate reporting of hate crime incidents and showed that police are poorly trained in dealing with hate crime and, for example, lack the necessary reporting tools.<sup>79</sup> In this way, NGOs aid the FRA in its objective of collecting objective, reliable and comparative information and data for its thematic reports.

The NGO therefore participates in the FRA’s rights discourse through a number of channels – the FRP, public consultations and interviews – and thereby has an impact on its most important products (i.e., the work programme, annual reports and thematic reports). NGOs help formulate the FRA’s rights discourse, directly contributing to and thus defining the discourse via their participation through the aforementioned channels.

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<sup>76</sup> *Ibid* 4.

<sup>77</sup> A list of the NGOs approached is not given in the Report.

<sup>78</sup> (n 36) 42.

<sup>79</sup> *Ibid* 46 and 58.

## **B. Participation and Responsibility: Self-Government**

To say that the individual and NGO interact with the FRA and participate in the Agency's processes is to say that the individual and NGO are *actors* within the FRA's rights discourse. More importantly than this, the individual and NGO are *experts* and it is this formulation that explains how self-government by actors is possible. I examine, below, the characteristics that enable the individual and the NGO to be classified as 'experts', these being *participation* and *responsibility*. It is, as I demonstrate, the equation of participation and responsibility that produces an expertise, which in turn enables self-government. I also show how, for each actor, self-government ties in with the 'care of the self'.

### *i. The Individual*

I begin with an example of self-government applied in another context that provides significant insights for my study: Rose's work in the context of healthcare. Rose, as I mentioned earlier in the chapter, has coined the phrase 'ethopolitics' – which is concerned with the self-techniques by which human beings act upon themselves to make themselves *better* than they are. I have also, in earlier chapters, shown how human rights have become aspirations and thus techniques to govern us 'at a distance'.<sup>80</sup> They are a means of bettering ourselves and the Community as a whole. I have also explained how government is made possible through tactics, or technologies of government that can be distinguished from traditional forms of authority, namely through

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<sup>80</sup> Note, in particular, Chapter 6 above.

experts (their actions, their vocabulary) and through information (statistics). Within the context of healthcare, the patient is similarly surrounded by a range of experts – doctors, counsellors and scientists, for example. Rose claims that nowhere have the shifts in the technologies of government been more telling than in the field of health. Within the new system of pastoral power that is at play, the patient is encouraged to become an *active* and *responsible* actor through availing herself of medical services and products.

Rose explores the individual's responsibility using the illustration of a case study conducted by Carlos Novas on web forums and chat rooms related to Huntington's disease.<sup>81</sup> Rose notes how the practices undertaken in these fora – diary writing, reading, posting and replying to messages – constituted technologies of the self. These practices were an exposure of experience and thoughts according to particular rules, norms, values and forms of authority. The individual in this scenario was not passive but an active actor, exercising responsibility. In fact, the individual becomes a 'layexpert'<sup>82</sup> in the management of Huntington's disease. That is, she is able to gain as much knowledge about it as possible and apply it to herself. Her aim in all this is to better her health and the quality of her life. Moreover, the layexperts educate each other in the knowledge they have gained. They become 'experts by experience'.<sup>83</sup> The relation of the 'layexpert' to what he calls 'professional expert[ise]'<sup>84</sup> is carried out at a distance. These experts do not come into

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<sup>81</sup> Rose (n 25) Chapter Four.

<sup>82</sup> *Ibid* 128.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

contact but do work together, such that they are ‘partners in prudence’.<sup>85</sup> These individuals, the patients, therefore become active in shaping the discourse on science. This is made inevitable since they become part of the processes of government through their participation and acceptance of responsibility for themselves. By becoming part of the processes, they become part of the discourse on science.

A parallel analysis can be made of the individual in her relationship to the FRA. The features of participation and responsibility, that signify self-government, are readily identifiable. The individual’s relationship with the FRA began, firstly, in the formative stages of the FRA, as I have earlier recounted, with the public consultation process that preceded the legislative proposals on the Agency. The public consultation provided the individual with the opportunity for interaction with the FRA through responses to the Commission’s Communication of October 2004 and the public hearing. This level of interaction in the formative stages of the FRA meant that the individual has had to access information on the proposed Agency herself, information that was available according to a pre-given set of rules, procedures and channels. Individuals thus had to educate themselves and, at the same time, were involved in educating each other.

Second, I used the example of surveys in the previous section to illustrate how the individual participates in the FRA’s rights discourse. By participating in the survey, the individual assumes a responsibility for herself as an entitled, rights-

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<sup>85</sup> N Rose, ‘Government and Control’ (2000) 40 *British Journal of Criminology* 321, 327.

bearing citizen of the EU. This participation together with responsibility means she is disciplined at the same time as she takes part in the survey. The FRA gathers knowledge on the individual during participation – EU-MIDIS, for example, asks for the respondent's gender, date of birth, religion, clothing preference (whether traditional dress is worn) and employment status, amongst other details<sup>86</sup> (and the FRA is determined to have an answer – the instructions to the interviewers are to 'probe' the respondent if they are unwilling to give answers. For instance, if the respondent is unwilling to give the interviewer their exact age, the instructions are to 'probe with listed categories' – i.e., 16-19, 20-24, etc.<sup>87</sup>). Certain details are noted without asking, such as place of residence and language proficiency of the respondent in the national language (here the instructions to the interviewer are 'note down the following details after interview, do not ask').<sup>88</sup> The individual is disciplined to the extent that she becomes part of the FRA's discourse – she must respond within the boundaries set by the FRA, choosing from a list of constructed scenarios or answers. She also falls into one of two categories which this disciplinary discourse perpetuates: the 'victim' or the '(ideal) citizen'.

The discipline exercised over the individual extends, moreover, to a governmentality of the entire *population*. The statistics gathered from the individuals who take part in the survey are used to represent the population of the EU at large. They are used to govern the population in terms of what their

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<sup>86</sup> European Union Agency for Fundamental Rights (FRA), 'EU-MIDIS European Union Minorities and Discrimination Survey: Questionnaire', 2009, 38-42

<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)>  
accessed 24 April 2009.

<sup>87</sup> *Ibid* 38.

<sup>88</sup> *Ibid* 42.

aspirations are (i.e., to have their human rights protected and to live in a secure society free of discrimination) and to educate them. I come back to the point about aspirations, which is linked to the idea of the ‘care of the self’. I consider first the point about education.

There is, importantly, an educational element to self-government. The individual is educated as to her rights in the process of being surveyed and the answers which individuals give are used to formulate reports containing statistics, opinions and policy outcomes that educate the population of the EU as to their rights. In fact, raising rights awareness is one issue that the survey intended to bring to the attention of policymakers.<sup>89</sup> During the process of being surveyed, the questions asked of the individual certainly raise awareness of, for example, the multiple instances in which crime may be experienced and makes them aware that this may be because of the minority group to which they belong. The questions thereby also reinforce the belief that the category of ‘minority’ is in danger and asks whether any such experiences of crime are frightening (for instance, the survey asks: ‘do you think that [this incident/any of these incidents] IN THE LAST 12 MONTHS happened partly or completely because of your immigrant/minority back ground?’ and ‘during the last 5 years, have you been personally attacked in a way that REALLY frightened you?’).<sup>90</sup> A ‘leave-behind’ information pack, containing a Gallup notification letter and a letter from the FRA (with the signature of senior officials) is also left with the individuals surveyed before or after the interview, given to hesitant contacts before a recall attempt was made or left in mailboxes for potential respondents

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<sup>89</sup> (n 34) 14.

<sup>90</sup> (n 86) 23, 28. Emphasis in original.

who were not at home. The FRA therefore engages in a deliberate and direct attempt to encourage the population to educate themselves.

Third, the individual interacts with the FRA where she is a victim of discrimination. Subsequent to the establishment of the FRA, the victim is advised to get in touch with either her National Equality Body or NHRI and a great deal of information is provided by the Agency on how exactly the victim should do this. The FRA's website contains enough information for the individual to educate herself on the role of these bodies and gives details of how to contact these bodies within each of the Member States – listing the telephone numbers, email addresses and websites for each body. Moreover, the individual is pointed to the 'Guide for Victims of Discrimination', which, again, advises the individual on how to act for herself. The individual, in addition, has access to all documentation on the Agency and to all links to other institutions and websites available on the FRA's own web pages.

Regarding these processes of interaction – i.e., public consultations, surveys and online guidance documents, two observations can be made. On the one hand, the individual becomes an *expert*, and on the other the individual as expert becomes a characteristic of the whole population of the EU. The individual as expert *represents* the whole population. The individual becomes an *expert* since she is accumulating a knowledge about the type of citizen that the discourse a) says she is and b) says she can be – i.e., a citizen of the EU, and moreover, a citizen who has rights. She is educating herself as to this knowledge. The individual's interaction with the FRA is made possible 'at a

distance' because she never comes into contact with 'the FRA'. The multiplicity of actors within the FRA's structure makes this impossible. Interaction also happens at a distance – more obviously so where the interaction is via the FRA's website. The individual in this case is operating as an 'e-citizen'<sup>91</sup> within a new technology of government that functions in such a way as to allow individuals to manage themselves and express their own needs (for example, through the FRA website survey). These needs are the aspirations which, as I have previously explained, have come to govern them (i.e., human rights).<sup>92</sup> Moreover, in these new technologies of government, or technologies of the self, the individual is responsible for herself. And, not only this, the individual inevitably assumes a responsibility for formulating the rights discourse of the FRA itself. This happens since the individual becomes part of the processes of government. As in the illustration of healthcare and science, given above, the individual through participation in the system and through accepting responsibility for herself has allowed herself to become part of the FRA's rights discourse.

An interesting question is whether the participation element in this equation for what equals self-government must be *active*. In other words, must the individual be *consciously* active to be an expert? Rose in his analysis refers to the subject as active and as the 'individual at risk' – i.e., the individual who is suffering from the disease and consciously seeks medical advice and consciously educates herself on medical knowledge. I argue for something

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<sup>91</sup> J Morison, 'Modernising Government and the E-Government Revolution: Technologies of Government and Technologies of Democracy' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart, Oxford 2003) 131.

<sup>92</sup> See Chapter 5.



more radical. The individual, I propose, is constructed as an expert by virtue of the processes and practices already in place. I have shown throughout this thesis how there are tactics and techniques in place within the FRA's governing structure that depart from the traditional model of hierarchical governmental authority and, rather, represent a new form of government that operates via actors, experts and statistics. Within this discourse, there is a place for the individual as one of the nodes of experts in the FRA's structure. There are further two points that are important with respect to the positioning of the individual: first, it is important, in support of the proposition that the individual governs herself, that the individual has the *possibility* of active participation in the technologies of government. Second, and this is the crucial point, the individual is *always-already* an expert because the governing structure of the FRA, its very discourse, always-already assumes that she is. This is the result of a new authority of expertise that is to be found in the individual; a new relation to expertise, one that is representative of self-government.

On the second point of the individual's *representation* of the population as a whole, the analysis I have presented overcomes one obvious, possible objection: that the 'individual' in the discussion above does not proportionately represent the citizenry at large of the EU. How many citizens actually access the FRA? How many that can be called 'victims' educate themselves on the forms of redress they might take, or take part in voluntary or random surveys? The analysis surely only refers to a minute percentage of the population of the EU. However, the possibility for active participation and the always-already determined nature of expertise negates this objection. Moreover, so do

statistics. As technologies of government, statistics make possible a knowledge about the *population*. Furthermore, this analysis extends to the nature of responsibility also. That is, responsibility is also extended to the population. An interesting aside point is that the responsibility of the individual is also capable of being either and at once imposed or assumed. The individual does not have to consciously accept this responsibility. I will consider the possible implications of a conscious acceptance of responsibility by actors in the conclusion to this chapter and further in Chapter 8. The point here is that individual participation and acceptance of responsibility in the FRA's processes is representative of the population of the EU according to the FRA's rights discourse.

It remains to clarify how self-government ties in with the 'care of the self'. I have described the care of the self as encompassing the aim of bettering the self. Within the model of the individual's relation to the FRA, there is an 'ethics of care' at work – the individual comes to act upon herself within certain regimes of authority and knowledge by means of technologies that are directed to self-improvement. Therefore, the individual is engaged in a process of care of the self, where she must know, examine and act upon the self, within the FRA's regime of expertise and authority. These techniques are directed at self-improvement in the sense that the individual modifies her identity from a citizen to an 'ideal citizen' with increased fundamental rights protection, in contrast to the 'victim'. The 'victim' is not an ideal version of the citizen and should strive to seek help and aspire to the protection of her rights. The victim is shown ways to better herself – she is given guidance on how to access

organisations at her national level that will inform her of her rights and how the wrongs that she has suffered may be remedied.<sup>93</sup> She is also informed that steps are being taken to help potential victims of discrimination (the EU-MIDIS survey, for instance, clearly identifies a category of victim: ethnic and racial ‘minorities’, and a most vulnerable minority group is also recognised: the Roma. The Homophobia Report, moreover, identifies the LGBT person as ‘victim’.). She can feel reassured, furthermore, that the FRA is looking out for the best interests of what it sees as ‘victims’. The category of the ‘victim’ is created by the FRA through technologies of government (as discussed in Chapters 5 and 6), which discipline and regulate the individual into wanting to differentiate herself from this undesirable category (compare the example of ‘the delinquent’, as discussed in Chapter 3). The individual is thus disciplined into self-reflection, into a conditioning or ‘care of’ herself which is dictated by the FRA’s discourse. The ‘technologies of the self’ – or ethics – in the FRA’s discourse which make possible this self-conditioning are rights. The FRA’s rights discourse therefore shapes the aspirations and lifestyles of individuals and groups of individuals in the EU – i.e., of the population of the EU.

It is worth taking a moment to problematise the care of the self. This process, where the individual looks after herself, so to speak, and regulates herself as far as rights protection is concerned possibly has the semblance of being the ideal formulation for a human rights regime. It resembles a human rights regime that is self-reinforcing. Not unlike the confession in Foucault’s analyses, this system for instance allows the individual to access a separate, independent,

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<sup>93</sup> This is made apparent in the FAQ section of the FRA website and in the ‘About us’ section of the homepage <[http://fra.europa.eu/fraWebsite/home/home\\_en.htm](http://fra.europa.eu/fraWebsite/home/home_en.htm)> accessed 20 March 2009.

protectionist entity (the FRA) when something has gone wrong (i.e., rights have been violated) – much like the guilty sinner who reinforces the pastoral power of Christianity by taking part in confession. However, a major flaw in this seemingly ideal model is that it does not encourage or facilitate critique of the system. It imprisons the critical voice within a ‘plastic cage’ in the name of emancipation. This is an illustration used by Wendy Brown in her problematisation of freedom. She takes Max Weber’s idea of the ‘*iron* cage of rationalisation and enslavement to bureaucratic soullessness’<sup>94</sup> and describes the ‘plastic cage’ as something that reproduces and regulates the injured subjects it would protect. That it is *plastic* means that the cage is transparent to the ordinary eye and distressingly durable, she says. It has been erected, moreover, in the name of equality and justice but, notwithstanding these good intentions, it ties, categorises, marks and imposes a law of truth on the individual.<sup>95</sup> The law of truth in this case is a regime of fundamental rights protection as defined by the FRA (for instance, through asking set questions inviting a certain type of response and defining ‘protected citizens’ versus ‘victims’ in surveys, or through delimiting whom the victim can approach and the procedures through which this should happen in cases of discrimination).

With this caution in mind, we must ask: How far could government go in the name of human rights? What ‘evils’ is it possible that this may perpetrate? Though we may be in a plastic cage, one we cannot escape, we have the right to contest regimes of government that govern in the name of values we are told we ought to aspire to for our own good. The significance of what the plastic

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<sup>94</sup> W Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, Princeton, New Jersey 1995) 23. My emphasis.

<sup>95</sup> *Ibid* 28-9.

cage says *about rights discourse* is an important point that I return to in Part IV.

*ii. Non-Governmental Organisations*

Similar principles as were applied to analysing the individual as an expert can be applied to the NGO, although the nature of the ‘self’ that is governed is obviously different. I will go through what I have earlier described as the NGO’s forms of interaction with the FRA to show that the elements of participation and responsibility exist and qualify the NGO as an ‘expert’. I described these forms of interaction as, first, meetings of the FRP, second, open and closed consultations and third, interviews for the purposes of collecting data for the Homophobia Report.

First, the FRP offers a means for the NGO to cooperate with the FRA, in particular on matters to do with the Work Programme, the Annual Reports and the Agency’s operating procedures. The Platform, furthermore, gives NGOs the opportunity to discuss the strengthening of their role in cooperation (we saw that the Summary Report of the first meeting of the Platform talked of discussion as to setting up the Platform as a permanent structure and suggested that a representative of the Platform should have observer status at the meetings of the Management Board and the Scientific Committee). The ‘expert meetings’ further increase the sites at which the NGO has the opportunity to represent itself and to cooperate with the FRA – for example, to comment on the findings of the thematic reports, namely the Homophobia Report, and to thereby provide support for a new horizontal directive on all grounds of

discrimination. The consultations, second, allow for feedback from NGOs, in particular on the Annual Report and hence on the FRA's activities and on fundamental rights issues. Third, the interview process of collecting data and information to support the Homophobia Report allows NGOs to directly influence what statistics are represented in the Report and, therefore, what will become part of the rights discourse of the FRA. These sites of interaction all provide forums for the exchange of information, which happens through written documents, face-to-face meetings and interviews, and online exchanges. The NGO thus has a wide array of techniques of participation with the FRA.

Via these techniques, the NGO becomes directly involved in the main task of the agency, which is to 'collect, record, analyse and disseminate' information and data, and in the Agency's main objective of providing 'assistance and expertise' relating to fundamental rights to the relevant Community bodies. Through the FRP in particular, the NGO has direct input with respect to the Work Programme, the Annual Reports and the strategic priorities of the FRA (as we saw in the analysis of the Summary Report of the first meeting of the Platform, above). Through interviews conducted for Part II of the Homophobia Report, the NGO has been involved in empirical, socio-legal research techniques used to gather information and data on homophobia and discrimination on grounds of sexual orientation at a level closer to the citizen (I elaborate on the importance of socio-legal research methods in Chapter 8). The NGO has, therefore, had a say in the findings of the Homophobia Report. The NGO educates itself and develops a knowledge about fundamental rights in the

FRA in the same way as the individual, to the extent that through its participation in the Platform, consultations and interviews it is educating itself as to the fundamental rights discourse of the FRA, and at the same time contributing to the development of this discourse. NGOs, moreover, also educate each other as they share information via the FRP, consultations and reports produced as a result of interviews (i.e., the Homophobia Report, ‘Part II: The Social Situation’). The NGO must work all the time within a prescribed regime of expertise (set out by the FRA’s experts).

The NGO therefore shows the elements of participation and responsibility – although the latter may not be conscious in the same way as this was true for the individual. Together, these elements of participation and responsibility reflect a process of self-government. From the perspective of governmentality, the NGO is governing itself according to the rights discourse of the FRA through being involved in and thereby assuming a responsibility for this discourse. It is perhaps easier to see how this equation works to formulate the NGO as an ‘expert’ within the FRA’s layered expert structure. The NGO already has a specific expertise in its own area – its own members are employed to accumulate and develop that knowledge. It is therefore not a ‘layexpert’ in the sense that the individual is.

How does self-government tie in with the ‘care of the self’ with respect to the NGO? The same principles can be applied to this body as to the individual. The NGO seeks to ‘better’ itself in the sense of preserving and strengthening a certain identity. Interestingly, the FRA lists ‘participation criteria’ for

participation in the FRP. These are a set of ‘basic criteria ... for ensuring a structured and efficient work’.<sup>96</sup> The FRA invites NGOs and other institutions of civil society active in the field of fundamental rights at the national, European and international levels to *become participants* in the Platform. The criteria include, for instance, that organizations are committed to work and have a *proven record* of work for the advancement of fundamental rights; organizations show a specific and proven *expertise* and engagement in matters within the remit of FRA; and organizations are *representative* in the field of their competence on national, regional, European or international level. These criteria are interesting because they represent what the NGO must both conform to and aspire to – they are therefore the means of perpetuating a care of the self (where the self is the NGO). The NGO will want to be included in the FRA’s rights discourse as a ‘suitable participant’ and not be relegated into a category of, for instance, a ‘violateur of human rights’ (a category created through the FRA’s disciplinary role of monitoring, as shown in Chapter 5). It will seek to protect its identity as a source of objective and reliable information and data to the FRA. Moreover, it must preserve its identity as a promoter and protector of human rights, and an expert, in its own right. This in turn reinforces the NGO’s identity as a civil society organisation with a voice in the FRA’s discourse. We can see the NGOs desire to maintain this identity following the first meeting of the FRP, in which it was proposed that NGOs would facilitate the sharing of information (self-education and educating each other) via a well managed website. Furthermore, NGOs suggested that the

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<sup>96</sup><[http://fra.europa.eu/fraWebsite/civil\\_society/fr\\_platform/participation/participation\\_en.htm](http://fra.europa.eu/fraWebsite/civil_society/fr_platform/participation/participation_en.htm)> accessed 30 June 2009.



Platform establish a permanent structure and have observer status at the meetings of the FRA's Management Board and Scientific Committee.<sup>97</sup>

Problematizing the care of the self idea shows that NGOs, as human rights organisations, do not reflect on the extent to which they are governed by rights discourse or the extent to which they too are involved in formulating rights discourse. David Kennedy takes up the issue of responsibility in governance in *The Dark Sides of Virtue*.<sup>98</sup> He conceptualises the international humanitarian organisation as conceiving of itself as speaking truth to power – as not openly reflecting on the 'darker sides' of its work. It does not accept responsibility for its level of expertise and for, according to my analysis, the resultant extent to which it both *governs rights* and is *governed through rights*. This further illustrates the pertinence of a governmentality analysis – it brings to light the automatic, continuous and hidden nature of power operating as government through tactics and techniques that are given other, more palatable names (such as 'governance'), blinding even organisations that work in the name of rights and for the good of the 'victim'.

Therefore, both the individual and the NGO show the characteristics of 'participation' (in the FRA's processes) and 'responsibility' (for that participation), which qualify them as experts. As experts they engage in a process of self-government. Self-government does not necessitate 'active' (conscious) participation and responsibility need not be consciously assumed. I have described above how self-government affects the identities of these

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<sup>97</sup> (n 57).

<sup>98</sup> D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton 2004).

bodies and how the individual's self government reflects self-government of the population as a whole, in the name of a secure society for all. Not only this, but by virtue of their participation and responsibility these actors are involved in tactics and techniques that shape the rights discourse of the Agency.

#### IV. CONCLUSION

The previous chapter highlighted that a governmentality perspective views the rights discourse of the FRA as a process of 'governing through rights' and 'governing rights'. This chapter has developed the understanding of 'governing through rights' to show that not only are the 'other actors' in the FRA's rights discourse governed, but they *govern themselves*. Governmentality thus extends to a notion of self-government, in which the twin elements of participation and responsibility mean that these other actors are always-already experts and so directly involved in the governing tactics and techniques that are taking place. Moreover, self-government represents a 'care of the self', which supports the idea that each actor seeks to preserve their identity within a determined regime of authority or expertise. The individual tries to become, and is encouraged to become, an 'ideal citizen' as opposed to a 'victim'. The NGO is conditioned into being, or striving to become, a 'suitable participant' in the FRA's cooperation structures, fulfilling the FRA's participation criteria. The chapter thus serves to strengthen the argument of the earlier chapters – i.e., from Chapter 5, the argument that the FRA's rights discourse is a disciplinary discourse and, from Chapter 6, that the FRA's rights discourse operates as a

discourse of government(ality). The FRA's rights discourse is also a discourse of self-government(ality).

What are we to do with this knowledge – the knowledge that we are governed and govern ourselves through rights discourse? The crucial point is that rights act upon our conduct in the interests of our collective wellbeing – i.e., we are governed, and govern ourselves, in the name of a discourse that claims to be emancipatory and for our own good. This is significant since it not only disturbs but inverts the liberal tradition of rights – of rights against the state, or *against government*. Rights therefore act as a 'plastic cage', to use the illustration that Brown gives in relation to freedom. An interesting question is, once we have this knowledge, can government be refused? No – we cannot refuse government; the regime of rights discourse as governmentality means that through our (in)active participation and unconscious acceptance of responsibility we accept government and govern ourselves. But we *can* contest the regimes of authority that seek to govern us in the name of our own good. We can contest, or *resist* the so-called governance systems of rights discourse, such as the FRA, through critique. So, for instance, the knowledge that we have gained through observing rights and the FRA from a governmentality perspective means we can ask questions such as: Who are the experts who govern? Who should they be? Ought they to be lawyers and/or sociologists? What are the merits or implications of a socio-legal analysis of data and information collected by the experts? What are the merits or otherwise of the forms of data information and collection? I attempt to answer these questions and develop the point about resistance in the final chapter.

## Conclusion

I would therefore propose, as a very first definition of critique, this general characterisation: the art of *not being governed quite so much*.

Michel Foucault<sup>1</sup>

Let us speak it aloud, this *new challenge*: we need a *critique* of moral values, *for once the value of these values must be called into question* ... One has taken the *value* of these “values” as given, as a fact beyond all calling-into-questioning; until now no one has had not even the slightest doubt or hesitation ranking “the good” as of higher value than “the evil” ... What? if the opposite were true? What? if a symptom of regression also lay in the “good,” likewise a danger, a temptation, a poison, a narcotic through which perhaps the present were living *at the expense of the future*?

Friedrich Nietzsche<sup>2</sup>

This thesis is a critique of the rights discourse of the FRA. It takes a governmentality perspective and shows how the FRA’s rights discourse is a discourse of governmentality – i.e., a discourse that exhibits characteristics of disciplinary power and power as government(ality). As such, the thesis has attempted to make a contribution towards remedying the ‘elusive novelty’ of theorising in EU legal scholarship on rights.

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<sup>1</sup> M Foucault, ‘What is Critique?’ in M Foucault, *The Politics of Truth* (S Lotringer and L Hochroth, eds) (Semiotext(e), USA 1997) 29. Emphasis added.

<sup>2</sup> F Nietzsche, *On the Genealogy of Morality* (M Clark and A Swensen, eds) (Hackett Publishing Company, Indiana 1998) 5. Emphasis in original.

Chapter 2 provided evidence for the elusive novelty of theorising in EU rights scholarship and suggested governmentality as an appropriate and necessary tool to help fill the existing gap resulting from the lack of a deeper critique of rights in EU legal scholarship. The chapter outlined extant theoretical-critical approaches to rights in both EU and non-EU contexts, showing that in the EU context scholarship is, generally speaking, event-sensitive at the expense of a deeper critique of rights.

Chapter 3 defined ‘governmentality’ as a rationality of government (a way of thinking about the practices of government) and an art of government (the process of governing or being governed). Governmentality, as I described, refers to the ‘conduct of conduct’ – activities and practices that guide and determine the conduct of persons. I explained that governmentality refers both to a process and a methodology (hence I refer to a *governmentality perspective* throughout the thesis as my approach). Moreover, I explained how governmentality does not replace Foucault’s earlier conception of power as *discipline*: rather, the two coexist, along with sovereignty, in the triangle, sovereignty-discipline-government.

Chapter 4 introduced the FRA. I described the Agency’s origins, tasks and activities, and the way in which it is structured. I highlighted that the main objective of the FRA is to provide ‘assistance and expertise’ to the Union institutions, other Community bodies and the Member States,<sup>3</sup> and that its principal activities include the production of annual reports, thematic reports

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<sup>3</sup> Council Regulation 168/2007/EC of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1, art 2.

and other publications such as the recent minorities and discrimination survey, EU-MIDIS.<sup>4</sup> I focused on the Annual Report 2008,<sup>5</sup> the Homophobia Report (the FRA's first comparative thematic study)<sup>6</sup> and EU-MIDIS since I apply these to my analyses throughout the thesis. I also described in this chapter how the FRA's structure consists of intricate networks of actors, and/or experts, which operate at the EU and national levels. There are, moreover, 'other bodies' which form part of the FRA's structure with which the FRA has a relationship of cooperation (for instance, the bodies of the FRP— which includes NGOs, for example).<sup>7</sup> Chapter 4 also featured a review of academic comment on the Agency. This review demonstrated that critical analyses of the Agency, and in particular a governmentality critique, are lacking.

In Chapter 5 I looked at the earlier monitoring role of the Agency, explaining why it is important to examine the evolution of the FRA's functions from the original *monitoring* function to the advisory role it now has. What is interesting is that the functions of the FRA today, whilst they have moved away from being described under the heading of 'monitoring' *do* in fact perform a monitoring role. I used the model of the panopticon to illustrate a Foucauldian understanding of monitoring as surveillance, and I used the FRA's first comparative thematic study (the Homophobia Report) and its first and largest

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<sup>4</sup> <[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)> accessed 24 April 2009.

<sup>5</sup> European Union Agency for Fundamental Rights (FRA), 'Annual Report 2008', 2009 <[http://fra.europa.eu/fra/material/pub/ar08/ar08\\_en.pdf](http://fra.europa.eu/fra/material/pub/ar08/ar08_en.pdf)> accessed 16 November 2008.

<sup>6</sup> European Union Agency for Fundamental Rights (FRA), 'Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part I: Legal Analysis', 30 June 2008 and European Union Agency for Fundamental Rights (FRA), 'Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part II: The Social Situation', 31 March 2009

<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_p2\\_0309\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm)> accessed 24 April 2009.

<sup>7</sup> (n 3) arts 8-10.

survey on minorities and discrimination (the EU-MIDIS survey) to show panopticism in operation. I described how surveillance resembles disciplinary power, which acts as a normalising power (through disciplinary techniques such as the Homophobia Report and the EU-MIDIS survey). I showed that four different identities are normalised through the FRA operating in this way: first, the FRA as a promoter and protector of human rights. Second, the EU as a safe and secure society for all. Third, categories of ‘victim’ (against which the ‘ideal citizen’ is defined) and finally, the ‘violateur of human rights’.

Chapter 6 took this analysis further: I moved on from looking at the power relations of the FRA as discipline to examining them as government. The FRA’s role is now described as advisory: it is to provide ‘assistance and expertise’.<sup>8</sup> These are characteristics of governance discourse. I used governmentality to intervene in the FRA’s rights *and governance* discourses and analysed certain features of the FRA from a governmentality perspective to show that the Agency in fact exhibits features of governmentality rather than governance. I looked specifically at the *actors* that make up the Agency’s structure, the *expertise* of these actors, and the use of *statistics* by these actors to collect and record information and data. A governmentality perspective brings new power relations to light, showing how through these everyday, mundane features and practices (which are associated with ‘governance’ processes following traditional institutional and academic discourse), the FRA governs (through) rights. Governmentality, I further discussed, reveals a

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<sup>8</sup> *Ibid* art 2.

different type of normalising power (to discipline), which operates through tactics of security and targets the population of the EU.

Chapter 7 developed the governing (through) rights proposition by introducing *self-government*. Here I considered other actors involved in the FRA's rights discourse besides the 'experts' described in Chapter 6. My particular focus was, first, the individual and, second, NGOs. Under a governor/governed dichotomy, these actors would be classified as 'the governed' but according to a governmentality perspective these actors *govern themselves*. I explained how self-government involves the two elements of (not necessarily active) participation and (assumed) responsibility. The analysis in Chapter 7 served to strengthen the arguments made in Chapters 5 and 6 – namely, that the FRA's rights discourse is a discourse of governmentality that shows characteristics of power as discipline and as government(ality) – because the chapter revealed that the discourse reinforces and reinvents itself through self-government and the responsible participation of the individual and NGOs. Governmentality perpetuates itself through the involvement of these actors, even 'without' the FRA, so to speak.

I began asking questions about what we can take away from analysing the FRA from a governmentality perspective at the end of Chapter 7. What are we to do with the knowledge acquired so far – i.e., that the FRA shows features of discipline and governmentality and that this means that certain identities are normalised? What exactly does it mean to say, as I did in Chapters 5 and 6, that these identities are politically useful? Framed another way, what are the



*advantages* of a governmentality perspective on the FRA's rights discourse? I outline four advantages below. Put briefly, they are the following: first, I explain that a governmentality perspective reveals processes of '*governing rights*' in the FRA's rights discourse; second, we are also alerted to processes of '*governing through rights*'; third, I demonstrate that a governmentality perspective provides a *critical* perspective; and finally, governmentality is a *creative* tool.

## I. GOVERNING (THROUGH) RIGHTS

The first advantage of a governmentality perspective is that it reveals processes of 'governing rights'. 'Governing rights' refers to processes that result in the government *of* rights. These processes involve experts and statistics. Through channelling expertise and gathering, recording and presenting statistical information, the FRA 'governs by information'. To explain simply how this works, 'to say what *is* is also to govern'.<sup>9</sup> The 'information and advice' provided by the experts, which is related in the form of statistics, becomes the dominant discourse describing how human rights are promoted and protected by the FRA. The information and advice are presented in the FRA's documentation – i.e., the annual reports, which provide a comparative analysis of the human rights situation across the 27 Member States (e.g., the Annual Report 2008); the comparative thematic reports, which provide an account of

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<sup>9</sup> D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton 2004) 348.

research into the thematic areas of the MAF<sup>10</sup> (e.g., the Homophobia Report); other publications of the Agency – including surveys (e.g., EU-MIDIS) and also opinions, rapid responses, studies and discussion papers, statements, the newsletter and the magazine, which amongst other things outline the FRA's past and future activities and research findings. I focused on the Annual Report 2008, the Homophobia Report and EU-MIDIS in Chapters 5, 6 and 7 to show how these publications formulate the FRA's rights discourse – for instance, they record the current fundamental rights situation in the Member States, examples of good practice and the FRA's opinions. Through using these tactics of surveillance (e.g., EU-MIDIS, as discussed in Chapter 5), channelling expertise and gathering, recording and presenting statistical information via these documents, an 'analytics of government' is formed, meaning that these features together define a 'truth' about human rights (i.e., what the discourse is and how it is represented), who is involved in circulating that truth and the technical conditions for its production and circulation.

A governmentality perspective further shows that through surveillance, actors, experts and statistics, the FRA regulates not only its own rights discourse but the rights discourse *of the EU*. The Homophobia Report, which discusses a new horizontal directive on all discrimination grounds, provides an excellent illustration. The Report was originally prepared following a request from the European Parliament for a comprehensive, comparative report on homosexuality and discrimination based on sexual orientation from the FRA, which was intended to contribute to the debate on the need for a new

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<sup>10</sup> And potentially areas that fall outside the MAF where a request is made to this effect by the European Parliament, Council or the Commission under the Regulation (n 3), art 4(1)(c) and (d), and art 5(3).

‘horizontal directive’ covering all grounds of discrimination. Since its publication, the Report has incited response from the Union institutions. After publication of ‘Part I: The Legal Situation’ in June 2008, the Commission issued a Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in July 2008.<sup>11</sup> Moreover, the European Parliament, in April 2009, adopted a Resolution on the application of the citizens’ rights directive to LGBT couples and to combat discrimination on the basis of sexual orientation (making reference to Article 13 EC).<sup>12</sup> The Resolution makes reference to the FRA’s Homophobia Report. This shows the impact of the FRA on the EU’s rights discourse. These new developments, furthermore, have the potential to impact more deeply on the EU’s rights discourse – a new horizontal directive may be cited in decisions of the ECJ, and in academic literature also, thereby expanding the EU-wide discourse on rights. Moreover, the FRA’s rights discourse impacts also on the international arena: the Homophobia Report ‘Part II: The Social Situation’ refers to support which the EU Member States lent to combating discrimination against LGBT persons by supporting a Declaration on sexual orientation and gender identity presented to the General Assembly of the UN.<sup>13</sup>

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<sup>11</sup> Commission (EC), Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final, 2 July 2008.

<sup>12</sup> European Parliament Resolution on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States, INI/2008/2184, 2 April 2009. See points 2 and 3 of the resolution.

<sup>13</sup> European Union Agency for Fundamental Rights (FRA), ‘Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States: Part II: The Social Situation’, 31 March 2009, 3

<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_p2\\_0309\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm)> accessed 24 April 2009.

An interesting point is that these new developments, at the EU and international level, are presented as ‘progress’. The ‘governing rights’ processes within the FRA also therefore define how the rights discourse can progress and what constitutes progress. So, for instance, the Homophobia Report addresses a need to ‘contribute to a *positive* change in public attitudes and behaviour’.<sup>14</sup> Through the Homophobia Report and the Annual Report 2008, the FRA identifies examples of good practice and encourages these practices, which it describes as ‘evidence that things are slowly changing. FRA welcomes this process.’<sup>15</sup> The opinions of the FRA, as presented in the Homophobia Report, are also aimed at ‘progress’ – toward increased protection and promotion of human rights. Moreover, the FRA explicitly asks how the results of EU-MIDIS can be useful to policy-makers – the Agency thereby attempts to impact upon and instigate progress in the human rights policy of the EU.<sup>16</sup> For example, the FRA expresses concern to increase awareness amongst vulnerable minorities about their rights in the context of EC and national laws and asks, how can these be successfully targeted to reach different groups?<sup>17</sup>

The second advantage of a governmentality perspective is that it highlights processes of ‘governing *through* rights’. This refers to the processes of government in the name of rights, where the FRA gains a knowledge about the subject. I described in Chapter 6 how experts make it possible to regulate the

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<sup>14</sup> *Ibid* 4.

<sup>15</sup> <[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_p2\\_0309\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm)> accessed 24 April 2009.

<sup>16</sup> European Union Agency for Fundamental Rights (FRA), ‘EU-MIDIS at a Glance: Introduction to the FRA’s EU-wide Discrimination Survey’, 2009, 14-15  
<[http://fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_eu-midis\\_en.htm](http://fra.europa.eu/fraWebsite/products/publications_reports/pub_eu-midis_en.htm)> accessed 24 April 2009.

<sup>17</sup> *Ibid*.

conduct of individuals by constructing a discourse through which rights operate as ‘technologies of freedom’, at a distance. Rights govern by becoming linked with the moral norms, values and aspirations of individuals. They become ‘that which we cannot not want’.<sup>18</sup> Moreover, rights govern through statistics, as discussed in Chapter 6, by producing a knowledge about the subject. Statistics therefore create a knowledge about the Member State, for instance – about its internal human rights situation and examples of good practice – enabling the FRA to label a ‘good Member State’ as one which shows examples of good practice. Statistics also create a knowledge about the citizen, creating categories of victim (I showed how the Homophobia Report created the category of the ‘LGBT victim’ and how EU-MIDIS created the category of ‘minority as victim’, with ‘the Roma’ as the most vulnerable of the minority victim groups).

Furthermore, government through rights happens via *self-government*. Governmentality reveals how government reinforces and reinvents itself, and actors within the FRA’s rights discourse govern themselves. In Chapter 7, I described how this can be seen through the responsible participation of individuals and NGOs. This analysis can be extended to other ‘other actors’ of the FRA – the Member States and NHRIs, for example. The discussion of self-government in Chapter 7 reinforced the analysis in the previous chapters (Chapters 5 and 6) since it showed the strength and invisibility of the processes of governmentality. The individual and NGO were shown to be in a situation of governmentality which they could not refuse and, without a critical eye, this

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<sup>18</sup> G Chakravorty Spivak, quoted by W Brown, ‘Suffering the Paradoxes of Rights’ in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Duke University Press, London 2002) 420.

situation is not readily identifiable – similar to Wendy Brown’s ‘plastic cage’,<sup>19</sup> which I return to shortly.

Governing through rights also explains the representation of the identity of the FRA itself as a human rights institution for the EU. Moreover, this directly impacts on the identity of the EU as a moral advocator of human rights. The society of the EU is presented as a safe and secure society in which rights are protected. In an understanding of governing through rights, rights thereby operate as technologies of security, reinforcing the identity of not only the FRA but also the EU as a human rights institution, or organisation.

I consider these processes in more detail now and ask the ‘so what’ question. So what if governmentality reveals processes of governing rights and governing through rights? Why should governing (through) rights be of interest? I suggest it is of interest because these processes tell us something about rights discourse. I explain by making six further points.

First, on the issue mentioned above about which *identities* are represented, governing (through) rights are important processes because they reveal how certain identities are normalised. The identity of the FRA as an institution for human rights protection is normalised, as is the identity of the EU as a moral advocator of human rights.<sup>20</sup> These identities are reinforced by the construction

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<sup>19</sup> W Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, Princeton 1995) 28.

<sup>20</sup> For an interesting discussion of the tension between the EU’s image as a promoter and protector of fundamental rights and its image as a ‘virtuous international actor’ see G de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*, *forthcoming* <<http://ssrn.com/abstract=1321313>> accessed 26 March 2009.

of the EU as a safe and secure society through the FRA's rights discourse. The idea of a safe and secure society is perpetuated by the creation of categories of 'victim' through the FRA's rights discourse. The 'victim' is constructed in a similar sense to the 'delinquent' in Foucault's analysis of the prison in *Discipline and Punish*,<sup>21</sup> as I explained in Chapters 5 and 6, and provides a politically useful category because, in contrast to the victim and victimisation, the ideals of the protected citizen and the safe and secure society are perpetuated. 'Good Member States' and 'good NGOs' also contribute to the safe and secure society by carrying out good rights practices and providing reliable and comparable data on rights. In contrast to the safe and secure society, the identity of the 'violation of human rights' is also created, as I showed in Chapter 5. This is also a politically useful category since it warns against and does not welcome the violator, thereby reinforcing what is required in the safe and secure society. In Chapter 5 I showed how this worked using the example of Austria as the violator of human rights, or the 'deviant state'.

Moreover, these norms that are created – of the 'ideal citizen' and the 'good NGO', for instance – are norms that ought to be aspired to, according to the FRA's rights discourse. So, 'victims' of rights violations should remedy their situations so they can avail themselves of the more protected, and indeed more regulated, identity of the 'ideal citizen'. They can do this by (responsibly) participating in the FRA, as I described in Chapter 7. The NGO also has something to aspire to – it must work to gain and maintain the status of suitable participant in the FRA's structures, to preserve the relationship of cooperation

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<sup>21</sup> M Foucault, *Discipline and Punish: The Birth of the Prison* (A Sheridan, trs) (Penguin, London 1991).

that it has with the FRA and keep the quality of its information and data to an acceptable standard.

Second, governing (through) rights is of interest because we are alerted to the *experts* who take part in the FRA's rights discourse. We can therefore question: Who are the experts who govern? Moreover, who should they be? The identities of these individual actors are lost in the networks of the Agency. We have access to the 'main' actors, of course, so the issue is not necessarily one of transparency. Rather, it is one of unravelling the intricate networks of actors which conceal workings of power – and which do so under the umbrella of 'governance' (in Chapter 6 I described how experts within the FRA's structures are features of the EU's governance discourses). Moreover, the issue is also one of the classification and nature of these experts as lawyers and sociologists because of the different data they provide and how this then affects the FRA's rights discourse.

The FRA favours an inter-disciplinary approach and is interested in a socio-legal analysis: take, for example, the Homophobia Report, which, as we saw, is split into two parts: 'Part I: *Legal Analysis*' and 'Part II: the *Social Situation*'. The emphasis on a socio-legal analysis means that the FRA recognises the validity of data and information from empirical, socio-legal methods: from interviews, questionnaires and surveys, for example.<sup>22</sup> These are interesting tactics of governmentality. They place an increased emphasis on statistics and empirical research, which happens at a level closer to the citizen (for example,

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<sup>22</sup> (n 13) 24.



surveys involve direct contact between the citizen – a ‘layexpert’, as Chapter 7 described – and the FRA’s ‘experts’). Chapter 6 especially pointed to the FRA’s acknowledgement of a general lack of statistical information on homophobia and discrimination based on sexual orientation (in the Homophobia Report) and on discrimination against minorities (EU-MIDIS). The FRA is therefore formulating its own methods of data collection – a ‘socio-legal’, interdisciplinary method, which relies on empirical research and the collection of statistics. The use of statistical data and empirical methods operate as technologies of governmentality.

Third, and related to experts, is the issue of *responsibility*. I explained, in Chapter 7, how the individual and the NGO are always-already experts and as such *assume* responsibility for their participation in government. Moreover, responsibility applies not only to the individuals but also to the population of the EU as a whole. I come back to the possibility of the individual accepting responsibility for her role in government in Part II. What of the responsibility of the FRA’s ‘experts’? Can and should these experts *take* responsibility for their role in governmentality? David Kennedy problematises the responsibility of experts, saying that experts deny responsibility for the extent to which they ‘rule’: experts tend to say that they ‘advise, they interpret but they do not rule’.<sup>23</sup> Kennedy, by contrast, sees experts (for instance, international humanitarians) as ‘rulers’ who face the challenge of accepting responsibility for their role in governance.<sup>24</sup> And he offers 10 maxims as suggestions for how

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<sup>23</sup> D Kennedy, ‘Challenging the Expert Rule: The Politics of Global Governance’, *The Julius Stone Memorial Address 2004*, Thursday 17 June 2004, 11

<<http://www.law.harvard.edu/faculty/dkennedy/publications/>> accessed 9 August 2007.

<sup>24</sup> Kennedy (n 9).

to move closer to a ‘responsible humanitarianism’.<sup>25</sup> These include: ‘international humanitarianism rules’ (meaning that humanitarians ‘speak truth to power’ – i.e., what they say is a form of governing and humanitarians should no longer feign blindness to rulership); ‘international humanitarianism is powerful’ (the practice of international humanitarianism, whilst it presents itself as weak, is a force, and humanitarians should accept this and embrace the full range of their effects on the world); ‘decision, at once responsible and uncertain’ (international humanitarians, Kennedy says, have sought power but have not accepted responsibility. Kennedy imagines a humanitarianism that embraces the act of decision, that is comfortable intervening because it knows itself to be a participant in governance). It is intriguing to problematise the issue of the responsibility of experts. From a governmentality perspective, this is all the more so since we are not talking about a category of actors that can be labelled, such as ‘humanitarians’, or about ‘governance’, as Kennedy is, but about ‘actors’ who take part in mundane and procedural processes and about government through norms that are presented as a departure from government (as features of governance and thus a deliberate move away from hierarchical forms of government). What is pertinent is that governmentality shows that responsibility is *assumed* – i.e., it is not conscious. There need not, in other words, be acceptance of responsibility in order for governmentality to take place.

A fourth issue is to do with how experts gather and relay information and data, how they provide their expertise, through what channels: i.e., *statistics*.

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<sup>25</sup> *Ibid* xxvi.

Governmentality emphasises statistics as technologies of government. We should, therefore, pay attention to what these statistics *are* and how they are relayed. What counts as ‘information and data’ that will be used in the FRA’s task of providing information and expertise? How is this information gathered? In this respect, interesting work has been done on the use of human rights measurement indicators, work which touches on issues relating to the types of data used to ‘measure’ human rights protection and promotion.<sup>26</sup> A governmentality perspective should help to situate these issues within the wider context of the implications that this data has for governing (through) rights – i.e., what statistics say about the nature of rights discourse itself (for instance, whose rights are protected, by whom and using what methods).

Fifth, governing (through) rights reveals processes whereby we are governed through a discourse that claims to emancipate us, to exist for our own well-being and, crucially, *govern us less*. I intervene in the FRA’s rights and governance discourses to disrupt this understanding. The rights discourse of the FRA has developed in a climate where the Commission has been advocating the message that we ought to be ‘governing ourselves better, together’ and that governing refers to governance, not government. However, as this thesis has

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<sup>26</sup> See for example S Fukuda-Parr, ‘Indicators of Human Rights and Human Development; Overlaps and Differences’ (2001) 2 [Statistical Journal of the United Nations Economic Commission for Europe](#) 239; P Hunt and G McNaughton, ‘A Human-Rights Based Approach to Health Indicators’ in MA Baderin and R McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP, Oxford 2007) 303; T Landman, *Studying Human Rights* (Routledge, Abingdon 2006); T Landman, ‘Measuring Human Rights: Principle, Practice and Policy’ (2004) 26 *Human Rights Quarterly* 906; T Landman, ‘Comparative Politics and Human Rights’ (2002) 24 *Human Rights Quarterly* 890; N Mitchell and J MacCormick, ‘Economic and Political Implications of Human Rights Violations’ (1988) 40 *World Politics* 476. UN human rights bodies have also been preparing reports on the topic – see for instance Report on Indicators for Monitoring Compliance with International Human Rights Instruments, 11 May 2006, HRI/MC/2006/7; United Nations Development Programme (UNDP), *Human Development Report 2000: Human Rights Development*, especially Chapter 5 < [http://hdr.undp.org/en/media/HDR\\_2000\\_EN.pdf](http://hdr.undp.org/en/media/HDR_2000_EN.pdf) > accessed 20 March 2009.

shown, government has not been ‘lessened’, rather it has been ‘bettered’ by being ingrained more deeply into the social body. Government is ‘bettered’ by becoming less visible because it manifests itself in forms of authority less detectable than hierarchical forms of government (there is no sovereign entity that governs, only networks of ‘experts’) and it is more ingrained because it is in place in the very operational practices of these expert bodies, in the collection of information and data (statistics). Rights as governmentality distorts, even inverts, the idea behind the liberal tradition of rights, of rights against the state – or *against government*. Rights therefore act as a ‘plastic cage’, the illustration from Wendy Brown that I used in Chapter 7 to symbolise a transparent, durable and regulatory structure which, notwithstanding its good intentions, categorises, marks and imposes a law of truth of the individual. The individual is defined as the ‘victim’ or the ‘ideal citizen’ and as the ‘layexpert’ by this discourse. The processes which propagate the construction of these identities are in fact linked with, not removed from, government(ality).

A final point on why governing (through) rights is a useful concept is that it leads to, and exposes, the question: Could this ‘plastic cage’ represent an *ideal situation* for the promotion and protection of rights? There is therefore a dilemma – is self-government not in fact ‘the dream of democracy’<sup>27</sup> since we, conveniently and ideally, promote and protect rights discourse ourselves, together? Moreover, if we cannot refuse the plastic cage – i.e., we cannot refuse governmentality and our being involved in processes of governing ourselves through rights discourse – what are we left with? I suggest that the

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<sup>27</sup> Brown (n 19) 5.

answer to both these questions is critique/resistance. The plastic cage is not an ideal rights model because it does not encourage or facilitate critique/resistance of the value of its values. Furthermore, what we are left with, despite not being able to refuse governmentality, is critique/resistance. Therefore, I argue that we ought to question how far government in the name of human rights could go. What ‘evils’ may this type of government through rights possibly perpetrate? We retain the right, even in the plastic cage, to contest regimes of government that govern in the name of values we are told we ought to aspire to for our own good – such as the FRA. These are points I made in Chapter 7. What this says about the *nature of rights discourse* is interesting. Rights discourse is a discourse of governmentality – a discourse that governs and through which we govern ourselves but we do it with a (false) sense of being liberated and less governed, we do it not knowing how that government operates and we do it in furtherance of a process of care of the self. I go on to explore critique and/or resistance in the next section.

## II. CRITIQUE: RESISTANCE AND POSSIBILITY

As noted earlier, the third advantage of a governmentality perspective is that it provides a critical approach. By critical I refer to a concern for *critique* over criticism. Critique, as explained in Chapter 3, is ‘not a matter of saying that things are not right as they are. It is a matter of pointing out on what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought the practices that we accept rest ... Practicing [critique] is a matter of

making facile gestures difficult'.<sup>28</sup> As such, the type of critique that I carry out in this thesis is in itself a form of *resistance*. Moreover, '[a critical analysis operates] to make a system better. It is an analysis that focuses on the grounds of that system's *possibility*'.<sup>29</sup> In what follows, I want to explore these points about resistance and possibility.

In terms of *resistance*, this thesis presents a critique that disrupts the traditional analytical frame within which EU rights and governance discourses tend to be analysed. It resists the disciplinary and governing power of what has become the discipline – the traditional, existing scholarship on rights and governance, as outlined in Chapters 2 and 4 – and searches for 'new directions' and 'new tools' for analysis. I present governmentality as a new tool for analysis of the FRA's rights and governance discourses. I describe governmentality as 'the conduct of conduct' (i.e., the way in which the conduct of some person or persons is shaped, guided or effected by an activity or practice) and resistance as 'counter-conduct'<sup>30</sup> (i.e., 'in the sense of struggle against the processes implemented for conducting others',<sup>31</sup> as explained in Chapter 1). Resistance is therefore a refusal of the form of being conducted. Foucault further describes resistance, in the context of resistance to pastoral power, with this statement: 'We do not want this salvation, we do not wish to be saved by these people and

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<sup>28</sup> M Foucault, *Politics Philosophy and Culture* (L Kritzman, ed; A Sheridan, trs) (Routledge, Abingdon 1988) 154. Where I have inserted 'critique' Foucault uses the term 'criticism', which he seems to use synonymously with critique throughout this interview. As I explained in Chapter 3, I agree with Brown that there is a subtle difference between 'criticism' and 'critique' and have therefore inserted 'critique' into the quotation.

<sup>29</sup> B Johnson, 'Translator's Introduction' in J Derrida, *Dissemination* (B Johnson, trs) (University of Chicago Press, Chicago 1981) xv.

<sup>30</sup> M Foucault, *Security, Territory, Population* (M Senellart, ed; G Burchell, trs) (Palgrave Macmillan, Hampshire 2007) 201.

<sup>31</sup> *Ibid.*

by these means.’<sup>32</sup> This thesis resists the argument that we are governing *ourselves better* together and experiencing ‘governance, not government’, as per the Commission’s motto. The actuality is not quite so simple: we are at once the governed and the governor. This thesis also resists the argument that human rights are our salvation, that they are ‘good’, ‘moral’ values and cannot possibly be called into question since that would be ludicrous given their natural, obvious and self-evident nature. It resists, furthermore, the assumption that the FRA is or can naturally become ‘a beacon on fundamental rights’.<sup>33</sup>

Does resisting in this sense mean that I am advocating an ‘end of human rights’<sup>34</sup>, or rejecting the FRA? If it is suggested, as in this thesis, that human rights are a discourse of governmentality, does this equate to implying that rights are (as Nietzsche did of moral values) a ‘regression ... a danger, a temptation, a poison, a narcotic through which perhaps the present were living *at the expense of the future*’?<sup>35</sup> No, it does not. The point is, rather, that we perhaps assume too much and take the ‘value’ of these values as given, without (self-)reflection. Also, the point is to suggest that we recognise the ambiguity and naivety of statements such as: ‘Human rights are trumpeted as the noblest creation of our philosophy and jurisprudence and as the best proof of the universal aspirations of our modernity’;<sup>36</sup> or that human rights are the ‘new

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<sup>32</sup> *Ibid.*

<sup>33</sup> “‘FRA Should Become a European Beacon on Fundamental Rights’: Interview with Morten Kjaerum, FRA’s New Director’ (2008) 23 *Equal Voices* 4, 4.

<sup>34</sup> This phrase is taken from C Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart, Oxford 2002).

<sup>35</sup> Nietzsche (n 2).

<sup>36</sup> Douzinas (n 34) 1.

ideal [that] has trumped in the global world stage'.<sup>37</sup> Human rights are defined by paradox and dark times; they have dark and 'other' sides, as I showed when discussing critiques of rights in Chapter 3. In the context of the EU, human rights are the new vision, replacing the internal market, that tired goal of the 1980s. Statements to this effect were made by dignitaries at the opening of the FRA in Vienna on 1 March 2007: 'We must look for a new identity, one based on human rights',<sup>38</sup> and '[t]he European Union is a human rights union'.<sup>39</sup> Resisting this is not to deny the value or the promise of rights discourse, or of the FRA and its rights discourse. Resistance, rather, urges a *re-assessment* of the promise of the FRA's rights discourse.<sup>40</sup> It is also to suggest that the *promise* of human rights, and the FRA's rights discourse, must always remain in the future.

As Costas Douzinas states, the 'end of human rights comes when they lose their utopian end'.<sup>41</sup> I suggest that the 'end of the FRA', the end of the promise of its rights discourse, will come when we accept that it has achieved what should be the 'utopian' role as a beacon on fundamental rights and we stop re-assessing its promise. Human rights must remain the promise of what Jacques Derrida calls the 'future-to-come'.<sup>42</sup> This useful, if awkward, translation of the French '*avenir*' refers to 'that which is impossible to anticipate but *may* come,

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<sup>37</sup> *Ibid* 1. Douzinas makes this statement subject to historical evidence that suggests otherwise – see especially 2 and 8. On the historical failings of human rights, see also M Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton 2001).

<sup>38</sup> Franco Frattini, Vice President of the EU Commission, 'Fundamental Rights: Fundamental to Europe's Identity' (2007) 21 *Equal Voices* 12.

<sup>39</sup> Ursula Plassnick, Foreign Minister of Austria, 'The Opening of the Fundamental Rights Agency in Austria' (2007) 21 *Equal Voices* 6.

<sup>40</sup> See similarly Douzinas (n 34) 8.

<sup>41</sup> *Ibid* 380.

<sup>42</sup> J Derrida, *Without Alibi*, (P Kamuf, trs) (Stanford University Press, Stanford 2002) xxxiii.



*perhaps*'.<sup>43</sup> The nature of rights as 'promise' means that they will never actually *be present* in the future. Derrida describes the promise of the 'to-come' as waiting for a messiah. Waiting for the realisation of human rights can be likened to a religion that awaits the coming of a messiah. Unlike religion, however, there is actually no messiah in this version of events. That is, the promise of human rights is 'less like waiting for God than *Waiting for Godot*'<sup>44</sup> – it is a 'messianicity without messianism'.<sup>45</sup> The promise of the 'to come', however, despite the impossibility of its achievement, gives an imperative to strive for its realisation. The promise means that whilst we can never achieve it, we can and should strive for the promise – the promise is thus *perfectable*. This very perfectibility is what encourages, demands even, incessant critique.<sup>46</sup> It demands that we engage in a constant struggle towards the promise through critique, towards change. Critique and change, or transformation, thus go hand in hand: 'It is not therefore a question of there being a time for criticism and a time for transformation ... In fact, I think that the work of deep transformation can only be carried out in a free atmosphere, one constantly agitated by a permanent criticism.'<sup>47</sup> Only through this struggle can we thus be open to transformation and new possibilities both for human rights and for the actors involved in rights discourse. Applying this to the FRA, I suggest that we must continue the struggle to critique the Agency's structure, working methods and output – as this thesis has sought to do by questioning the Agency's make-up of actors and experts, the workings of disciplinary power through monitoring

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<sup>43</sup> D Bulley, *Ethics as Foreign Policy: Britain, The EU and The Other* (Routledge, Abingdon 2009) 113.

<sup>44</sup> *Ibid* 114. Bulley is referring to Samuel Beckett's play, *Waiting for Godot*.

<sup>45</sup> J Derrida and B Stiegler, *Echographies of Television: Filmed Interviews* (J Bajorek, trs) (Polity, Oxford 2002) 13.

<sup>46</sup> Bulley (n 43) 115.

<sup>47</sup> Foucault (n 28) 155.

functions (represented in EU-MIDIS, for example), and the significance of statistics (as presented in EU-MIDIS, the Homophobia Report and the Annual Report 2008).

We can move on now to *possibility*. Resistance means that questions and possibilities are left open. The leaving open of possibilities is about opening to possibilities of making a system ‘better’.<sup>48</sup> What possibilities become apparent as we engage in the constant, agitated state of permanent critique? I break these down into three: knowledge, transformation and responsibility.

Critique and resistance provide, first, for the possibility of *knowledge* – i.e., a knowledge of the tactics that govern us and have us govern ourselves in the name of human rights and good governance. This knowledge makes us aware of the power relations at work in the FRA, of who are the governor and the governed (and of the falseness of the dichotomy) and how subject identities are constructed (e.g., ‘victim’ versus ‘ideal citizen’). Knowledge takes the form of ‘minor’ or ‘subjugated’ knowledges, which Foucault describes as those that struggle against a unitary, formal discourse. The ‘local, discontinuous, disqualified, illegitimate knowledges’,<sup>49</sup> in other words knowledges that do not form part of the traditional discourse. These subjugated knowledges about the FRA are what this thesis has attempted to cast light upon. A ‘will to knowledge’, a *curiosity* to find what surrounds us as strange and odd, in turn

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<sup>48</sup> Earlier I described that ‘[a critical analysis operates] to *make a system better*’ (n 29). I now qualify this statement using the notion of possibility.

<sup>49</sup> M Foucault, ‘Two Lectures’ in M Foucault, *Power/Knowledge* (C Gordon, ed; C Gordon and others, trs) (Longman, London 1980) 78, 85.

sets us free. The system can then be critiqued, it can be ‘bettered’, or transformed.

We have, thus, second, a promise and a hope of *transformation* through resistance and critique of the FRA’s rights discourse. This opens up the possibility for the discourse to develop and therefore maintain a *perfectability* (i.e., we accept that it is not already perfect and cannot be perfect). An illustration of this is the proposal for a new horizontal directive on discrimination, as incited by the FRA’s Homophobia Report. This thesis has attempted to reassess this development in the FRA’s rights discourse – which the FRA’s institutional discourse describes as progress – through critique, or a governmentality perspective, and has therefore remained open to a ‘future to come’ for the FRA’s rights discourse.

There is an optimism in resistance, for we no longer have to stand by or only criticise. The freedom that comes with knowledge extends to a freedom to *do something*, however small, to change something in the minds of people. And ‘for those who for once in their lives have found a new tone, a new way of thinking, a new way of doing, those people, I believe, will never need to lament that the world is in error ... and that it is time for others to keep quiet so that at last the sound of their disapproval may be heard’.<sup>50</sup> Moreover, critique promises to address the following types of questions: Should there be such power exercised through ‘experts’? Is the power that is present in the form of ‘statistics’, to define and determine actualities, recognised? How can we better

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<sup>50</sup> M Foucault, ‘The Masked Philosopher’ in M Foucault, *Ethics: Volume 1: Subjectivity and Truth: Essential Works of Foucault 1954-1984* (P Rabinow, ed; R Hurley, trs) (Penguin, London 2000) 321, 327.

recognise the influence of these tactics of government? How can we, as experts in our own right, shape our futures? Asking these questions is *doing something* in itself – i.e., transforming the discourse, through critique.

Related to transformation, an issue particularly relevant for the FRA is competence; how far can the boundaries of formal, legal competence be exceeded by a human rights agency? In this respect, will the FRA *itself resist* the constraints of its competence? Will it act beyond the remit of its MAF? This resistance, like power, would not have to be a deliberate act but would be the result of the governmentality relations at play within its processes. If sites of resistance are inherent to sites of power, then it is not difficult to take the step to understanding how processes that equal resistance to competence may come about. There is evidence of this at work in the examples of the FRA's output that have been reviewed in this thesis.

The Homophobia Report, I suggest, provides evidence of the FRA extending the strict boundaries of its competence in three ways. First, the themes which the Report covers do not strictly speaking fit squarely within the Agency's thematic framework<sup>51</sup> – I refer in particular to the themes of hate crime and hate speech, and specific issues concerning transgender persons which appear in 'Part II: The Social Situation'. Second, the opinions given by the FRA in both parts of the Report are extensive, detailed and written in an imperative tone – arguably not fitting in with the Agency's milder objective of providing 'assistance and expertise', through 'opinions and conclusions' (i.e., not

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<sup>51</sup> Council Decision of 28 February 2008 implementing Regulation 168/2007/EC as regards the adoption of a Multi-Annual Framework for the European Union Agency for Fundamental Rights for 2007-2012 [2008] OJ L 63/14, art 2.

recommendations).<sup>52</sup> Third, I believe that the method of data collection used in the Report is important. I have pointed out that the Report uses a socio-legal approach to data collection. The Regulation of the FRA and its MAF do not refer to socio-legal analysis as a method of data collection for the FRA. I suggest that governmentality supports the observation that the FRA has formulated its own inter-disciplinary method for collecting information and data, through tactics that function at a level closer to the citizen and appear removed from government. The survey, EU-MIDIS, also seems to show the FRA operating at, if not beyond, the boundaries of its competence in terms of its scope. EU-MIDIS surveyed respondents in all 27 Member States and is the largest minority survey of its kind in the EU. This shows the wide reach that the FRA has in terms of exercising its competence.

Finally, there is the possibility of accepting *responsibility* for our roles in government. Here I refer to ‘lay-individuals’ accepting responsibility in government (earlier I discussed the responsibility of the FRA’s ‘experts’). I draw on Foucault’s final works on government. Foucault talks, with some optimism, of the idea that ‘[t]o work with government implies neither subjection nor global acceptance. One can simultaneously work and be restive’<sup>53</sup> and I think he is implying a working with government. Perhaps he is suggesting, or can at least be interpreted as suggesting, accepting (and being in a position to accept, having the ‘will to knowledge’ and the desire to critique/resist and transform) responsibility for our roles as ‘actors’ and

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<sup>52</sup> (n 3) art 2 and 4(1)(d).

<sup>53</sup> C Gordon, ‘Governmental Rationality: An Introduction’ in G Burchell et al (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, Chicago 1991) 1, 48.

‘experts’ in the practices of government – thus, in the practices of the FRA. This is a rather abstract idea which Foucault did not finish articulating; to investigate it further necessitates a separate project that for now must remain to be explored but which, I believe, offers promise for human rights discourse. I believe there is something positive, or at least something to be critiqued – perhaps a new approach to ethics based on individual responsibility in (self-) government – in the notion of the ‘layexpert’ accepting responsibility. It also gives a possible answer to the question of where to go from here.

Foucault’s point is echoed in the ideas put forward by Kennedy, which I referred to earlier, related to accepting responsibility in governance. Kennedy verbalises a hope for ‘grace in governance’.<sup>54</sup> He focuses on the context of international humanitarianism, writing from his own experience as an international humanitarian who believed he would ‘rule in virtue’,<sup>55</sup> despite not knowing the extent to which humanitarianism participated in governance and despite not assuming responsibility for any decision. He describes ‘[m]odern humanitarianism [as] a Gordian knot of participation in power and denial, a wilful blindness posing as strategic insight’.<sup>56</sup> His call for grace in governance is an optimistic one, ‘at once uncomfortable and full of human promise’.<sup>57</sup> ‘We need to recover the pleasures and insights of the sceptical – rather than instrumental – reason ... if we do, we might build a new humanitarian community. Forged in disenchantment. Embracing the dark sides. Deciding –

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<sup>54</sup> Kennedy (n 9) xxvi, 354.

<sup>55</sup> *Ibid* 356.

<sup>56</sup> *Ibid* 357.

<sup>57</sup> *Ibid* 355.

at once uncertain and responsible'.<sup>58</sup> I agree with this sentiment. Kennedy has, moreover, offered some suggestions towards recognising responsibility in governance through experts that I touched on earlier. I support his suggestions and the hope for responsibility in government(ality) – but, as I have said, it is not within the scope of this project to take these suggestions further.

### III. CREATIVITY

Nikolas Rose, Pat O'Malley and Mariana Valverde have asserted that 'what is worth retaining above all' from the governmentality approach is its *creativity* and I define this feature of governmentality as the fourth and final advantage of a governmentality perspective.<sup>59</sup> Rose et al describe the analytical tools developed in governmentality studies as flexible and open-ended. They stress, moreover, and I strongly agree, that what such an approach advocates is not that we look for a *method* from the multiple studies of governing (nor, I would stress, by implication that we 'apply' governmentality to studies or practices of governing). Rather, that we identify a 'certain ethos of investigation, a way of asking questions, a focus not upon why certain things happened, but how they happened and the difference that that made in relation to what had gone before'.<sup>60</sup> In other words, the legacy that governmentality has left behind is to encourage a critical attitude and a curiosity to 'look at the same things in a different way'.<sup>61</sup>

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<sup>58</sup> *Ibid* 357.

<sup>59</sup> N Rose et al, 'Governmentality' (2006) 2 *Annual Review of Law and Social Science* 83, 101.

<sup>60</sup> *Ibid*.

<sup>61</sup> Foucault (n 50) 325.

One of the implications of governmentality being a flexible and open-ended analytical tool, is that it can have *broader application* than that presented here. So, for example, governmentality can be used as a way to think about the nature and practice of government not only in the rights discourse of the FRA but also the rights discourse of the EU more generally. This means one could extend the propositions made in this thesis to say what governmentality reveals about rights discourse in the EU (more deliberately and in more detail than I have done here). Moreover, I suggest that a governmentality approach can be translated into a wider context so as to provide a way of thinking about human rights and governance in sites and spaces outside the EU. For example, a similar project could be to examine another new institution for human rights protection but in the *international* context: the Human Rights Council of the UN. Furthermore, governmentality can be used to examine a wider range of other actors within the FRA's rights discourse in addition to the individual and NGO examined in Chapter 7. So for instance, one could extend the analysis to Member States, NHRIs and even to the Council of Europe.<sup>62</sup>

To summarise: this thesis has analysed the FRA from a governmentality perspective to show how the FRA's rights discourse is a discourse of discipline and a discourse of government(ality). It has shown this by concentrating on the features of the FRA that are traditionally associated with 'governance talk' – i.e., actors, experts and statistics – as well as examining the earlier monitoring role of the Agency. The thesis has highlighted how there is a need in traditional EU legal scholarship on rights for a governmentality perspective on the FRA.

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<sup>62</sup> See above Chapter 1 (n 52), Chapter 5 (n 66) and Chapter 7 (n 4) for comment on how I have referred to the Council of Europe in this thesis.



Using this new tool for analysis, I attempt to contribute towards remedying both what Neil Walker identified as the ‘elusive novelty’ of theorising in the EU legal context and what Francis Snyder called the need to move in ‘new directions’. I therefore emphasise that governmentality is a resistance to the traditional paradigm within which rights and governance have been conceptualised in EU legal scholarship.

This chapter supported the argument for governmentality as a new tool for analysis by highlighting certain advantages of a governmentality perspective for analysing the rights discourse of the FRA. I thus drew attention to how governmentality reveals processes of governing rights and governing through rights – which in turn highlight how certain identities (for instance, the identity of the society of the EU as a safe and secure society, the identity of citizens as ‘victims’ of discrimination) are represented and normalised. Furthermore, I described the advantages of governmentality as a form of resistance, which are that it urges a re-assessment of the FRA’s rights discourse and questions assumptions ingrained within the current discourse. This in turn opens up possibilities for the FRA’s rights discourse – possibilities for knowledge about the nature of the rights discourse, possibilities for transformation of the discourse and for accepting responsibility in government. Finally, I referred to the creativity of the governmentality perspective as an advantage, since this implies that other sites and spaces outside the context of the FRA and the EU can be re-thought from the perspective of the nature and practice of government. There is, moreover and to conclude, an optimism in a

governmentality perspective, since it leaves us with the knowledge that we are  
'not being governed *quite so much*'.

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