

The Fundamental Rights Agency of the European Union: A New Panopticism

Bal Sokhi-Bulley*

Abstract

The Fundamental Rights Agency of the European Union (FRA) is the European Union's newest, and only, human rights institution. The FRA represents a new way of speaking about rights in the European Union, using 'governance' language. It was not conceived as a traditional human rights monitoring body and the monitoring mission was actively abandoned in favour of an advisory one. This article examines how the FRA's governance-related role actually reveals a type of monitoring best understood as 'surveillance' in a critical, Foucauldian sense. In exercising surveillance tactics, the FRA represents a model of *panopticism* which allows it to carry out a new form of government. This is an interesting observation not only because of the implications it has for a European Union that is striving to move away from government towards *governance*, but also because it challenges the assumption of the FRA as a 'beacon on fundamental rights' and a model of apolitical progress.

Keywords: European Union – Fundamental Rights Agency – Foucault – governance – governmentality – human rights monitoring – panopticon

1. Introduction

On 1 March 2007, the European Union (EU or 'Union') officially recognised its first human rights agency: the Fundamental Rights Agency of the EU (FRA or

*Lecturer in Law, School of Law, Queen's University Belfast (b.sokhi-bulley@qub.ac.uk). I must thank Thérèse Murphy, Dan Bulley and Sally Wheeler for their direction and comments on earlier versions.

‘the Agency’).¹ The objective of the FRA, as laid down in founding Regulation 168/2007, is to provide ‘assistance and expertise’ to the relevant institutions of the EU and the Member States, when implementing EU law.² The FRA, consequently, is described as having an ‘advisory mission’.³ These features of the Agency define it as a ‘new governance tool’,⁴ representative of the EU’s recent turn towards new modes of governance.⁵ ‘Governance’ describes a departure from the classic ‘Community Method’ which, according to the Commission’s White Paper on Governance, is ‘premised on the Commission’s exclusive right of legislative initiative and the legislative powers of the Council of Ministers and the European Parliament’—that is, mechanisms designed to produce law at the EU level.⁶ The FRA fits this mould as it is not specifically provided for in the (hierarchical) institutional layout of the treaties and exhibits the characteristics of power sharing, multi-level integration, decentralisation, deliberation, participation, flexibility and knowledge-creation—features that have been used to define what ‘governance’ in the EU means.⁷ However, aside from the Agency’s advisory function, other possible missions were contemplated prior to the Regulation. At the early stages of proposal and negotiation, *monitoring* was regarded as one of the new Agency’s main tasks. The monitoring role was, nevertheless, sidelined in the months directly preceding the Regulation (late 2006, early 2007). 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.

This article argues that the FRA’s governance-related role actually reveals a type of monitoring best understood as ‘surveillance’. Surveillance is interpreted here in a critical sense, taking inspiration from the work of Michel Foucault. Surveillance connotes power relations—that is, processes which reveal the operations of power as discipline (disciplinary power) and of power as government (what Foucault terms ‘governmentality’). This is important because it

- 1 Pursuant to Council Regulation 168/2007/EC of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1.
- 2 Ibid. at Article 2.
- 3 de Schutter, ‘The Added Value of the European Union Agency for Fundamental Rights’ (2007) 21 *Equal Voices* 27 at 27, available at: <http://fra.europa.eu/fraWebsite/attachments/ev21en.pdf> [last accessed 14 September 2011].
- 4 de Búrca, ‘New Modes of Governance and the Protection of Human Rights’, in Alston and de Schutter (eds), *Monitoring Fundamental Rights in the EU* (Oxford: Hart, 2005) 25 at 25.
- 5 For comment see de Búrca and Scott (eds), *Law and New Governance in the EU and the US* (Oxford: Hart, 2006); de Búrca and Walker, ‘Reconceiving Law and New Governance’ European University Institute Working Paper Law No 2007/10, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstractid=987180> [last accessed 31 October 2011]; Möllers, ‘European Governance: Meaning and Value of a Concept’ (2006) 43 *Common Market Law Review* 313; Scott, ‘The Governance of the European Union: The Potential for Multi-Level Control’ (2002) 8 *European Law Journal* 59; and Scott and Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’ (2002) 8 *European Law Journal* 1.
- 6 Scott and Trubek, *ibid.* at 1. See also European Commission (EC), ‘European Governance: A White Paper’, COM (2001) 428 final, 25 July 2001.
- 7 Scott and Trubek, *supra* n 5.

shows *panopticism* in the FRA's methods—that is, the FRA operates via processes that allow forms of *governing through discipline*. These are the processes used to provide advice and expertise, and rely on expert networks and the gathering of statistics.

This interpretation of the role and function of the FRA is interesting since the EU is striving to move away from *government* towards *governance*. The FRA is therefore concealing its panoptic function under the guise of governance and thereby allowing itself to be represented as a 'beacon on fundamental rights'⁸ and a model of apolitical progress. The critique of the Agency undertaken in this article exposes and challenges these assumptions. Highlighting the FRA's panopticism and exposing the power relations that operate in the Agency's processes is not, however, a negative view of power. Disciplinary power is *productive* in that it produces identities: of the FRA as the EU's rights institution, of the EU as a human rights actor and the identities of the subjects of rights discourse (the Member States, EU citizens and 'other' actors with whom the FRA cooperates, for example, NGOs). However, it is precisely this productive element of power that makes the FRA a 'great new instrument of government'⁹: the FRA governs by monitoring the space of the EU, gathering information and statistics on its population and proliferating a discourse of rights. It therefore governs to the extent that this discourse creates the norm of a safe and secure Europe in which rights are protected, of the EU as a human rights organisation—reinforced by the existence of a human rights agency—and of the type of subjects this society deems desirable (that is, the 'good Member State', the 'ideal citizen' and the 'suitable' NGO). We ought to be aware of the disciplinary and governing potential of organisations like the FRA which are charged with the protection and promotion of moral norms and values such as human rights so that we might resist forms of discipline and government, rather than accepting these as apolitical progress. Moreover, we ought to be aware of how this makes *rights* a discourse that is used to discipline and to govern, rather than purely to emancipate—so that we might question and resist the *extent of government* in the name of rights.

2. Human Rights Monitoring and the FRA

The association of the FRA with 'monitoring' probably comes from a link to its predecessor, the European *Monitoring* Centre on Racism and Xenophobia

8 "FRA Should Become a European Beacon on Fundamental Rights": Interview with Morten Kjaerum, FRA's New Director' (2008) 23 *Equal Voices* 4 at 4, available at: <http://fra.europa.eu/fraWebsite/attachments/ev23en.pdf> [last accessed 14 September 2011].

9 Foucault, *Discipline and Punish: The Birth of the Prison* (A. Sheridan, trans.) (London: Penguin, 1991) at 206.

(EUMC). The original proposal for a human rights agency, made in 1998, was for a *monitoring* agency. Philip Alston and J.H.H. 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'.¹⁰ 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 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 EU 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 [European] Union policy in this field'¹¹ 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.¹² 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 a Network of Independent Experts (NIE). The NIE is now extinct 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 rights on the ground and promote awareness of fundamental rights on the ground'.¹³ 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

10 Alston and Weiler, 'An "Ever-Closer Union" in Need of a Human Rights Policy' (1998) 9 *European Journal of International Law* 658; and '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.

11 Brussels European Council, 12-13 December 2003, Presidency Conclusions, Brussels, 5 February 2004.

12 Nowak, 'The Agency and National Institutions for the Promotion and Protection of Human Rights', in Alston and de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford: Hart, 2005) 91 at 96.

13 European Policy Evaluation Consortium (EPEC), 'Preparatory Study for the Impact Assessment and Ex-Ante Evaluation of Fundamental Rights Agency: Final Report', February 2005, at 14.

EU law and policies.¹⁴ The Commission pointed out that there is a difference between ‘monitoring in a legal sense’ and ‘observatory monitoring’.¹⁵ It described ‘monitoring in a legal sense’ as the legal control of the correct application of EC law and as a function only it was to assume. Such monitoring cannot be delegated to a Community agency in the interests of maintaining the institutional balance of power.¹⁶ The FRA would, rather, 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 as a human rights monitoring body. According to Philip Alston, ‘monitoring’ would be ‘used as a sort of shorthand’¹⁷ to describe the functions of the FRA. Alston and others examined the proposed new agency as a mechanism, a central authority, which would enforce human rights by ‘monitoring’. Thus Martin Scheinin has 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.¹⁸ 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 with 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.¹⁹ This mandate belonged, Scheinin claimed, to the (now redundant) NIE and cannot ‘be reduced’ to the collection of information.²⁰ He also commented that the suggested model for the FRA ‘resembles more an “observatory” than an international

14 European 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 at 38 (emphasis added).

15 EPEC, supra n 13 at 14.

16 As per the ‘*Meroni doctrine*’, 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.

17 Alston, ‘The Contribution of the EU Fundamental Rights Agency to the Realization of Economic and Social Rights’, in Alston and de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford: Hart, 2005) 159 at 176.

18 Scheinin, ‘The Relationship between the Agency and the Network of Independent Experts’, in Alston and de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford: Hart, 2005) 73 at 73.

19 For example, the European Court of Human Rights, which is entrusted by Article 19 of the European Convention on Human Rights 1950, 5 ETS, 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.* at 75, refers to is *Refah Partisi (Welfare Party) and Others v Turkey* 37 EHRR 1 at para 100.

20 Scheinin, supra n 18 at 83.

expert body making a normative assessment' to support the assertion that the FRA would not engage in true, legal, normative monitoring.²¹ Thus Scheinin argued that the FRA's proposed role of collection and analysis of data is what the *real* monitoring function would be *reduced to*. I disagree with this view and propose, rather, that the collection and analysis of data allows the FRA to undertake *surveillance*. As an observatory, the FRA is a mechanism of *surveillance*: it is a model of the exercise of disciplinary power.

Some reference to monitoring is made in the FRA's Regulation of 2007—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) of Regulation 168/2007 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 does not, for example, have the competence to analyse individual complaints. The FRA's website, under 'Your rights', features the question: 'Discriminated against? Who can help you?'²²—and is answered by referring the individual to organisations within their Member State (that is, National Human Rights Institutions and National Equality Bodies) that will offer help, advice and support.²³ The FRA's objective was intended to be 'observatory monitoring' and this has been formalised in the Regulation as 'assistance and expertise' relating to fundamental rights to the relevant institutions, bodies and agencies of the Union (Article 2). The main task of the Agency is therefore to 'collect, record, analyse and disseminate, relevant, objective and reliable and comparable information and data' (Article 4(1)(a)).

The emphasis which the FRA places on the provision of advice and expertise defines it as a *governance* body. Its role relies on relations between its networks of experts and on the efficient production of reliable and comparable information and data through statistics—these are features of governance.²⁴ As a regulatory agency (not provided for in the treaties) the FRA fulfils the Commission's vision for 'better application of rules' through regulatory agencies, as expressed in the White Paper on European Governance under the

21 Ibid. at 73.

22 See <http://fra.europa.eu/fraWebsite/your.rights/your.rights.en.htm> [last accessed 31 October 2011]. See also 'FAQs' at: <http://fra.europa.eu/fraWebsite/faq/faq.en.htm> [last accessed 31 October 2011].

23 Lists of these bodies are provided. Note the National Human Rights Institution and the National Equality Body for the United Kingdom (UK) are the Equality and Human Rights Commission and the Equality Commission for Northern Ireland.

24 See further Sokhi-Bulley, 'Governing (Through) Rights: Statistics as Technologies of Governmentality' (2011) 20 *Social and Legal Studies* 139; and Sokhi-Bulley, 'Government(ality) By Experts: Human Rights as Governance' (2011) 22 *Law and Critique* 251.

heading 'better policies, regulation and delivery'.²⁵ This framing of the FRA using governance language conceals power relations of *governmentality* by hiding how it operates as a monitoring body. The monitoring role is lost in the governance language of 'assistance' and 'expertise'. The current, post-Regulation role of the FRA has, however, been interpreted by Olivier de Schutter as 'collective learning' and 'guidance' and linked to the FRA's original monitoring mission.²⁶ de Schutter discussed how collective learning is not clearly distinguished from monitoring and described 'guidance' as a 'type of' monitoring. Nowak has articulated a similar perception of the FRA's advisory function. Advice, Nowak says, requires a normative assessment of the respective situation and is therefore monitoring of a sort.²⁷ These critical analyses do not, however, go far enough: in this article, I explore the power relations within the FRA's operational processes to show how the FRA is governing though discipline: it is exercising a type of monitoring that shows relations of disciplinary power and governmentality—that is, panopticism.

3. Panopticism

Panopticism describes disciplinary and governing processes that rely on observation/surveillance. Foucault describes panopticism as 'the general principle of a new 'political anatomy' whose object and end are not the relations of sovereignty but the relations of discipline'.²⁸ He was concerned with the extent to which individuals (bodies) were 'made' by the power relations of discipline rendered possible through forms of disciplinary organisation, or surveillance. Examples of these disciplinary 'techniques' or 'tactics' can be found for example in prisons, the military, in schools and in hospitals—places where 'a whole set of techniques, a whole corpus of methods and knowledge, descriptions, plans and data' are used 'for the control and use of men'.²⁹ These are 'meticulous, often minute techniques',³⁰ such as the timetable, the spatial distribution of prison cells and handwriting lessons, and are used as a means of controlling activity. They are the minor processes and procedures which, when multiplied in scale, 'gradually led to the blueprint of a general method'³¹—that is, they provide a method for the regulation of a general pattern of behaviour of

25 White Paper, supra n 6. The White Paper states, at 8 footnote 1 (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*'.

26 de Schutter, supra n 3.

27 Nowak, supra n 12.

28 Foucault, supra n 9 at 208.

29 Ibid. at 138–41.

30 Ibid.

31 Ibid. at 138.

groups of individuals and for creating normalised categories within society. The tactics within the prison, for instance, created the 'delinquent' (prisoner) category and in turn 'delinquency'—an abnormal, deviant subject which was nevertheless politically useful because it provided an undesirable label against which the ideal society was able to define and regulate itself. In *Discipline and Punish*,³² Foucault describes how through technologies of observation, heavily reliant on the structure and spatial organisation of the prison and its timetable, the body of the 'condemned' (prisoner) was regulated, or 'subjected, used, transformed and improved' to produce a 'docile body'³³—a particular kind of manipulable subject.

The ideal model for showing the tactics of disciplinary power according to Foucault was the panopticon.³⁴ Originally designed by Jeremy Bentham as a model for the prison, 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 towards the tower. A supervisor is placed in the central tower and in each cell one could place any version of the condemned: 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.'³⁵ 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. Significantly, 'this invisibility is the guarantee of order.'³⁶ 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 power*.'³⁷

32 Ibid.

33 Ibid. at 136. For a critique of *Discipline and Punish*/of the panopticon as the only model of power/surveillance, see Wood, 'Beyond the Panopticon? Foucault and Surveillance Studies', in Crampton and Elden (eds), *Space, Knowledge and Power: Foucault and Geography* (Farnham: Ashgate, 2009) 245.

34 Foucault makes reference to Bentham, *The Works of Jeremy Bentham* (Bowring (edn)) 1843, supra n 9 at Part 3, chapter 3.

35 Ibid. at 200.

36 Ibid.

37 Ibid. at 201 (emphasis added).

Using the illustration of the prison, panopticism—in the sense of techniques of disciplinary power—thus produces a certain type of individual: the *delinquent*. Furthermore and significantly, panopticism also thereby produces *delinquency*. The interesting point here is that delinquency is described as the success of the prison; this is because this type of illegality is directly useful and advantageous from a political point of view. Delinquency is supervised, disarmed and concentrated, and makes it possible to supervise a relatively small and identifiable group. But not only this: delinquency ‘makes it possible to supervise, through the delinquents, the *whole social field*’.³⁸ In other words, delinquency functions as a ‘political observatory’³⁹ through which it is possible to regulate the behaviours of other groups within society by creating a category against which (the secure, or ‘ideal’) society wants to define itself. The police–prison–delinquency circuit, in Foucault’s example, functions in an uninterrupted and regulatory fashion. Disciplinary power thus operates as a power of normalisation, to produce knowledge (of individuals, or groups of individuals) in society—it is this knowledge that is useful.

The tactics of disciplinary power come to represent a form of normalisation and regulation of conduct that target not only the individual body, however, but the population as a whole and can thus be understood as a form of government—or what he called ‘governmentality’. Governmentality refers to regulatory practices that are concerned with governing the conduct of individuals—it is, in other words and famously, the ‘conduct of conduct’.⁴⁰ This article analyses the disciplinary tactics used by the FRA in its role as the EU’s human rights agency and how these tactics ‘make’, or normalise, the FRA as the EU’s human rights institution. It further draws attention to other subject identities that are normalised through the FRA’s governing processes.

The steady recognition of the category of delinquency was only possible due to the proliferation and transformation of the discourse on punishment—which centred on the removal of public torture. With this change, punishment came to target not just the body but the soul—the very being of the subject, its desires, hopes and fears, its behaviour, or its conduct. What is interesting is *how* this transformation took place. How did punishment come to target the soul? 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.⁴¹ We associate the evolution with ‘progress’, rather than with techniques of normalisation and control.⁴² The same

38 Ibid. at 281.

39 Ibid.

40 Gordon, ‘Governmental Rationality: An Introduction’, in Burchell et al. (eds), *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991) 1 at 2.

41 Ibid. at 7.

42 Ibid. at 160.

rationale can be applied to the multiplication of the EU's discourse on rights; it has proliferated and transformed—and what is interesting is *how*, and why we do not question what we assume is a *progressive* development and transformation of the discourse.

The rights discourse of the EU has evolved since the late 1960s, which witnessed a burgeoning of the jurisprudence of the European Court of Justice (ECJ),⁴³ as 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 Court's case law occurred 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*'. A significant change to this norm came with the Treaty of Amsterdam in 1997, which amended Article 6(1) so that it read: '*the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law*'.⁴⁴ 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. The incitement to rights discourse has recently manifested itself in a less traditional way than through case law and treaty amendments: the birth of the FRA.

The panoptic schema (that is, the model of the panopticon and the relations of disciplinary power that it illustrates) can therefore be integrated into a human rights monitoring function, as illustrated by the FRA. The panoptic schema, Foucault argued, was destined to spread throughout the social body and consequently it is '*a great new instrument of government*'.⁴⁵ 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'.⁴⁶ It is therefore '*applicable to all establishments whatsoever*'⁴⁷ and can be integrated into any function. Bentham's vision of the panoptic schema imagined a wide range of uses and Foucault's application of the model extended not only

43 Note especially 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; and Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219.

44 Treaty on European Union OJEC C325/7 ('TEU or 'Maastricht Treaty'), amended by the Lisbon Treaty to: 'The Union *recognises* the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union' (Article 6(1)). Note the commitment to upholding human rights standards made also in Article 6(2), which states that the Union shall accede to the ECHR.

45 Foucault, *supra* n 9 at 206 (emphasis added).

46 *Ibid.* at 205.

47 Foucault quoting Bentham in Foucault, *supra* n 9 at 206.

to the reform prisoners but to confinement of the insane, to supervision of workers, to the instruction of schoolchildren. I argue that panopticism applies similarly to the FRA.

4. Panopticism and the FRA: Governing Through Discipline

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’ (comments de Schutter). These processes are in fact, I argue, a type of ‘monitoring’, understood as ‘surveillance’. Surveillance operates through ‘*tactics, techniques and functionings*’⁴⁸—disciplinary and governing processes that are identifiable in the FRA’s structure, working methods and products.

Structurally, the Agency operates through nodes of experts at the EU, national and international levels. At the EU level the four structural bodies of the Agency are: the Director, Management Board, Executive Board and Scientific Committee.⁴⁹ The FRA includes networks at the national level: until 2011 these were RAXEN (groups of experts collecting data on issues concerning racism, xenophobia and related intolerances)⁵⁰ and FRALEX (the FRA’s ‘group of legal experts’, who report on legal aspects of fundamental rights issues in all Member States). These have been merged into FRANET. The FRA’s networks extend to ‘other’ bodies, which adds an international level to the organisation of the Agency—these bodies include the UN and the Organisation for Security and Cooperation in Europe (OSCE), the Council of Europe and human rights NGOs.

The Agency’s working methods entail gathering data and information, which it releases as its ‘products’.⁵¹ The major products of the FRA are its annual reports, thematic reports and surveys.⁵² In this regard, the thematic study on homophobia and discrimination on the grounds of sexual orientation (in two parts—Part I: ‘Legal Analysis’ and Part II: ‘The Social Situation’, hereafter referred to as ‘The Homophobia Report’) forms the FRA’s first major

48 Ibid. at 26 (emphasis added).

49 Regulation 168/2007, supra n 1 at Articles 11–15.

50 RAXEN operates in each of the Member States in the form of ‘National Focal Points’ (NFPs)—typically made up of bodies such as anti-racist NGOs, university research centres, institutes for human rights, or government-affiliated organisations. The FRA announced on 12 September 2011 that it will host the first kick-off meeting of the NFPs of the new FRA Research Network (FRANET)—which will work for both the FRA and the European Institute for Gender Equality (see <http://fra.europa.eu/fraWebsite/news.and.events/2011-events/evt11.12sep.en.htm> [last accessed 22 September 2011]).

51 The term initially used by the FRA to describe its output.

52 Regulation 168/2007, supra n 1 at Article 4(1)(e)–(g).

thematic report.⁵³ A second major product of the Agency is the results of ‘EU-MIDIS’, the European Union Minorities and Discrimination Survey, which 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.⁵⁴ I use these products to demonstrate how the FRA enacts 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.

A. Features of Panopticism

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. As the moral code of correct conduct, human rights is a discourse of 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 typically associated with progress.⁵⁵ Due to 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, what (socio-legal) data will be collected, and how this data will be collected (using sociological or legal methodologies)—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*’.⁵⁶

- 53 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, available at: <http://fra.europa.eu/fraWebsite/lgbt-rights.en.htm> [last accessed 17 October 2011]. Note the updated report of November 2010, ‘Homophobia, Transphobia and discrimination on grounds of sexual orientation and gender identity 2010 Update, Comparative Legal Analysis’, available at: <http://fra.europa.eu/fraWebsite/lgbt-rights/lgbt-rights.en.htm> [last accessed 17 October 2011]. The FRA has since produced ‘Child Trafficking in the European Union: Challenges, Perspectives and Good Practices’, 7 July 2009, available at: <http://fra.europa.eu/fraWebsite/research/publications/publications.per.year/2009/2009.en.htm> [last accessed 31 October 2011].
- 54 European Union Minorities and Discrimination Survey (EU-MIDIS) – survey results, available at: <http://fra.europa.eu/fraWebsite/eu-midis/index.en.htm> [last accessed 2 December 2010].
- 55 See, for instance, Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2002) at Chp 1.
- 56 Press Conference Speech by Morten Kjaerum, ‘Speaking Points for EU-MIDIS Press Conference’, at 5, available at: <http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS-speech-pc-Director.pdf> [last accessed 31 October 2011] (emphasis added).

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 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 FRANET 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 expertise⁵⁷—that is, organisations at the Member State level (National Liaison Officers, National Human Rights Institutions), organisations at the international level (for example, the OSCE, the UN), the Council of Europe,⁵⁸ NGOs and other civil society organisations. However, the complexity of the FRA structure makes drawing this literal parallel between the two models awkward. It does, nonetheless, lead to an important discovery: that, building on Foucault's interpretation of the panoptic schema, it is not necessary 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 regardless. The principle that explains this is *panopticism*, rather than the panopticon *per se*.

In terms of the third feature of panopticism, the *target* of disciplinary power is not literally 'the body' (as it was in studies of the prison) but a slightly different subject is 'subjected, used, transformed and improved'⁵⁹: 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

57 European Agency for Fundamental Rights, *supra* n 1 at Articles 7–10.

58 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 (including the European Convention on Human Rights, the European Social Charter, the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment, the European Framework Convention for the Protection of National Minorities, the European Court of Human Rights, the Committee of Ministers, etc). This means that, whilst it does fit into the analysis that I am making here—that is, 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, *supra* n 1 at Article 9).

59 Foucault, *supra* n 9 at 136.

is heavily involved in the structural and working methods of the FRA. The Member States are, therefore, within the cells surrounding the central tower, which resemble ‘small theatres’⁶⁰—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.

We can see panopticism at work in the annual reports, the Homophobia Report and in EU-MIDIS. 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 its Multi-Annual Framework (MAF)⁶¹). Through the collection of information and data for these products the Member States, citizens and NGOs are being observed. Because of how intricate and multifarious the expert networks of the FRA are (existing at the EU, national and ‘other’ levels), this surveillance is invisible as well as constant.

B. Disciplinary Power as Normalisation

The FRA uses good practice indicators to determine which are the ‘good Member States’ in its annual reports, for instance. In each of the substantive chapters (Chapters 4–8) of the Annual Report 2010, there is a section on ‘good practices’, where individual countries are highlighted, in bold, against data that supports ‘good practice.’⁶² For instance, in the area of ‘immigration and border control’, the FRA cites Austria, Ireland and Poland as having made exemplary reforms with respect to specific visa arrangements for foreign nationals.⁶³ Under access to justice and victim compensation’, the FRA recognises in particular Belgium and again Ireland as working to support the development of competent and efficient services for victims of crime.⁶⁴ This emphasis

60 Ibid. at 200.

61 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. The MAF defines nine thematic areas of activity for the FRA (Article 2). The FRA can potentially act in 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/EC at Article 4(1)(c) and (d), and Article 5(3).

62 European Union Agency for Fundamental Rights (FRA), ‘Annual Report 2010, Conference Edition’, available at: <http://fra.europa.eu/fraWebsite/attachments/AR.2010-conf-edition.en.pdf> [last accessed 31 October 2011].

63 Ibid. at 131.

64 Ibid. at 138.

on good practice indicators is a type of collective learning and guidance or, effectively, surveillance. The Member States are being observed by experts and being disciplined to conduct themselves according to a good practice standard. The 'good Member State' is desirable within the rights discourse that is constructed by the FRA, and the 'bad Member State' is not. The most recent Annual Report 2010 presents a new style and differing content, and the normalisation of good practice standards is even more stark.⁶⁵ The Report covers the nine thematic areas of the MAF and a new layout displays 'FRA Activities', 'Promising Practices' and 'Key Developments' in boxes for each thematic section. Whilst the Report states that the term 'promising' is deliberately used instead of 'good' practice (since these practices 'have not been directly scrutinised or evaluated by the FRA')⁶⁶ the boxes highlight what are effectively 'achievements' (note the sub-title of the report) of Member States (for example, under the 'Roma in the EU' section, a 'promising practice' box recognises that the Berlin Senate set up a contact office for newly arrived Roma in Berlin regarding access to work, healthcare and decent housing). The selected practices are highlighted because they are activities which the FRA has identified as initiatives to be 'emulated'⁶⁷—the FRA's rights discourse is thus normalising 'promising' practice. Moreover, the new Report identifies developments in individual Member States in bold lettering throughout, again making it easier to identify those states that carry out 'good/promising practice that ought to be emulated.

Examples of Member States periodically meriting the 'bad' practice label include, firstly, Austria. In 2000, following the entry of the far-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), the issue of Austria as the 'delinquent' state thus arose with sanctions under Article 7 of the TEU being called into question.⁶⁸ In 2008, events in Austria suggested that the 'delinquent' may be threatening to re-offend. In the parliamentary elections held on 28 September, the country's two far-right parties succeeded in taking a total of 29 percent of the vote between them.⁶⁹ 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

65 European Union Agency for Fundamental Rights (FRA), 'Fundamental Rights: Challenges and Achievements in 2010' (Luxembourg: Publications Office of the European Union, 2011), available at: <http://fra.europa.eu/fraWebsite/attachments/annual-report-2011.EN.pdf> [last accessed 14 September 2011].

66 *Ibid.* at 9.

67 *Ibid.*

68 Note that the 'delinquent' label is my own and not that of the FRA/EU.

69 The Freedom Party of Austria and the Alliance for the Future of Austria – data obtained from BBC News, see 'Far Right Gains in Austria', available at: <http://news.bbc.co.uk/2/hi/europe/7641563.stm> [last accessed 31 October 2011].

traditional centrist parties.⁷⁰ In September 2010, the nomination of Barbara Rozenkranz of the Freedom Party ‘caused outrage among Jewish groups, and politicians from the centre-left and centre-right’, in particular given Rozenkranz’s criticism of parts of Austria’s anti-Nazi legislation (that it is unconstitutional insofar as it does not protect freedom of opinion). Comments from protestors, who recognise the negative political implications of this turn to deviancy (Germany—and its allies, including Austria, were of course painted as ‘deviants’ during and following the Nazi era and its atrocious violations of human rights), included: ‘Austria was part of Nazi Germany and Barbara Rosenkranz is definitely a sign that this country did not learn from its history’ and a statement that it was ‘a scandal for Austria’ that someone with her background was running for the highest position in the state.⁷¹

The response of the ‘tower’—that is, the FRA’s experts—to this type of delinquency is interesting: on 9 November 2010, the FRA published a press release on ‘Understanding the Holocaust through human rights education: FRA Handbook for teachers’⁷² and the Handbook, ‘Excursion to the Past—Teaching for the Future: Handbook for Teachers.’⁷³ The FRA is here attempting to educate its Member States and citizens *against the delinquency* exhibited in the Austrian case—it ‘encourages national governments to better integrate education on the holocaust and human rights into their school curricula to reflect the significance of human rights in both the history and the future of the EU.’⁷⁴ It is thus reinforcing the undesirable category of the delinquent and the society of delinquency: as the FRA’s Director makes clear when he states: ‘The European Union Agency for Fundamental Rights wants to respect the lessons of the Holocaust and use those lessons to inform the education of our future generations, in particular using the human rights context of the Holocaust to teach about the importance of respect for human rights, diversity and the protection of minorities.’⁷⁵ Moreover, it is interesting to note that the FRA is now housed in Vienna.⁷⁶ In their speeches at the opening ceremony of the FRA in March 2007, neither the Federal Chancellor of Austria nor its

70 Ibid. See also Cesarani, ‘The Limits of Free Speech’, *The Guardian*, 3 October 2008, available at: <http://www.guardian.co.uk/commentisfree/2008/oct/03/race.austria> [last accessed 31 October 2011]; and Gavenda, ‘Austria’s Fragile Middle’, *The Guardian*, 30 September 2008, available at: <http://www.guardian.co.uk/commentisfree/2008/sep/30/austria.thefairright> [last accessed 31 October 2011].

71 ‘Austria Spooked by Nazi Past in Election’, *BBC News*, see <http://news.bbc.co.uk/1/hi/world/europe/8634796.stm> [last accessed 17 October 2011].

72 See <http://fra.europa.eu/fraWebsite/research/publications/publications.en.htm> [last accessed 17 October 2011].

73 See <http://fra.europa.eu/fraWebsite/research/publications/publications.per.year/publications.per.year.en.htm>. [last accessed 17 October 2010].

74 See <http://fra.europa.eu/fraWebsite/media/pr-091110.en.htm> [last accessed 17 October 2011].

75 Morten Kjærsum, Recent News – Understanding the Holocaust through human rights education: FRA Handbook for teachers, 9 November 2010, see <http://fra.europa.eu/fraWebsite/news.and.events/infocus10.0911.en.htm> [last accessed 17 November 2011].

76 This was the old home of the EUMC.

Foreign Minister⁷⁷ made reference to the previous dark time of 2000, indicating that the label of 'delinquent' need not be permanent. 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.

A second 'bad Member State' example is surfacing in Greece, which has been reprimanded regarding the fundamental rights situation of migrants and asylum seekers entering its territory irregularly at its land border with Turkey. The FRA's 'tower' has published a thematic 'situation report' on the matter, declaring that 'the situation at the EU's external land border between Greece and Turkey constitutes a fundamental rights emergency'—a determination made possible through intense observation via the collection of data and information through interviews with key actors and direct observation of the conditions at the border and inside detention centres.⁷⁸ The FRA is thus able to highlight evidence of 'bad' practice and enforce the 'bad Member State' label.

Thirdly, those states that remain outside the Union but want to accede to it assume a delinquent status. Thus, Croatia, the Former Yugoslav Republic of Macedonia (FYROM) and Turkey are deemed not to fulfil the conditions of acceptance into the 'common European home'; they are treated by the EU with a 'conditional hospitality of enlargement' that is at once hospitable and hostile.⁷⁹ Moreover, those states that have recently been welcomed into the European home are constantly reminded, through 'the tower's' observatory gaze, of their conditional acceptance, which is based on respect for democracy, free markets, human rights and the rule of law.⁸⁰ So, for instance, the FRA's 2010 Annual Report points to Member States in which human rights protection bodies require more support (since they lack resources, are not independent enough and often have weak mandates), naming Bulgaria, Romania, Latvia, Poland and Slovakia amongst them.⁸¹

Member States therefore educate each other as to good practice standards by observing the situation of human rights within their territories, and identifying and disseminating best practice. Through this relation of power/

77 Respectively, Alfred Gusenbauer and Ursula Plassnik.

78 EU Fundamental Rights Agency, Thematic Situation Report 2011, 'Coping with a Fundamental Rights Emergency: The situation of persons crossing the Greek land border in an irregular manner', available at: <http://fra.europa.eu/fraWebsite/attachments/Greek-border-situation-report2011.EN.pdf> [last accessed 10 March 2011].

79 Bulley, *Ethics as Foreign Policy: Britain, the EU and the Other* (Abingdon: Routledge, 2009) at 70, at 72.

80 Article 6 and Article 49 TEU. Note also the Copenhagen Criteria of 1993 (European Council in Copenhagen, Presidency Conclusions, 21–22 June 1993, DOC 93/3)

81 EU Fundamental Rights Agency (FRA), Media Memo – FRA Annual Report 2009, 10 June 2010, available at: <http://fra.europa.eu/fraWebsite/media/mr-100610.en.htm> [accessed 17 October 2011]. Note that the Report also mentions Austria, Cyprus, Greece, Hungary, Ireland, Italy and the Netherlands.

knowledge the Member States are disciplined by the FRA and discipline each other into complying with the FRA's standards of (what constitutes) good human rights practice (the FRA acquires knowledge about the Member State and Member States acquire knowledge about each other as this knowledge is formalised and made public in the annual and thematic reports). 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.⁸² 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 terms of the FRA and the standard of the Charter). Further, they accept the FRA's code of conduct, and seek to contribute to and develop it—for instance, by providing country specific thematic reports through FRALEX to support the FRA's thematic studies,⁸³ providing support based on FRA research for EU legislation to combat discrimination,⁸⁴ and attending FRA events and meetings.⁸⁵

It is not only the Member States that are observed but also the Union *citizens* and the other actors with which the FRA cooperates, such as NGOs. Citizens are observed to the extent that through socio-legal methods such as surveys and interviews, information is gathered on the extent to which they represent the 'ideal citizen' (the citizen suffering no discrimination) and the 'victim' (suffering discrimination). EU-MIDIS provides an illustration. The FRA was able to record the experiences of discrimination and racist crime suffered by immigrant and ethnic minority persons resident in the EU Member States through the survey.⁸⁶ The surveyed groups were selected on the basis of

82 Foucault, *supra* n 9 at 38–9.

83 For example, the UK's country thematic report on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: Harris, Murphy, Jenner and Johnson, 'Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity' (Human Rights Law Centre, Nottingham University, February 2010), available at: <http://fra.europa.eu/fraWebsite/networks/research/fralex/nationalreport/lgbt.country-reports.2010.en.htm> [last accessed 14 September 2011].

84 Following the publication of the Homophobia Report, the Commission, in 2008, 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 (a 'horizontal directive' covering all grounds of discrimination): 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.

85 For example, the annual Fundamental Rights Conference organised by the FRA. The 2011 Conference will bring together will bring together about 300 participants from across the EU, including Member State and EU officials: see <http://fra.europa.eu/fraWebsite/frc2011/> [last accessed 14 September 2011].

86 See further European Union Agency for Fundamental Rights (FRA), 'EU-MIDIS European Union Minorities and Discrimination Survey, Main Results Report', 2009, available at: <http://fra.europa.eu/fraWebsite/eu-midis/index.en.htm> [last accessed 17 October 2011]; European Union Agency for Fundamental Rights (FRA), 'EU-MIDIS at a Glance: Introduction to the FRA's EU-wide Discrimination Survey', 2009, 14–15, available at: <http://fra.europa.eu/>

information supplied to the FRA by RAXEN (that is, 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—for example, 'Roma'). From these results the FRA is also to produce a series of nine 'Data in Focus' reports, which give details on selected themes to emerge from the research and focuses on the most vulnerable groups of 'victims'—the first in the series, on 'The Roma', was released on 22 April 2009 and the second, on 'Muslims', was issued on 28 May 2009.⁸⁷ 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. In this way, EU-MIDIS allows for observation of the population of the EU through surveys, interviews, reports, etc and through these minute tactics the FRA creates identities of the subjects of rights, as 'victim' and 'most vulnerable victim'. EU-MIDIS clearly identifies discrimination against 'minorities'.⁸⁸ 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.⁸⁹ 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 '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';

[fraWebsite/eu-midis/eumidis.output.en.htm](http://fra.europa.eu/fraWebsite/eu-midis/eumidis.output.en.htm) [last accessed 17 October 2011]; European Union Agency for Fundamental Rights (FRA), 'EU-MIDIS European Union Minorities and Discrimination Survey, Technical Report: Methodology, Sampling and Fieldwork', 2009, available at: <http://fra.europa.eu/fraWebsite/eu-midis/eumidis.details.en.htm> [last accessed 17 October 2011] and European Union Agency for Fundamental Rights (FRA), 'EU-MIDIS European Union Minorities and Discrimination Survey: Questionnaire' (2009) available at: <http://fra.europa.eu/fraWebsite/eu-midis/index.en.htm> [last accessed 17 October 2011].

87 European Union Agency for Fundamental Rights (FRA), 'EU-MIDIS European Union Minorities and Discrimination Survey: Data in Focus Report: The Roma' (2009), available at: <http://fra.europa.eu/fraWebsite/research/publications/publications.per.year/2009/2009.en.htm> [last accessed 17 October 2011]; and 'Data in Focus Report 2: Muslims', available at: <http://fra.europa.eu/fraWebsite/research/publications/publications.per.year/2009/2009.en.htm> [last accessed 17 October 2011].

88 EU-MIDIS, 'Technical Report', *supra* n 86, highlights that the labels used for the groups that were sampled are 'immigrants', 'ethnic minorities' and 'national minorities'.

89 *Supra* n 86.

'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 one in-person crime in the past 12 months'. Similarly, the Homophobia Report creates another category of victim: the LGBT (lesbian, gay, bisexual and transgender) victim. Part II 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.'⁹⁰ These categories of victim—the 'minority citizen', the 'Roma' and the 'LGBT person'—are created as a result of panopticism.

Within the ideal, safe and secure European society (which is the goal perpetuated by the rights discourse of the FRA)⁹¹ the 'victim' is an undesirable category of EU citizen. The FRA's disciplinary and governing rights discourse therefore further creates a 'risky society', the 'victim' society, which is also undesirable. Moreover, citizens discipline themselves in the same way as the Member States do: we accept human rights as the code of correct moral conduct, as values to which we ought to aspire. Rights are after all 'that which we cannot not want'.⁹² Taking the example of the EU-MIDIS survey to illustrate how this occurs, 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?'⁹³ This question 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.'⁹⁴ The FRA therefore produces the EU citizen—as either 'ideal' or 'victim'—and this representation is reinforced by the citizenry itself.

In terms of the non-governmental organisation (NGO), the behaviour of these organisations is also closely observed. The FRA is required to cooperate

90 Homophobia Report: Part II, *supra* n 53 at 11.

91 See text at *infra* n 97 for comments by the FRA's Director regarding creating a 'safe' European society.

92 Chakravorty Spivak, quoted by Brown, 'Suffering the Paradoxes of Rights', in Brown and Halley (eds), *Left Legalism/Left Critique* (London: Duke University Press, 2002) 420 at 420.

93 EU-MIDIS, 'Questionnaire', *supra* n 86 at 28.

94 *Ibid.* at 4.

with NGOs and 'other' bodies (for example, universities, trade unions) which together form a body called the Fundamental Rights Platform (FRP).⁹⁵ Interestingly, the FRA lists 'participation criteria' for participation in the Platform. These are a set of 'basic criteria . . . for ensuring a structured and efficient work'.⁹⁶ 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 Fundamental Rights 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 represent observational techniques which condition the NGO into always being a 'suitable participant' in the FRA's processes.

Therefore, disciplinary power targets the subjects of rights discourse in two ways: it creates on the one hand an undesirable category of 'victim' of human rights violation, 'bad Member State' and 'unsuitable NGO participant' and, simultaneously and on the other hand, it creates the desirable safe and secure space (of 'Europe') that contains the 'ideal citizen', the 'good Member State' and the 'suitable NGO participant'. The creation of the 'undesirable' 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, bad Member State and bad NGO creates an identity against which the rest of 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 '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*'⁹⁷ in opposition to the victim, or delinquent, label. A safe and secure, victim-less and obedient society is the promise of the FRA's rights discourse—and this promise is completely reliant on the victim and deviant categories and their constant production.

Consequently, disciplinary power, as it operates via surveillance, or panopticism, is a *normalising* power. The following 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 and as a safe and secure space. Second, the safe society is produced in opposition to something, to that which is 'other', the risky society. In Foucault's studies of the prison and of sexuality the 'abnormal' was the delinquent or the pervert.⁹⁸ The FRA

95 Regulation 168/2007, *supra* n 1 at Article 10.

96 See <http://fra.europa.eu/fraWebsite/networks/frp/frp.en.htm> [last accessed 17 October 2011].

97 *Supra* n 56 at 5 (emphasis added).

98 Foucault, *supra* n 9; and Foucault, *The History of Sexuality: Volume 1: The Will To Knowledge* (Hurley, trans.) (London: Penguin, 1998).

similarly exercises disciplinary power, which creates undesirable categories (of Member State, of individual, of NGO), which in turn creates the disciplinary society (which is both disciplined and disciplines itself). Third, the FRA produces the normalised subjects of the safe and secure society: the ideal citizen, the good Member State and the good NGO.

This is important to recognise since it challenges the assumption of the FRA as an instrument of progress, as a beacon on fundamental rights and a guarantor of rights protection. A critical reading of the Agency shows it to also be a *disciplinary and governing* body: the Agency carries out regulatory processes that govern through disciplinary tactics (for example, gathering statistics on minority discrimination through surveys; compiling experts reports on homophobia and gender discrimination using data gathered and communicated through entangled and complex, self-organising networks of expert actors). The important point is that this construction relies on the normalisation of the undesirable categories of the *victim* of discrimination, the *bad* member State and the *unsuitable* NGO, which together would lead to the highly undesirable risky society in opposition to which the safe and secure European society defines itself.

5. Conclusion

The FRA is part of the new governance trend that has swept through the EU in recent years. As a human rights agency, the FRA's potential 'monitoring' function was not considered, at either the institutional or academic levels, as 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 critically re-read these terms using Foucault's understanding of disciplinary power to reveal how the FRA's current role is actually as a monitoring body, where monitoring is understood as *surveillance*. Interpreting the FRA's role as surveillance highlights the nature of the Agency's rights discourse as a *disciplinary and governing discourse*. The FRA represents a site of panopticism: the code of disciplined conduct within this panoptic model is human rights. Panopticism operates even in the absence of a centre of power (that is, 'a' supervisor), meaning that the nature of this disciplinary discourse is self-perpetuating. The discourse of rights is disciplining because it targets the Member States, the citizens of the EU and other bodies of the Agency (for example, NGOs) to produce normalised identities: 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, and a human rights organisation.

In addition to fulfilling its role as a human rights institution responsible for providing 'assistance and expertise' to the EU and its Member States, the FRA

is also, therefore, a great new instrument of government. It has not, on a critical re-reading, abandoned its monitoring role but it carries out rather a surveillance which means that tactics of discipline and governmentality operate within the space of the FRA. This reading of the FRA, as a model illustrating *panopticism through rights*, is important in three main ways: first, it means that we cannot simply see the proliferation in rights discourse of the EU, which has led to overlap between rights and governance discourses in the model of the FRA, as 'progress'. Rather, as this article has argued, we ought to interrogate how this so-called 'progress' has been made possible: in the case of the FRA and the EU, it has occurred through using governance discourse to talk about rights. This has resulted, contrary to the EU's claims, not in *less* government but *better* government: government that is automatic, permanent and invisible—as it is carried out by networks of experts that do not assume responsibility, representing a 'faceless gaze',⁹⁹ and produce information and data in the form of statistics that comes to define what the rights situation of the EU is.

Second, a reading of the FRA as showing panopticism is important because the 'progress' is built upon identity norms that label and marginalise certain groups. The 'safe and secure society' in which the 'ideal citizen' belongs is created in opposition to the 'risky society' and the 'victim'—where the latter includes, according to the FRA, the minority citizen (for example, the Roma), the LGBT person, the Muslim, etc. These become undesirable, abnormal categories against which we want to define ourselves as 'ideal citizens' in the safe and secure society. It is surely reasonable and vital to highlight the marginalisation that FRA's rights discourse enables—so that we might then be alerted to how far marginalisation in the name of rights might go. Finally, the reading of the FRA undertaken in this article consequently brings to light the nature of rights as the disciplinary code of conduct: rights are a disciplining and governing discourse, in addition to being the moral norms and values that we aspire to.

I will re-assert that the critique presented here is not a criticism of the FRA, which human rights advocates most likely see as an emancipatory institution promising to make human rights more effective. Rather, it aims to interrogate the claims of rights and human rights institutions to progress and freedom from government.¹⁰⁰ This is not a negative critique since panopticism *produces* the FRA and the subjects of rights, as well as allowing for the extension of the EU's human rights norms. It is therefore a productive, developmental and by implication positive process. However, the FRA, I argue, cannot

99 Foucault, *supra* n 9 at 214.

100 See further in this critical tradition, Douzinas, *supra* n 55; Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Abingdon: Routledge-Cavendish, 2007); and Golder, 'Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures of Rights' (2010) 20 *Social and Legal Studies* 283.

unproblematically be declared ‘a beacon on fundamental rights’. I have sought to highlight the operations of disciplinary power within the FRA and the impact on identity norms in the hope of encouraging us to oppose and resist these constructions through constant interrogation of the FRA’s processes. We ought to ask, therefore: How has the code of conduct (rights) of the FRA developed? What assumptions have been made in recognising this development as progress and what identities have been normalised (and necessarily which have been marginalised) in this progression? Who are the visible supervisors—that is, who are the experts who ‘discipline’? Who should they be? And furthermore, how might we learn of or engage our (largely inactive) participation in the processes of the Agency which come to represent the population as a whole? Only in this way might we resist the ‘other’ side of rights: their disciplinary and governing potential and how far, even in the (apolitical) form of new human rights institutions, this disciplinary potential might go in terms of how we label the FRA, the EU, its Member States and its citizens.