



1ST Fundamental Rights Conference

**Freedom of Expression,
a cornerstone of democracy –
listening and communicating
in a diverse Europe**

PARIS 8-9 DECEMBER 2008

Conference Report

**EUROPEAN UNION
AGENCY FOR FUNDAMENTAL RIGHTS**

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FOREWORD

First of all, let me welcome you all to the Agency and thank those of you who joined us in Paris for the first of what I hope will be a series of important meeting points on the road to full enjoyment of human rights. You should find on this memory stick not only information and images from the Fundamental Rights Conference in Paris, but information about the Agency, its work programme and the results of some of its key activities in a multi-media format. I hope that after reading, listening and watching the information and products you will continue to follow the Agency on its journey and provide critical and positive contributions to the work of the Agency. There are many opportunities to engage with the Agency. For those of you in civil society you may wish to become members of our Fundamental Rights Platform, for others we have specific events and activities linked to the thematic areas of our Multi-annual Framework and you can subscribe to the Agency's information alert facility to keep up to date on our work. Please click on the relevant icons and should you still require help, please contact us by sending an e-mail to information@fra.europa.eu.

I hope that the Fundamental Rights Conference in Paris will mark a starting point in enabling the Agency to engage on some of the key questions of human rights with friends, stakeholders, sceptics and the broader human rights community. The Agency plans to be a hub for debates and action-oriented approaches to human rights issues, using its research and networks, to raise awareness of human rights and embed it across the various layers of our societies. The Agency cannot find the solutions to all the questions on its own, that is why its approach is very much that of a facilitator, a network of networks and a multilevel interlocutor with the various levels of governance across the European Union, its Member States and institutions.

In selecting freedom of expression, the Agency was deliberate in addressing an issue which is topical and permanently testing the limits of our rights, duties and responsibilities. Freedom of expression is one of those freedoms which defines the European Union in a way that is unique. It is a cornerstone of Europe's unique human rights institutional architecture. It is also a right and freedom which is evolving as a result of the new communication and networking environment that is shaping our lives and redefining our boundaries of interaction. It is a very exciting time to be involved in these debates – there is a real sense that we are engaged in something that has far wider consequences than we are currently aware of or can fully grasp.

The issues before us from hate speech, defamation, diversity in the media to questions related to the viability of an independent media, security legislation and its impact on freedom, data protection – all these matters touch on fundamental rights and freedoms, all these matters impact on us directly or indirectly and they shape the future of the European project.

I hope the information and images presented here provide much food for thought, reflection, provocation and in some cases inspiration – and contribute to promoting and protecting fundamental rights in the European Union.

Morten Kjaerum
Director, European Union Agency for Fundamental Rights

BACKGROUND

As part of marking the 60th anniversary of the Universal Declaration of Human Rights, the European Union's Fundamental Rights Agency launched its first in a planned series of Fundamental Rights Conferences (FRC). The Agency has a specific role to play in supporting greater knowledge, and raising awareness, to promote the respect and protection of fundamental rights in the European Union. One way it can contribute to achieving this is by creating a space for the human rights community and others to examine specific fundamental rights issues and develop approaches and measures which guarantee their protection – this space can be the Fundamental Rights Conference.

The Fundamental Rights Conferences plan to examine the relationship between key freedoms and rights, which are imbedded in European law and underpin our democratic societies, and place them in a contemporary European context. Over the coming years, it is hoped that the FRCs will become a central place for developing innovative solutions to concrete fundamental rights challenges in the EU, support the development of EU policy in a variety of related areas and identify multilevel action. They will therefore bring together a diverse, but well defined group of stakeholders from the international to the local level, including EU institutions, Member State governments, local authorities, civil society, and individual experts.

The Agency understands that participation in an FRC must create value for stakeholders, meet their expectations and needs, and have them return home with new knowledge they can use in their practical work. The FRC should initiate a common learning process that deepens the understanding of the needs of and solutions to promote and protect fundamental rights.

For the Agency, it will provide a forum to learn and share in a cooperative relationship with its stakeholders and partners. Continuous learning is inseparable from the Agency's effectiveness as regular interaction with a wide range of stakeholders helps the FRA to ensure that its work remains relevant, usable and can meet the challenges in the human rights environment.

The FRCs serve the purpose to develop together with the Agency's stakeholders and partners strategic directions, recommendations, good practices and lessons learned that can improve the effectiveness of fundamental rights protection in Europe.

THE FIRST CONFERENCE: FREEDOM OF EXPRESSION, A CORNERSTONE OF DEMOCRACY – LISTENING AND COMMUNICATING IN A DIVERSE EUROPE

For its first conference, the Agency focussed on one of the key freedoms and rights which are widely known to the public at large, which impacts on our daily lives and without which the European Union (EU) could not function, namely freedom of expression.

Freedom of expression is not only a cornerstone of democracy, but an important basis for other freedoms and rights whether in the Universal Declaration of Human Rights, the European Convention on Human Rights and Fundamental Freedoms or the European Union's Charter of Fundamental Rights. Without freedom of expression it is difficult to imagine the progress achieved in developing, scrutinising and establishing norms and standards which form the basis of our democratic society. Our successes in the fight against racism, anti-Semitism, Islamophobia and homophobia and all other forms of discrimination and intolerance, our call for greater pluralism and inclusion in the media and society, our challenges to practices and policies which undermine human rights would be hard to imagine without freedom of expression. The flipside is that very freedom can be used as a pretext to stoke up hatred, incite hate crimes, support discriminatory practices which exclude members of our society and in effect undermine the freedom itself.

The topic of freedom of expression has a history with the Agency and its predecessor the EUMC. It follows up some of the issues highlighted at the seminars in cooperation with the European Commission and the Austrian Presidency of the EU, namely the EU Seminar on Racism, xenophobia and the media and the Seminar on Racism and Xenophobia in the context of the Framework Decision on Racism and Xenophobia. The Agency has developed a diversity training programme for the broadcast media with the European Broadcasting Union. Most recently the Agency highlighted in a report the hate speech directed at homosexual people. In addition, the Agency continues to cooperate with the European Commission in a variety of activities which impact on freedom of expression.

The European Union has taken action related to human rights since the 1970s. It has also developed a variety of tools related to legislation, mechanisms, policy and action, of which the Agency is an integral component. These, in effect, contribute to protecting freedom of expression while at the same time addressing some of the challenges associated with it in practice, and as it relates, whether to technological development or its impact on vulnerable individuals and the groups they associate or define themselves with.

Examples of EU legislation/measures/initiatives/action related to the themes of the Fundamental Rights Conference

- Charter of Fundamental Rights
- Racial Equality Directive
- Proposal for a Council Framework Decision on Combating Racism and Xenophobia
- Joint Action on combating racism and xenophobia
- Recommendation on the protection of minors and human dignity
- Television without frontiers" (TVWF) Directive
- The new "Safer Internet" action plan

The Agency's first Fundamental Rights Conference brought together many of the issues identified with EU policy, placing them in certain thematic areas which relate to some of the key challenges

facing the Union in the Fundamental Rights field. The conference examined freedom of expression under five thematic areas within the context of the contemporary European Union – taking into account the changing diversity of its societies, the technological advancements in communication and structural issues related to access and representation in the media. The thematic areas were: freedom of expression in a democratic society; freedom of expression and the development of new media; freedom of expression and defamation; challenges to freedom of expression; and freedom of expression and diversity in the media.

HIGHLIGHTS - EXTRACTS FROM OPENING SPEECHES

The Fundamental Rights Conference was opened by a series of speeches on freedom of expression, its history, importance in democratic societies and its contemporary relevance. The Opening speech was made by Rachida Dati, the Minister of Justice for France. The Ministry of Justice of France being the key partner of the Agency in co-hosting the conference under the French Presidency of the European Union. Her speech was followed by that of the chairperson of the Agency's Management Board, Anastasia Crickley, the Vice-President of the European Commission, Jacques Barrot, and representatives of the key European and international institutions that work to promote and protect freedom of expression, namely the United Nations, the Council of Europe and the Organisation for Security and Cooperation in Europe.

In addition, the FRA invited two media experts and practitioners, Florence Aubenas the distinguished French journalist, and Andrew Puddephat, a media consultant and advocate of new media, to make keynote speeches on topics of their choice. Florence Aubenas focused on the situation of journalists and journalism and Andrew Puddephat on new media developments and opportunities.

Highlights from the opening speeches are provided below and the full presentations of the speeches are provided in multi-media format and can be accessed by clicking on the appropriate icon in this memory stick.

Mme Rachida Dati, Garde des Sceaux, Ministre de la Justice

« **Pourquoi la liberté d'expression est-elle inséparable de l'idée de démocratie ?** Parce qu'elle est la première garantie d'un exercice sain du pouvoir politique. Aucun pays, aucun peuple ne peut prospérer sans être gouverné ; la liberté d'expression garantit la transparence et le choix démocratique dans l'exercice du pouvoir. ..

« Le socle de la philosophie politique européenne est résumé par l'analyse du penseur allemand Hegel : si un gouvernant refuse la liberté d'expression, c'est qu'il compte gouverner contre le peuple...

« Dans une démocratie, nous n'avons pas tous la même idée du bien commun; mais la liberté d'expression permet à chacun de se faire entendre et d'interpeler ceux qui assument les responsabilités...

« **La liberté de la presse est la voix de la démocratie.** Elle exprime la diversité des opinions dans le débat politique. Elle éclaire l'opinion publique en lui donnant accès à l'information. Dans un univers où l'information circule de plus en plus vite, et où sa vérification est de plus en plus difficile, la qualité et le professionnalisme des journalistes revêtent une attention et une importance toute particulière.

« La déontologie de la presse et la recherche de la fiabilité des sources d'information sont **des garanties contre les dérives de la liberté d'expression**. Car la liberté d'expression ne peut pas être une porte ouverte à la diffusion de toutes les opinions, quelles qu'elles soient. Elle impose **un équilibre entre le droit à la parole et le respect des valeurs morales et politiques**.

« La nécessité de garantir le plus large accès à l'information, de défendre l'indépendance des médias et la liberté de l'expression artistique doit s'accompagner du souci de protéger chacun contre le mensonge, les expressions de haine et la négation de la dignité ou de l'intimité humaine.

« Internet a donné une nouvelle dimension à la liberté d'expression, en créant des espaces sans limite. Chacun dispose aujourd'hui du pouvoir d'exprimer son avis, ses convictions, ses valeurs. Les blogs et les sites d'opinions se sont développés.

« La protection des droits fondamentaux ne doit pas être négligée dans la construction européenne. Nous n'avons pas le droit d'oublier que la liberté d'expression n'est pas un acquis définitif. Elle reste un des objectifs que nos gouvernements doivent poursuivre avec énergie. Grâce à ses missions d'expertise et d'analyse, votre Agence nous rappellera à nos responsabilités. Elle appuiera les efforts de nos gouvernements et de tous ceux qui, dans la société civile, travaillent à la défense des libertés fondamentales. »

Anastasia Crickley, Chairperson of the Management Board, EU Fundamental Rights Agency

"Freedom of expression comes with rights and responsibilities - the right to express an opinion and the responsibility to ensure that this opinion does not lead to serious violations of the rights of others. Freedom of expression is the hard-won fruit of our struggle for human rights and we must cherish this. At the same time, we have to find effective ways how to deal with acts of hate speech which are committed intentionally and incite to violence or hatred against various groups in our societies, because of their gender, ethnic origin, sexual orientation, religion, age, or a disability."

Jacques Barrot, Vice-président Commission Européenne, Commissaire responsable pour la Justice, Liberté et Sécurité

« La Liberté d'expression est un des piliers de nos sociétés démocratiques. A ce titre elle est reconnue par la charte des droits fondamentaux de l'Union européenne. Comme pour toutes les libertés fondamentales, l'exercice de la liberté d'expression comprend une dimension éthique. Ainsi, cette liberté s'exerce dans le respect des libertés d'autrui. »

Janez Lenarčič, Director ODIHR, Organisation for Security and Cooperation in Europe

“The threats that are faced by human rights defenders in the OSCE region exemplify this challenge. This year we also celebrate the 10th anniversary of the UN Declaration on Human Rights Defenders. In a week’s time, the ODIHR will publish its second report on the situation of human rights defenders in the OSCE region. And I can already tell you that the patterns of violations identified for the last two years (e.g. threats and attacks on the physical integrity of defenders, their right to liberty, freedom of movement, freedom of assembly and freedom of association) and individual cases highlighted in the report are troubling. It is essential to join efforts to promote the rights of those who strive to defend human rights and bring them to people.

“Sixty years after the adoption of the UDHR and over 30 years after the Helsinki Final Act, new challenges seem to appear also in what we call older and established democracies. Let me name one: the fight against international terrorism. There are competing visions as to how this fight should be conducted, in particular regarding the role and importance of human rights and international humanitarian law. Human rights should be protected in all measures aiming at countering international terrorism...”

Margaret Killerby, representing the Secretary General of the Council of Europe

“...The European Court of Human Rights has recognized that freedom of expression protected by Article 10 of the ECHR [European Convention on Human Rights] constitutes one of the essential foundations of a democratic society founded on pluralism, tolerance and broadmindedness. According to our standards and principles, freedom of expression and information has a pre-eminent importance, in particular through free and independent media, for guaranteeing the right of the public to be informed on matters of public concern and to exercise public scrutiny over public and political affairs as well as for ensuring accountability and transparency of political bodies and public authorities, which are necessary in a democratic society.

“One of the exceptions to the freedom of expression concerns hate speech. The Council condemns all forms of expression which spread, incite, promote or justify racial hatred, intolerance or discrimination against minorities.

“Member states should, while respecting the principle of editorial independence, encourage the media to supply the public with a diversity of media content capable of promoting a critical debate and a wider democratic participation of persons belonging to all communities and generations. They should, in particular, encourage the media to contribute to intercultural and inter-religious dialogue, so as to promote mutual respect and tolerance and to prevent potential conflicts through discussions.

“The possibilities afforded by the new information and communications environment can strongly encourage freedom of expression and information by the media and by the general public either

through the media or through other channels. In order to maximize these opportunities, it is essential that member states promote affordable access to Information and Communication Technologies (ICT) infrastructure, make available better possibilities to access information as a public service and encourage cooperation between stakeholders...”

Ulrika Sundberg, Special Adviser to the Commissioner for Human Rights, Council of Europe

“At the heart of any well functioning democracy is freedom of expression. The scrutiny assumed by journalists, human rights defenders, non governmental organisations and civil society representatives is crucial. The purpose of journalism is not please power holders or to be a mouth piece of the government. They should be public watchdogs and inform the public about relevant developments in society including those that may embarrass the powerful and the wealthy.

“One of the main problems today is probably that too little meaningful information is being circulated and too few voices are being heard. The Internet has assisted in remedying in part this problem as it has increased the possibilities for democratic dialogue. Still the media continues to be the main vehicle of common interest news and the key arena for debate

“Journalists should be free to receive information anonymously from everyone, including government employees. Individuals who provide information on corruption or abuse of power often run high risk of being dismissed or even worse. This right should be protected in national law.

“An order to disclose sources cannot override this protection, unless there is an overriding public interest. Every democratic society has to welcome whistle blowers as they are the safety valve against abuse of power both in public and the private sector.

“...Politicians should not be given a higher degree of protection than ordinary citizens under the national defamation laws. In fact they have to endure more, because of the post they occupy. Critical reporting is allowed, including of activities of authorities, private companies as well as individual politicians or businessmen.

“There are many ways of silencing media. Bringing repeated defamation charges, setting up obstacles in buying printed paper, having monopolies on printing or distribution systems of papers, or asking for exorbitant damages in libel suits are such examples. Tendencies undermine democracy and must be countered by a clearly rights media policy based on the principle of freedom of expression.

“The promotion of professionalism among journalists can be done through media self-regulation or co- regulation and professional code of ethics rather than legislative acts. The debate should include the role of an independent self-regulatory mechanism within the media. In some countries media representatives have developed code of ethics, and designed their own special procedures

to monitor and enforce professionals standards, like Press councils or Press Ombudsman. With this, the media has matured and the public has received better protection and e.g. the right to reply as well as apologies published in the newspapers when factual errors have been committed or compensation has been given to the injured party.

“Several discussions ensued after the publication of the Danish cartoons on the possible opposition between freedom of religion and freedom of expression. It should be clear that freedom of religion cannot exist in a society where there is no freedom of expression. However, speeches that criticize religions do not automatically constitute incitement. Each case has to be assessed on its own merits and circumstances...”

Soussan Raadi-Azarakhchi, representing the High Commissioner for Human Rights, United Nations

« Je souhaiterais en premier lieu vous féliciter pour cette célébration du 60^{ème} anniversaire de la Déclaration Universelle des Droits de l'Homme. Je me réjouis de cette commémoration qui a lieu dans la ville où, 60 ans plus tôt, au Palais de Chaillot, la communauté internationale posait les premiers jalons d'un système international de protection des droits humains. Depuis, beaucoup de chemin a été parcouru. La Déclaration universelle a inspiré plus de 80 traités et déclarations au niveau international, notamment la Charte internationale des droits de l'homme englobant les deux Pactes sur les droits civils et politiques, économiques, sociaux et culturels ; un grand nombre de conventions régionales y compris la Convention européenne des droits de l'homme, et de nombreuses législations et constitutions au niveau national.

« En ce qui concerne plus précisément la liberté d'opinion et d'expression , les débats qui ont eu lieu lors de la rédaction de l'article 19 du Pacte international des droits civils et politiques consacrant ce droit illustrent la portée spéciale qui lui a été accordée, c'est-à-dire la reconnaissance de sa valeur transversale et le renforcement qu'il confère à d'autres droits. En donnant une voix aux groupes vulnérables, en exposant les abus commis par les autorités ou en éduquant les citoyens sur leurs droits, la liberté d'expression permet de renforcer la mise en œuvre d'autres droits.

« Mais malgré le rôle central reconnu à la liberté d'expression dans toutes les sociétés modernes, la réalisation de ce droit est loin d'être universelle. Des centaines de millions d'individus-en particulier les plus vulnérables aux abus de pouvoir- sont encore dépourvus d'accès à une presse libre, du droit de réunion et d'association pacifiques ou même du droit d'exprimer en public leurs convictions personnelles, y compris leur religion. Des journalistes continuent d'être arrêtés, harcelés ou même assassinés. Les nouveaux media, notamment l'Internet, font aussi l'objet de répression.

« Un autre défi auquel nous sommes confrontés aujourd'hui est la définition des limites au droit à la liberté d'expression, ainsi que de leur portée. Prenons par exemple le droit à la réputation, consacré aussi bien par les instruments de droits humains que par les législations nationales, où

des délits tels que diffamation et atteinte à l'honneur sont en général également reconnus. Cependant, ces délits sont l'une des principales causes d'emprisonnement des journalistes dans le monde... A cet égard, le Rapporteur spécial sur la liberté d'expression a suggéré que le délit pénal de diffamation des individus soit abrogé et remplacé par des lois civiles.

« Il est important de différencier la diffamation d'individus et la diffamation d'idées abstraites. Ceci nous ramène au débat sur ce qui a été qualifié de « diffamation des religions ». Ce débat semble nourri par le manque de clarté qui subsiste autour de l'interprétation des normes pertinentes, plus particulièrement autour du seuil d'application des articles 19 et 20 du Pacte International relatif aux droits civils et politiques. C'est la raison pour laquelle le Haut- Commissariat aux droits de l'homme s'efforce d'aborder cette question de manière systématique sous l'angle des normes internationales des droits humains.

Panel Discussion

The FRA organised a panel discussion among some of the key participants at the conference to gauge their views on the key issues related to freedom of expression. The discussion was moderated by Bent Sorenson of the European Training Foundation who is also a former journalist. The panel members were Florence Aubenas, journalist, Nicole Wong, Google, Andrew Puddephat, media expert, Doudou Diene, former UN special rapporteur on racism, and Morten Kjaerum, the Director of FRA.

The moderator asked a question to the panel “What would you like to see in 10 years time from now change in relation to freedom of expression?” A full presentation of the panel discussion is available by clicking the video icon.

Florence Aubenas, (Journalist)

I would like to see strengthening of freedom of expression as a value. We need to move towards that spirit of a deep seated human decision. Laws and regulations are already in place, we need to increase appreciation of freedom of expression as a value of our democratic societies and realise potential danger in losing this freedom.

Nicole Wong (Google)

I would like to see a truly open internet. There is currently a debate ongoing with technological companies on limits of information flows. In my view FRA should be part of that debate. We have to open access to internet to all members of our society. Recent study commissioned by Google showed that there is 1 trillion web pages and about 110 million blogs, which is an incredible increase compared to 2 million blogs four years ago. On Youtube, 13 hours of videos are uploaded every minute.

Andrew Puddephat (Media Consultant)

Use of new technology shows that communication can be cheap and free and I feel enlightened by this reality. Within next ten years, we need to roll out from 1 billion to next 5 billion users of internet. There should be more investment in technology to promote development of software applications. We need also an economical model for sustainable content development. FRA could be developing public interest in information exchange and raise awareness of the following stakeholders:

- Governments – to stop them being afraid
- Business – to make them promote human rights values
- Civil society – to make civil society an active part of that conversation

Doudou Diene (former UN Rapporteur on Racism)

I would like to see that ideology is taken out of the debate on freedom of expression. We have to realise that freedom of expression is crucial, however, while we debate freedom of expression, we have to also debate its limitations (hate speech). Freedom of expression is a fundamental right.

Morten Kjaerum (Director, Fundamental Rights Agency)

We need to be more positive in our thinking. We have a teenager (google), but we have to see how we protect human rights much better with technology. How do we ensure that minorities get access to the internet. What legislation do we create? There is also a rapidly changing media picture from traditional to new media. This conference is a first step for facilitating these discussions.

WORKING GROUPS

The conference had a specific focus on five thematic areas related to freedom of expression. The participants were divided amongst these five working groups and had the task to identify the key issues and make suggestions for the work of the Fundamental Rights Agency specifically, but could identify issues which the European Union needed to consider.

The themes of the working groups were as follows:

A. Freedom of Expression in a democratic society

The working group examined freedom of expression and issues related to hate speech, political and public discourse (race/homophobia etc), public manifestations of hate e.g. in sports and stadia.

B. Freedom of Expression and the development of new media

The working group examined issues related to the internet (including the role of service providers) and new media (namely digital, computerized, or networked information and communication technologies) and their use related to expressions of hate, their use to control or limit freedom of expression such as access to information and expression on the internet (censorship/self-censorship).

C. Freedom of Expression and defamation

The working group examined issues related to the debates around freedom of expression and defamation – touched on religion, public personalities, etc.

D. Challenges to freedom of expression

The working group examined the challenges to freedom of expression including diversity and independence of the media, issues of security limiting public debate, concentration and monopolies of media.

E. Freedom of Expression and Diversity in the media

The working group discussed to what extent there can be freedom of expression if certain voices in society do not have access or representation in the media, freedom of expression's role in supporting social inclusion, and active citizenship.

Each working group was composed of a chair, a rapporteur and a number of introductory discussants. The working group reports were presented at plenary and can be watched and listened to in full by clicking on the video icon. This report presents the core of the written presentations in their original language.

Freedom of Expression in a democratic society

Chair : **Eva SMITH ASMUSSEN**, Chair, ECRI

Rapporteur : **Peter MOORE**, Committee of the Regions

Introductory discussants : **Mogens SCHMIDT**, Deputy Assistant Director-General for Communication and Information, UNESCO, **Paco AUDIJE**, Deputy Secretary General, IFJ

Six questions encompassed the main issues raised during the course of the debate:

- 1) What about the new forms of expression and communication such as internet, social networking sites, blogs, SMS etc? Should there be limits on this? If so how could we impose them?
- 2) What is the right balance of freedom of expression against the impact on third parties?
- 3) How do we get the balance right? Is it through legislation, codes of conduct, professional standards etc? If so should it be left to member states to implement or should there be an EU wide approach? Should it be left to the market to decide? Should it be self regulating? Should we make this an essential or possibly mandatory part of journalist training?
- 4) If there is to be a limit on freedom of expression should it only be in exceptional circumstances and if so what are they? If something is unacceptable what is the definition of unacceptable?
- 5) What about freedom of expression in non media forms such as election literature, TV shows, Theatres, sporting events etc?
- 6) How do the general public and minority groups etc complain about what they see as unfair journalism particularly in member states where is little in the way of ombudsman services? How do we ensure there is an effective service which can be accessed by those who are marginalised and perhaps don't have the knowledge to access the system or possibly even fear repercussions if they do?

Four recommendations were identified by the working group that encompassed the answers to the original six questions.

The recommendations although directed primarily at the European Commission and the Fundamental Rights Agency should be sent to all of the institutions of the European Union to inform them and to influence policy and decision makers

In effect this means two recommendations that are broadly proactive looking at developments that may arise from the current situation as well as new and emerging technology and two that are broadly reactive in dealing with the impact on civil society from the current situation.

- 1) There should be an ongoing programme of support encompassing education and training, awareness raising and capacity building for marginal and vulnerable groups and NGO's and other organisations that support them with regard to fundamental rights. In addition there should be a programme of fundamental rights education for children and young people across member states of the European Union with particular emphasis on the situation of vulnerable and marginalised groups resident within the member state as well as the wider European Union.
- 2) There should be a similar but separate programme of education and training, awareness raising, etc targeted at those within the media including journalists, internet providers, and those involved in current or new and emerging areas of communication with regard to fundamental rights.
- 3) We do not recommend imposing new regulations or legislation on the media or those involved in any way with communications or who may be responsible for distribution or production of literature or in any other area that could result in a conflict between the fundamental right of freedom of expression and other fundamental rights. Rather we believe that use of the current legislation to protect those who could be damaged is sufficient provided they are given have the knowledge and awareness of how to use current and already proposed legislation and how to access the Court of Human Rights..
- 4) Programmes should be created that seek to build partnerships between legislators, civil society, media organisations and those involved in new and emerging communication technology in order to create synergy and understanding of fundamental rights and the responsibilities that go with those rights.

In addition the Fundamental Rights Agency in co-operation with the Council of Europe should produce a handbook for journalists and others in the media and communications industries outlining current and best practice in all the member states within both the European Union and the wider Council of Europe area and including a synopsis of current use and future trends of all forms of media and communication technology in regard to fundamental rights.

Freedom of Expression and the development of new media

Chair : **Lara MARLOWE**, correspondante pour le Irish Times pour la France et le Maghreb

Rapporteur : **Véronique RICHARD**, Directrice du CELSA

Introductory discussants : **Birgit ROTH**, Secretary General, Inhope, **Yaman AKDENIZ**, Director, Cyber Rights Cyber Liberties, **Nicole WONG**, Deputy General Counsel, Google

Résumé des deux sessions du groupe

Les deux sessions ont tout d'abord commencé par les présentations des intervenants sollicités, qui chacun ont davantage insisté sur des dimensions de contrôle permanent exercé sous forme de veille et de partenariats avec les instances juridiques et les réglementations des différents états, avec chacune leurs spécificités, avec des associations civiques, des associations non gouvernementales, plutôt que sur le besoin une réglementation poussée, uniquement pensée pour l'internet. La notion d'auto-régulation, établie autour d'une responsabilité sociale accrue des entreprises directement partie prenante de l'internet est aussi évoquée.

Il faut souligner que les échanges du groupe *se sont polarisés autour de deux types de regards sur la notion de liberté d'expression* : certains intervenants ayant à cœur de préserver les plus jeunes de contenus dangereux ou diffamatoires, à repérer et à éliminer dans des procédures accélérées, d'autres se souciant de garantir la possibilité d'une information libre, respectueuse des droits fondamentaux, avec des acteurs responsables et conscients des risques de dérive d'un média non maîtrisé, et, dans le même temps, soucieux de pouvoir continuer à exercer leurs métiers de journalistes, d'auteurs... sans qu'un corpus de réglementation trop restrictive viennent entraver leurs pratiques.

Après les interventions des invités, le Président a lancé le débat autour d'une question ouverte sur la notion de régulation de l'internet et sur les lois éventuellement nécessaires à ce développement important de nouvelles marques de l'internet, entraînant des reconfigurations dans les cycles de production et de diffusion des industries culturelles. Puis dans le début de la deuxième session, il a relancé les échanges autour de deux points : le rôle des fournisseurs d'accès dans les processus à mettre en place et les manières d'accompagner l'émergence de modes reconfigurés d'exercice de la citoyenneté.

Le présent rapport se déclinera autour de cinq axes d'analyse, tous abordés à un moment ou à un autre des deux sessions de l'après-midi par les différents intervenants et membres du public.

A/ Le premier axe souligne les tensions autour d'un certain nombre de mots-clés, souvent utilisés, mais peu définis, tensions qui se jouent entre le besoin de réglementer et les nécessaires préservation et renforcement de la liberté d'expression.

Les cinq mots-clés sont les suivants : **faut-il réglementer, réguler, contrôler, filtrer, bloquer ?**
Les différents termes ont été mentionnés au cours des deux sessions.

Chacun de ces termes pose **la question des différents moments possibles de l'intervention et de la coordination d'acteurs différents**, qui peuvent soit agir en amont de l'expression individuelle et de la diffusion de contenu, soit en aval de la diffusion de ces mêmes contenus et formes de l'expression individuelle, une fois ceux-ci disponibles sur l'internet.

Selon la plupart des intervenants (invités comme public des deux sessions), les acteurs de l'internet (et nous verrons dans le point suivant qu'ils sont nombreux à être concernés) doivent absolument travailler en coopération, en concertation, en nouant des alliances, des partenariats, des ententes. Les intervenants-invités ont, pour leur part, insisté sur la nécessité d'un travail de définition des termes « **contenus** » et sur la nécessité d'un travail de concertation avec les instances des différents pays concernés, pour tenir compte des contextes législatifs spécifiques et du corpus de textes déjà existants, y compris au niveau européen.

Les questions posées et restées ouvertes sont les suivantes : quand intervenir, avec quel type de processus (judiciaire, administratif...), avec quels acteurs, selon l'engagement de quelles juridictions ? Faut-il aussi établir, sur ces sujets, une concertation accrue avec les entreprises de ce support et média, à même d'établir des chartes de valeurs, des actions ciblées engageant leur responsabilité sociale sur ce point ? Une posture qui semble être défendue et promue par certaines d'entre elles, à l'instar de Google, à travers la voix de sa représentante, intervenante de la session.

B/ Le second axe abordé à plusieurs reprises concerne les acteurs qui peuvent devenir parties prenantes du développement croissant de l'internet et qui peuvent prendre part à cette question de la préservation de la liberté d'expression.

Ont été présentés comme ayant un rôle croissant à jouer **les fournisseurs d'accès, les hot lines, les associations non gouvernementales, les entreprises liées à la production des contenus**, rôle croissant soit autour de l'établissement de règles qui leur seraient propres et qui pourraient encadrer leurs activités commerciales, soit autour d'une entraide accrue avec d'autres acteurs, plus « classiques » et « traditionnels », tels que **les magistrats** ou les forces de police, spécialisées.

Des membres de l'assistance ont alors insisté sur la nécessité d'accompagner les acteurs traditionnels afin qu'ils se dotent de moyens supplémentaires et de formations adéquates pour saisir et comprendre les mutations des formes de la communication sur l'internet.

Parmi les acteurs traditionnels ont été aussi cités les **individus** qui peuvent prendre la parole et devenir à leur tour diffuseurs d'informations, tout comme ont été cités les professionnels de l'information : **journalistes** ou documentalistes, qui selon certains membres de l'assistance ont des compétences qu'il serait nécessaire de réutiliser et de valoriser dans le cadre de l'internet : compétence de veille thématique, de sélection, de hiérarchisation, de valorisation éditoriale, de rédaction, de mise en relation, de recoupement, d'archivages autant de compétences que tout à

chacun ne peut pas toujours toutes développer dans le cadre de sa fréquentation et de son utilisation du média.

En tant que rapporteur, j'ai été, sur ce point, étonnée. En effet, n'ont pas été cités parmi les acteurs à mobiliser autour d'actions concertées, les acteurs historiques de la gouvernance d'internet, comme par exemple le W3C, l'IAB ou l'Icann et ses déclinaisons nationales, propres à chaque pays : ces organismes ont développé des réflexions poussées sur les normes, les standards de développement de l'internet, acteurs qui pourraient avoir un regard complémentaire sur les moments, les processus, les types d'organisation à adopter ou à faire évoluer en matière de vigilance sur les contenus et en matière de promotion de formes renouvelées d'expression.

C - Ce deuxième point, qui permet de commencer à envisager une typologie de l'ensemble des parties prenantes, en entraîne un troisième autour des enjeux qui ne sont pas les mêmes, qu'il faut distinguer en fonction des « contenus » concernés.

Un membre du public a souligné qu'une ligne de partage pouvait être dressée **entre des contenus clairement dangereux** (images pornographiques, violentes) devant entraîner des mesures rapides à la fois de retrait et de poursuites des auteurs et **des contenus interprétables** (textes et discours relevant des idées, de l'opinion) qui demandent plus de prudence dans les processus de contrôle, et qui peuvent faire l'objet de signalements (individus, associations) auprès à la fois d'acteurs traditionnels ou émergents.

Ce qui n'a été évoqué spécifiquement, c'est que ces contenus de l'internet représentent des masses importantes, propulsées dans un espace public potentiellement élargi, dans une vitesse de diffusion démultipliée...A ce sujet, un membre de l'assistance a souligné qu'en matière de publication, de diffusion, de droits d'auteurs, il existe des corpus de législations et qu'il lui semblait dangereux de considérer l'internet comme étant « hors sol », média qui nécessiterait des lois d'exception. Un autre membre de l'assistance a tenu à souligner que la distinction entre contenus « clairement violents » et contenus « interprétables » était aussi affaire de définition.

*D – Le quatrième axe concerne la question de l'éducation des différents acteurs de l'internet, y compris des acteurs de la réception : éduquer, c'est à la fois **former des individus à ce média**, à ses enjeux (potentialités d'expression et d'information comme risques de rumeurs, de manipulation, d'influence) et leur **permettre d'apprendre des comportements civiques et de préservation de soi**.*

Parmi les publics à former, les intervenants ont cités les parents de jeunes enfants, les jeunes eux-mêmes mais ils ont également cités les journalistes, afin de leur permettre de considérer l'internet comme sources d'informations et ressources pour leurs pratiques, ceci afin de leur permettre à la fois d'assister comme témoins à son existence, et comme acteurs vigilants de son devenir. Certains ont suggéré de créer un service public de l'information...

*E – le dernier axe de synthèse revient sur les propos qui à de nombreuses reprises, **ont mis en lumière que les modalités du contrôle et de la vigilance dépendent des Etats, de leur propre***

rapport à la démocratie. Pour plusieurs membres de l'assistance, l'internet comporte des vertus démocratiques, à formaliser et à diffuser.

Des membres de l'assistance ont évoqué à cet égard une « deuxième génération » de pays dans lequel l'internet est déployé, Etats qui ne partagent pas les mêmes valeurs de liberté d'expression et qui mettent en place des techniques de blocages de sites, de contrôle de l'accès, des stratégies d'influence des opinions publiques.

A ce titre, plusieurs personnes ont posé des questions sur les manières de mobiliser les vertus démocratiques portées par l'internet pour les diffuser auprès à la fois des populations et des gouvernements de ces pays. L'internet peut, à l'extérieur, produire des transformations politiques, en passant par la bande, notamment en ce que les énonciateurs des sites mettent en place non plus simplement des plans de communication mais de véritables stratégies d'influence.

Il peut être aussi l'objet d'un travail en proximité et en négociation avec les instances politiques des pays par des acteurs majeurs de l'internet, ou par les acteurs politiques. On retrouve ici le point évoqué plus haut sur la question de la responsabilité sociale, de la régulation de leur propres pratiques par les organisations impliquées dans le déploiement des outils du web, qui n'est pas l'outil exclusif des transformations démocratiques.

Un membre de l'assistance rappelle sur cet aspect précis qu'il peut aussi s'agir d'une panoplie de dispositifs et d'outils facilitateurs de la diffusion et de la réception, comme par exemple des valises de diffusion satellite, GPS ou autres, voire même des guides imprimés de « bonnes pratiques » de l'usage de la liberté d'expression...

Freedom of Expression and defamation

Chair : **Christine MARDIROSSIAN**, Deputy Head, Human Rights Department, ODIHR, OSCE
Rapporteur : **Ulrika SUNDBERG**, special adviser to the Commissioner for Human Rights, Council of Europe

Introductory discussants : **Anoush Begoyan**, Article 19, **Laurent PECH**, maître de conférence, Chaire Jean Monnet de droit public de l'Union européenne à l'Université nationale d'Irlande à Galway

The Chair presented objectives of the workshop and mentioned some questions as outlined in the Working Group discussion document. There were couple of questions: (1) How successful is regulation. Should there be further regulation – yes or no? (2) Is there a need for freedom of expression? (3) Is there a need for privacy protection?

Anoush Begoyan, Article 19, highlighted some key points:

- Defamation in relation to the protection of private reputation of individuals
- The tendency to move from criminal to civil defamation laws
- Many countries use defamation laws used for silencing critic
- Inside the EU there is now a “double regime” between those new EU MS which were required to abolish decriminalisation of defamation legislation (during 1990s) and old EU MS which were not required to do so;
- The impact of the political culture on the laws and the application of laws
- A need to recognize that where criminal legislation is not applied, they still remain a threat and also an inspiration (excuse) for other states.
- ECHR case law: public officials should tolerate more criticism, rather than less

Recommendation of Article 19: Use of defamation laws by public officials should be reduced as much as possible.

Laurent Pech, Jean Monnet Chair in EU Public Law at the National University of Ireland, Galway, highlighted some key points:

- Freedom of expression basis of democratic society
- There are limits of this right
- Limitation in Europe varies across EU MS
- No limitation in United States
- European Court of Human Right favours freedom of expression against right for protection of reputation
- 2004 New York Time vs. Sullivan – Supreme Court decision: right to freedom of expression benefits the whole society

- Public person can defend him/herself much better than private person, therefore freedom of expression has higher grounds than protection of reputation.

Chair's summary – two possible scenarios:

- European: strong legal system, protection of certain groups
- American: more educational measures, promotion of dialogue and civilizations;

Discussion

The discussion was wide ranging but several points emerged quite strongly and these considered criminal versus civil laws to deal with defamation, damage limitations, European and American traditions and the role of FRA in analysing the situation in Europe.

Key extracts of the debate are outlined below:

Criminal defamation should be abolished. If Council of Europe is not going to do it by convention, then the EU should take an initiative to recommend by way of Directive to abolish criminal prosecution of defamation cases. In some countries, it is not only the state, but also individuals who can bring a case.

Is FRA and the EU ready to pursue a study on defamation laws in 27 EU countries? On the basis of this study the FRA should pursue a proposal for a Directive. There is a legal basis to do this study, in the context of FRA with the aim to introduce relevant legislation. This could cover damage differences in the Member States of the EU – as this can impact on freedom of expression. There should be some approximation in the EU.

Does civil law cases mean more freedom of speech? In civil cases, the payment of damages is so high, that it can totally destroy journalists or newspapers. Civil procedure is not necessarily better for the freedom of press. Framework Decision on Racism and Xenophobia – a version includes two year period that allows Member States to put their laws in conformity with the Framework Decision. Scepticism remains about the Framework Decision, which says that group defamation concerning individuals belonging to a group. Does any individual have a case in such a situation? Burden of proof lies with the plaintiff and must prove link to individual.

The problem with defamation of group of people when one cannot prove that one was directly affected. In the civil code one has to prove that one was directly affected. The answer whether to regulate is therefore not that simple.

Defamation of groups, there is a problem. Journalist should feel responsible. Media has enormous impact on society and with that comes with responsibility. Should this regulation come from the side of the state? One would argue against that. Practice shows that defamation laws are used to fight critical voices, rather than protecting groups and individuals. Adequate hate speech laws are enough to deal with this.

Civil defamation cases are an issue of political culture. This can be used with the aim to bankrupt a newspaper. Criminal defamation should be abolished in the EU.

Venice commission undertook a comparative study on defamation laws. Question is whether we should be using this in a political setting, is a question for the Committee of the Ministers. Some countries are closer to the US tradition and some closer to the tradition in EU Members States such as France and Germany.

Article 10 (self regulation or co-regulation could be developed more). Question of filter could be linked to monitoring.

Discussant II

There is not a clear cut distinction between criminal and civil code, which could lead one to say that criminal law in defamation cases is a bad solution and that civil law is a good solution. Some journalists have a preference to spend some time in a prison, rather than endanger their newspaper, in order to ensure the survival of their newspaper. Regulation through community law in the private sphere may be an option.

The idea of a cap to limit damages has to be broken down to categories. It is something that could be worked on by technical experts. And this could be something that the FRA could possibly take on. Limit to damages can be very useful. Principle should be (for example 100 times average salary).

On the question of pure blasphemy it cannot stand under jurisdiction of ECHR, but if it is linked to calls for hatred it can be taken up by the Human Rights Court. Margin of appreciation – if there is no European consensus, the only thing that can be done is to leave it for national legislation. Public attitudes can be different in different countries. European institutions should enforce jurisdiction of the European Court of the Human Rights.

Conclusions and recommendations:

What to do with defamation. Should it be in the sphere of criminal or civil ambit?

- There has been a debate as for what is more efficient. There can be a chilling effect, in terms of damages in civil ambit, because the court sentences are too high.
- Proposal for the FRA: exploring possibilities of recommending regulation for compensation. Such study should be all encompassing and should look at legal aid and sociological study on what impact defamation cases have on freedom of expression
- Proposal for the FRA: Comparative study – approximation among EU countries – use of the internet and use of freedom of expression
- There is a need for a Study on case law of ECHR on principles and making it more popular reader version for general practitioners – awareness raising

- Possibility of a filter and a body to bring ex officio cases to ease the burden on victims
- Prevent forum shopping for civil law suits.
- Need to establish clear distinction between hate speech and hate crimes and this needs to be done as advocacy tool, but also as clarifying tool for wider public – awareness raising.
- Encourage the parliamentary institutions of the European Union, Council of Europe and the OSCE not to accept defamation as a human rights issue.
- There is a need to develop more human rights education about these issues.

Challenges to freedom of expression

Chair : **Christophe DELOIRE**, Directeur du Centre de Formation des Journalistes

Rapporteur : **Jean-Yves MONFORT**, Président du TGI de Versailles

Introductory discussants : **Doudou DIENE**, rapporteur spécial de l'ONU sur les formes contemporaines de racisme, de discrimination raciale, de xénophobie et de l'intolérance, **François ZIMERAY**, Ambassadeur des Droits de l'Homme, Ministère des affaires étrangères et européennes

Christophe DELOIRE, directeur du Centre de formation des journalistes, à Paris, qui présidait les travaux du groupe D, nous invitait à réfléchir autour de quatre questions :

- Quels sont ces enjeux, ou défis, de la liberté d'expression pour l'avenir ?
- Comment s'articule le rapport de la liberté d'expression au politique ?
- Comment s'analyse ce même rapport à l'économie (c'est la question de la concentration des media, de leur dépendance à l'égard de grands groupes industriels) ?
- Comment poser des limites à la liberté d'expression au regard des questions de sécurité (c'est le problème de la propagande et de l'action terroristes) ?

Rendre compte des travaux, c'est aussi évoquer ce dont on n'a pas (ou peu) parlé :

Le rapport à l'économie n'a guère été abordé : on a, certes, constaté que, "de plus en plus, de grands groupes industriels contrôlent les media, au détriment de la diversité et du pluralisme" (M. Doudou DIENE) ; ou bien qu'il faut toujours se poser la question : "qui possède les media ?" (en référence à la situation de l'Italie) ; mais ce poids de l'économie dans le fonctionnement de la presse -qui constitue, en France, un sujet particulièrement préoccupant- n'a pas retenu spécialement l'attention, dans les échanges du groupe D.

Il en est de même de la question de la sécurité, qui n'a pas rencontré d'écho particulier : si nous constatons, avec M. Doudou DIENE toujours, une évolution vers une "société de contrôle" (l'Etat met en place des outils de contrôle social), c'est pour relever aussitôt la contradiction de cette évolution avec "l'ouverture de l'espace" - l'ouverture du champ de la communication.

La question même de la définition de la liberté d'expression divise : pour l'essentiel, dans nos échanges, liberté d'expression et liberté de la presse sont synonymes ; mais on fait observer que cette liberté concerne aussi l'histoire, la littérature, l'expression politique (on évoque la tolérance traditionnelle de tel pays de l'Europe du Nord à l'égard de l'expression d'idées d'extrême-droite), ou bien encore la manière de se vêtir (les adeptes du foulard islamique ne revendiquent-ils pas aussi le bénéfice de l'article 10 de la CESDH devant la Cour de Strasbourg ?).

En tout état de cause, au-delà de la définition juridique de la liberté d'expression, c'est sa dimension politique sur laquelle on s'accorde : à la fois pour affirmer que c'est un moyen de développement (il s'agit de donner aux plus démunis : les minorités, les opprimés, les "sans-voix" - les outils du développement), et pour constater que certains groupes instrumentalisent les droits de l'Homme : la représentante de la LICRA évoque ainsi la tendance à une criminalisation de la diffamation envers les religions. C'est le retour en force du blasphème, crime disparu, en France, en même temps que la lèse-majesté. On aurait tort, d'ailleurs, puisque nous sommes en France, d'oublier, selon le mot d'Ernest RENAN, que *"le blasphème des grands esprits est plus agréable à Dieu que la prière intéressée de l'homme vulgaire"*...

Ici, la question centrale, ce n'est pas celle de la critique envers les religions, fait-on observer, mais celle de l'appel à la haine ; ou, pour dire la chose autrement : celle du respect de l'Autre, du pluralisme des opinions.

Constatant la diversité de nos approches nationales, nous abordons le projet d'une définition de normes communes (en moi-même, je m'interroge : toujours plus de normes ? je pense à Florence AUBENAS et à sa vigoureuse intervention d'hier matin, et à notre fabuliste Jean de la FONTAINE ; ne sommes-nous pas dans le rôle des "Grenouilles qui demandent un Roi" ? :

*"Les grenouilles, se lassant
De l'état démocratique,
Par leurs clameurs firent tant
Que Jupin les soumit au pouvoir monarchique"*.

J'exprime une inquiétude : si l'on admet que, dans notre domaine, l'Europe est une mosaïque d'histoires et de cultures différentes, la définition de standards européens très précis ne va-t-elle pas conduire à une régression pour certains (c'est la question que pose, en France, le projet d'une dépénalisation du droit de la presse qui mettrait en cause, paradoxalement, les avancées réalisées dans le cadre de la loi du 29 juillet 1881) - et au "politiquement correct" ?

On fait observer qu'ici, le principe de subsidiarité conduit chaque Etat à adopter, en première ligne, la norme pertinente, et que le droit européen n'intervient qu'en renfort, le cas échéant.

Certains opinent en faveur d'un dispositif souple, proportionné, évolutif : une approche au cas par cas - et plaident pour un droit jurisprudentiel, excluant toute solution normative rigide. Et si la lisibilité d'un droit d'origine jurisprudentielle fait difficulté, un intervenant néerlandais souligne qu'il est toujours possible d'en dégager des grands principes, à usage pédagogique, tant pour les institutions internationales que pour les institutions nationales (notre ami néerlandais se méfie des "nouvelles normes", et le juge français que je suis ne peut que l'approuver...).

Un participant britannique tempère ce consensus naissant, en faisant valoir qu'en Grande-Bretagne -royaume du "cas par cas"- la flexibilité jurisprudentielle est controversée, et que les normes "ne valent que par ceux qui les appliquent" : si les Anglais nous abandonnent, alors...

Des représentants des institutions européennes estiment, quant à eux, qu'un système de normes est souhaitable ; et de citer toutes les institutions productrices de normes au plan européen.

Je pense en moi-même : que de monde ! et que de textes ! et je rappelle que l'article 11 de la Déclaration des droits de l'Homme du 26 août 1789 a été rédigée en une nuit (ou presque), par un petit groupe de visionnaires :

"La libre communication des pensées et des opinions est un des droits les plus précieux de l'Homme : tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la Loi".

Peut-on faire mieux ?

Comment dégager de tout cela des propositions, des pistes de réflexion pour l'Agence des droits fondamentaux ?

Des représentants de l'Agence rappellent, d'abord, que le mandat de celle-ci est limité, et qu'il ne lui appartient pas, notamment, de formuler des recommandations. Selon l'article 4 du Règlement, elle a pour objet d'obtenir une meilleure connaissance et une prise de conscience accrue, dans l'Union, des questions relatives aux droits fondamentaux ; et à la représentante turque, qui s'inquiète de voir la Turquie "rester à la porte de l'Europe", il est fait observer que l'article 28 prévoit que l'Agence est ouverte à la participation des pays candidats, de manière à les soutenir sur la voie de l'intégration européenne.

La première piste de réflexion qui est évoquée, c'est celle de l'autorégulation interne des media, et on évoque, dans le même temps, la nécessité d'une formation adéquate des journalistes ("l'Europe, c'est l'entrée dans une certaine éthique", souligne-t-on).

On cite, par exemple, la manière dont la presse roumaine a repris, sans distance et sans enquête, les articles haineux de la presse italienne concernant les Roms, ou le "racisme anti-Roms" véhiculé, à l'occasion, par des autorités tchèques. Selon M. Doudou DIENE, il faudrait s'attaquer ici à des "constructions complexes" (le Rom est voleur...), qui touchent souvent à nos identités nationales (voir la question de l'immigration) : on en revient toujours à l'incitation à la haine, et aux difficultés liées à la "multi culturalisation", notamment celle de la représentation des minorités dans les grands medias.

La deuxième piste abordée est celle de l'accès à la justice : ceux que l'on prive de la liberté d'expression doivent pouvoir accéder au juge, notamment par le biais des associations.

En troisième lieu, il est question de démocratiser les media : pour certains, INTERNET s'impose comme le paradigme de la liberté ("nombre de personnes peuvent émettre des opinions", c'est le "contexte très libre de la blogosphère").

Et celui qui s'aventure à déplorer la médiocrité de certains échanges sur INTERNET doit rapidement battre en retraite : il ne faut pas lier liberté d'expression, et qualité de l'expression, ce serait détruire la première. Ce principe est partagé par tous.

On s'accorde, néanmoins, sur la nécessité d'une meilleure éducation des "bloggeurs" (peut-on créer un matériel pédagogique à leur intention ? comment former au respect de l'Autre, des différences ?).

On rappelle aussi qu'aux yeux du Conseil de l'Europe, INTERNET est soumis au même régime juridique que les autres media, et qu'il ne s'agit pas, à cet égard, d'un monde sans règles.

En abordant la conclusion, nous conviendrons que le défi, finalement, c'est toujours éduquer : apprendre aux citoyens à prendre la parole, leur donner les moyens d'accéder réellement aux droits dont ils sont titulaires.

Freedom of Expression and Diversity in the media

Chair: Frans Jennekens (Diversity Manager, Netherlands Programme Service)

Rapporteur: Mike Jempson (Director, The MediaWise Trust)

Introductory Discussants: Edouard Pellet (Integration and Diversity Representative, France Televisions), Brigitte Degen (European Commission Directorate for Employment, Social Affairs & Equal Opportunities) and Marc Gruber (European Co-Director, International Federation of Journalists)

A. Introduction

The fundamental right to freedom of expression is hindered substantially when distinct social groups are largely invisible or unheard in the mass media.

Diversity within the media sector has to be considered, and measured, in terms of visibility and voice, and of employment and representation, and not just in terms of the 'ethno-cultural' composition of the society served by particular media but also gender balance, sexual orientation, disability and age.

These were the clearly expressed views of participants, and provide the context for Working Group discussions and recommendations.

B. Summary of discussion

Edouard Pellet explained that *France Télévisions* had developed its Positive Action Plan for Integration (PAPI) in 2004, to raise the profile and enhance the representation and promotion of ethnic and cultural diversity within its services, focusing on three main areas - programmes and editorial content; human resources; and ethics. As a result, for example, bursaries and apprenticeships have been awarded to journalism students from Priority Education Zones.

He acknowledged that it was the duty of public-service broadcasting to remedy any imbalance between the diversity of French society and the presence and representation of minority and ethnic groups in the programming. He stressed nonetheless the overarching terms of Article 1 of the French Constitution which ensures 'the equality of all citizens before the law, without distinction of origin, race or religion' and 'respect (for) all beliefs'.

Brigitte Degen pointed out that Article 13 of Amsterdam Treaty (1997), amending the European Community's founding Treaty of Rome, authorised '*appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*'. Two subsequent Directives - on Racial Equality (2000/43) and Employment Equality (2000/78) - had strengthened and focused this commitment to diversity.

More recently the EU Social and Employment funding programme (Progress) was launched during the European Year of Equal Opportunities for All, with a 7 year budget of €743m devoted to improving understanding of and combating discrimination in the field of employment, working conditions, and social inclusion.

It has been noted that the mass media is reticent to cover let alone participate in European initiatives, even when they may be of relevance and value to the industry. Yet evidence from a 2006 Euro-barometer survey indicated that almost 35% of respondents thought that media institutions (second only to schools and universities at 43%) have an important role to play in combating discrimination. At the same time, the hard work of educational establishments and civil society groups on diversity issues can be wrecked at a stroke by sensational headlines and media stereotyping.

One of the projects funded through Progress is a mapping exercise of diversity initiatives by, with and for media organizations covering 27 EU member state and three European Free Trade Agreement (EFTA). It is being conducted by a partnership of media organisations – Internews Europe, The Media Diversity Institute and the International Federation of Journalists – in the hope that this will overcome the resistance of mass media to external pressures.

The mapping exercise - across all radio TV, print and online media in 27 Member States and 3 EFTA countries - has identified 150 good practice initiatives which challenge all forms of discrimination and promote diversity with the potential for replication. Thirty of these have been selected for showcasing at a validation seminar in Prague (5-6 February 2009). A full report of the project will be published in Spring 2009, and a website is being developed <www.media4diversity.eu> as a focal point for information sharing and debate between media professionals and 'diversity communities'.

Outlining the IFJ's long-standing concern about diversity issues. **Marc Gruber** suggested that the inevitable predominance of media and non-governmental organisations from north-western Europe among the 150 initiatives identified by the Media and Diversity project could be terraced to the tradition of public service broadcasting and statutory interventions to limit discrimination. There remain huge disparities between member states and across the expanded European Union over diversity issues.

To effect change within the media, he stressed the importance of providing practical examples of schemes that work in terms of the media's function. Diversity must start in the newsroom; without it the media will continue to rely upon stereotypes and society will continue to suffer the consequences.

Codes of conduct can be helpful if they offer practical guidance that takes into account the disciplines of media production, and emphasise the importance of:

- respect for 'the truth'; .
- independence of vested (political/commercial) interests);
- protection of sources

- ethical awareness of professional and social responsibilities.

Diversity awareness training may be needed for media professionals, but it is perhaps more important to engage with editors and senior executives. They must be persuaded of the value of a wider range of sources (for stories and expertise) and staff in order to provide better services to wider audiences.

Anti-discrimination legislation and European Directives may encourage public service broadcasters to begin to address their responsibilities to engage with and reflect social diversity more fully in their output and among their staff. Their example will be a welcome indication of inclusion to all sectors of society, and encourage recognition that freedom of expression is a right shared by everyone.

The rhetoric is in place but codes and guidelines are not enough – they need to be put into practice. If it is inimical to the notion of freedom of the press that codified good practice about the right to freedom of expression by minorities should be enforced by law, how are minorities to achieve equal access to the media?

The evidence from across the European Union suggests that there is along way to go before mainstream media acknowledges that it must become proactive in the provision of opportunities for freedom of expression and employment to the full diversity of society in contemporary Europe. And that must include addressing multiple forms of discrimination – for example the likelihood that if Roma are included the men are more likely to be visible than women, and able-bodied women more so than women with disabilities – and the broader problem that working class communities are equally under-represented in the media.

While media companies claim that ‘good ideas and good personalities’ are the way into the media, access to (jobs in) the media depends upon access to (the funds for) education and skills training and then to employment. And progress within the media is made more difficult by the likelihood that minorities enter on short-term and poorly paid contracts.

Ownership and control of the media is limited to very particular elites across Europe, and this concentration of ownership with its emphasis on profitability can have political implications which may contribute to marginalization of minorities. For example, in order to reach wide audiences the media prefer to use voices that are easily understood by the largest range of people – and this can exclude minorities.

The absence of minorities from the mainstream, especially when their issue are represented by (white, male) ‘experts’, also means that they lack positive role models – which can itself be a disincentive to seek to achieve.

Media practitioners have a well developed understanding of freedom of expression, and media institutions show a fierce resistance to any anything that smacks of state control or coercion from external agencies. However freedom expression belongs to everyone, and is certainly not the

exclusive property of commercial or state media. It is through mass media and new media that the citizens are able to express themselves to each other, to the institutions of the state and other power elites, and to the population as a whole.

That is why discrimination and impediments to freedom of expression need to be constantly rehearsed by and campaigned around by civil society groups, and especially organisations representing those who believe they are being excluded. By developing imaginative ways of keeping the issue in the public domain, they may not only attract the attention of the mainstream media, but also excite the interest of (elected representatives) and the academy.

Evidence-based academic studies can provide reliable objective data that may help to convince the media about its own shortcomings. It then becomes more difficult, indeed unethical, for media to resist the case for more diversity in the voice and visibility.

While there is a 'business case' for diversity – that it can be an economic generator as well as reflecting the intercultural riches of society – it is evident that change is more likely to come if under-represented minorities literally demonstrate their right to be included.

This may take a variety of forms – through media projects providing opportunities to make and broadcast media products; campaigns demanding greater access; and complaints about invisibility, stereotyping, etc; through 'champions'; through prizes for successful representation, etc.

Media companies may be reluctant to compromise their independence, they are less reluctant about using high quality products that do not stretch their budgets. Numerous media projects, developed by civil society groups sometimes in partnership with major broadcasters, have provided openings for the display of fresh programming strands and voices. Unfortunately such projects are reliant upon funding streams that dry up after a relatively short period – insufficient to guarantee the sustainability needed if they are to make a difference to the mainstream.

Change - overcoming inequities, social attitudes, ignorance and prejudice - takes time, patience, goodwill, and consistency of investment. These are the very qualities that seem to be missing in the operational framework of European (funding) institutions.

The Working Group felt that the Fundamental Rights Agency also has an important role to play as an advocate for the rights of minorities, and could make positive contribution in a variety of fields.

C. Recommendations

1. Regulation

- a. Advocate for broadcasting licensing systems that will facilitate the creation of community-based/not-for-profit media outlets run by, but not exclusively for, minority communities
- b. Advocate for a requirement that part of the social responsibility of 'public service broadcasters' should be to reflect, in their output and staffing, the cultural diversity of the society they serve.
- c. Advocate that 'public service broadcasters' should seek to ensure that an appropriate proportion of the independent productions they commission should involve as diverse a range of production talent and content as possible in relation to social demographics.

2. Training

- a. Advocate for the inclusion of 'diversity awareness training' as an essential and integral part of vocational training for all media professional (including journalists), at pre-entry and mid-career levels,
- b. Advocate for the promotion of careers in media to focus on issues of diversity, especially among school-children and in media literacy programmes.
- c. Encourage or commission training-of-trainers programmes around the promotion of the rights of minorities to be seen and heard

3. Employment

- a. Encourage or conduct a mapping exercise of diversity policies as they relate to recruitment (within the media) across member states, with a view to assembling effectiveness data, generating debate and action, and providing bench-marks against which progress might be measured.
- b. Encourage explicit diversity monitoring- covering all areas of discrimination – among (media) employers.
- c. Promote and support the development of a 'critical mass' of 'minority' media professionals - dealing with the full range of media output rather than being ghettoised to cover 'minority issues' - in the (news rooms and production studios of) mainstream media.

4. Funding

- a. Provide or encourage the establishment of bursaries to enable journalists of any background to learn more about the interests/concerns/culture of 'others'.
- b. Ensure or encourage continuity of funding for effective projects when initiating new projects on the diversity agenda. Momentum and skills transfer is often lost because EU/OSCE funding priorities change rapidly. Seek to resolve the (perceived) poor communications and co-ordination between EU Directorates on diversity issues.

5. Information Exchange

Create opportunities for intergenerational, intercultural and multidisciplinary information exchanges between media organisations and civil society groups across Europe, especially to encourage the replication of best practice.

6. Communications

Seek to promote the following messages to media organisations across Europe:

- a. That they should apply digital technologies (particularly subtitling, and multi-lingual versioning of programmes) to reach out to and include social minorities (audio & visually impaired as much as ethno-cultural minorities).
- b. That they should develop in-house codes and guidelines to ensure fair and accurate representation of the diversity in society – including advice about non-discriminatory language.
- c. That they should come together to establish an unconventional task force from within the industry to engage in a 5 year plan to make a noticeable difference in terms of diversity – from employment to visibility and representation.

CONCLUSIONS AND SELECTED RECOMMENDATIONS

The Fundamental Rights Conference highlighted many of the key issues within the thematic areas under discussion. It covered many of the key topics that concentrate the attention of society today, but it also raised awareness of issues such as the importance of data protection which some participants felt required greater scrutiny and public debate. A common thread running through the various working groups was new media and the sense that we are all still grappling with its consequences. In addition, although we had sought to encourage a focus on certain thematic areas, the interrelationship of the discussions and proposed solutions among the five working groups emerged as a strong visible marker. There are no boundaries between the thematic areas and in many cases they coalesce under the rubric of interdependence.

The key challenge for FRA was to sift through the variety of recommendations from the working groups to focus on those recommendations that FRA itself can take on and those to which it can contribute effectively by working with partners and stakeholders. The issue of the interrelationship of freedoms and rights is one that will continue to draw debate and differing views, the question of interpreting the “boundaries” of freedom of expression cannot be answered definitely with regard to all the issues raised at the conference, and in fact, nor should it – “boundaries” change over time and unforeseen developments such as the richness and impact of new media redefine “boundaries” and change the paradigm of the debate. The debate on defamation, on freedom of religion, on hate discourse to name a few will therefore continue with its lines of engagement periodically shifting. What has emerged is a growing ambivalence in some quarters to the impact of new media, the democratisation of expertise and the blurring of some distinctions between information and knowledge. The conference could not answer these questions directly – what is apparent is that the rules of the game are changing, traditional media can no longer be gate keepers of information and knowledge and social media in some shape or form is here to stay and is developing rapidly. It may well be that rather than concentrating on new media and trying to “control” it we should be ensuring that those who access the web are educated and informed enough to make reasoned and evidence based choices about the wealth of information provided to them.

The Agency can play a major role in partnership with key stakeholders in contributing to changing attitudes to what can be considered “offensive” discourse or raising awareness for example of the impact of racist, xenophobic and homophobic expressions in all media. A common element from the some of the working groups is an emphasis on education and training, whether this is on general human rights education and training to specific educational and training programmes targeting particular sectors of society. The Agency together with the European Broadcasting Union has initiated a training programme on diversity aimed at media practitioners and this can be further developed from the recommendations outlined below. There is a call for studies on justice related issues and the Agency can move gradually to placing justice more centrally in its work programme as it is very much a transversal issue. Studies should aim to support policy development, highlight examples of good and effective practice and assist FRA’s stakeholders in their action. The area of communication and networking is seen as supporting many of the actions and the Agency is called upon to make use of the new technologies to bring targeted stakeholders and groups together.

A selection of the recommendations is outlined below, for more detail the full list is provided under each working group report. What we have tried to do, as indicated at the beginning of this chapter, is to adopt a pragmatic and realistic approach and focus FRA's attention on what is do-able while drawing attention to the aspirational recommendations.

EDUCATION AND TRAINING

- FRA should develop an ongoing programme of support encompassing education and training, awareness raising and capacity building for marginal and vulnerable groups and NGO's and other organisations that support them with regard to fundamental rights;
- FRA should develop a programme of fundamental rights education for children and young people across member states of the European Union with particular emphasis on the situation of vulnerable and marginalised groups resident within the member state as well as the wider European Union;
- FRA should develop a programme of education and training, awareness raising, etc targeted at those within the media including journalists, internet providers, and those involved in current or new and emerging areas of communication with regard to fundamental rights;
- FRA should develop a programmes that seeks to build partnerships between legislators, civil society, media organisations and those involved in new and emerging communication technology in order to create synergy and understanding of fundamental rights and the responsibilities that go with those rights;
- FRA should encourage or commission training-of-trainers programmes around the promotion of the rights of minorities to be seen and heard; and
- FRA in co-operation with the Council of Europe should produce a handbook for journalists and others in the media and communications industries outlining current and best practice in all the member states within both the European Union and the wider Council of Europe area and including a synopsis of current use and future trends of all forms of media and communication technology in regard to fundamental rights.

RESEARCH

- FRA should undertake research exploring possibilities of recommending a EU Regulation on compensation. Such study should be all encompassing and should look at legal aid and sociological study on what impact defamation cases have on freedom of expression;

- FRA should undertake a comparative study – approximation among EU countries – use of the internet and use of freedom of expression;
- FRA should undertake research on access to justice – for organizations that can represent victims of violations of freedom of expression;
- FRA should undertake research on measures taken against terrorism/security measures, and the impact on fundamental rights;
- FRA should undertake research on the application of the Data Protection Directive in the EU in the context of promoting and protecting fundamental rights;
- FRA should undertake research on internet content and dissemination technologies and their use for violating fundamental rights;
- FRA should undertake research on the application of digital technologies (particularly subtitling, and multi-lingual versioning of programmes) to reach out to and include social minorities (audio & visually impaired as much as ethno-cultural minorities);
- FRA should undertake research on the effectiveness of self-regulation, in-house codes of conduct in traditional and new media on the subjects of racism, xenophobia and homophobia and the representation of minorities;
- FRA should undertake comparative research on access to the media for minorities and majority populations. This would include the identification and gathering of ‘best’ and ‘worst’ examples of access to the media and communication; and
- FRA should conduct a mapping exercise of diversity policies as they relate to recruitment (within the media) across member states, with a view to assembling effectiveness data, generating debate and action, and providing bench-marks against which progress might be measured.

NETWORKING

- FRA should organize seminars and events to create opportunities for intergenerational, intercultural and multidisciplinary information exchanges between media organisations and civil society groups across Europe, especially to encourage the replication of best practice;
- FRA should establish a working group of those involved in internet governance issues and new media to examine issues such as content and legislation at the national and European level;

- FRA should establish an unconventional task force from within the media industry to engage in a 5 year plan to make a noticeable difference in terms of diversity – from employment to visibility and representation; and
- FRA should bring together governments, business and civil society to develop public interest in information exchange and raise awareness of opportunities for new technology in the human rights field.

COMMUNICATION AND AWARENESS-RAISING

- FRA should launch a campaign with media organizations to develop in-house codes and guidelines to ensure fair and accurate representation of the diversity in society – including advice about non-discriminatory language.
- FRA should launch an awareness raising activity on educating youth on fundamental rights and issues related to internet content;
- FRA should advocate for broadcasting licensing systems that will facilitate the creation of community-based/not-for-profit media outlets run by, but not exclusively for, minority communities
- FRA should advocate for a requirement that part of the social responsibility of ‘public service broadcasters’ should be to reflect, in their output and staffing, the cultural diversity of the society they serve.
- FRA should advocate that ‘public service broadcasters’ should seek to ensure that an appropriate proportion of the independent productions they commission should involve as diverse a range of production talent and content as possible in relation to social demographics.
- FRA should advocate for the inclusion of ‘diversity awareness training’ as an essential and integral part of vocational training for all media professional (including journalists), at pre-entry and mid-career levels;
- FRA should advocate that ‘public service broadcasters’ should seek to ensure that an appropriate proportion of the independent productions they commission should involve as diverse a range of production talent and content as possible in relation to social demographics; and
- FRA should advocate for the promotion of careers in media to focus on issues of diversity, especially among school-children and in media literacy programmes.

FOLLOW UP - RELATED FRA ACTIVITIES AND PROJECTS IN 2009

The key element of FRA's follow up is to introduce the recommendations where appropriate and relevant into its work programme 2010. This will take the form of research, communication and awareness raising and networking and educational projects and activities. In addition, where possible it will use the information to inform the Agency's current and ongoing work. Many of the participants are already familiar to FRA and will be called upon to engage with the Agency in research, communication, networking and educational work. The Agency views the FRC as widening its pool of expertise and its potential community of practice.

With regard to current and ongoing work in the next chapter the Agency has identified projects and activities which are related to the FRC outcomes in a variety of ways.

The Conference examined freedom of expression under five thematic working groups all of which have direct or indirect bearing on the Agency's work. Some of the issues can be described as emerging issues for the Agency and will require more development, while others can be incorporated into the current and ongoing work or already form a component of the research, communication, networking and educational work.

The Agency participates in a variety of activities that have freedom of expression as a component particularly in its cooperation with the Council of Europe such as freedom of expression and democracy issues. The Agency undertakes a variety of projects and activities which address freedom of expression in the context of racism, xenophobia, anti-Semitism and islamophobia, it looks at ethnic minority representation in and access to the media and education and training on diversity issues for media professional. In 2009, the Agency is undertaking projects and activities in all of these areas and plans in the future to address some of the issues related to new media and internet.

Below are some examples of the Agency's ongoing work related to freedom of expression:

- ***“Comparative assessment of data protection measures and relevant institutions”***

The Agency will study the impact of data protection measures, the relevant legislative instruments and the work of the institutions active in this area, based on judicial statistical data and case law. Because of the broad thematic scope, the Agency will ensure that its work does not duplicate that of other actors in the field, such as the national data protection authorities, the European Commission, Art 29 Committee and the European Data Protection Supervisor (EDPS), and will liaise with them as appropriate to ensure that such is the case.

- ***“Comparative report on the situation concerning homophobia and discrimination on grounds of sexual orientation in the EU”***

In June 2007 the European Parliament asked the Agency to develop a comprehensive report on the situation concerning homophobia and discrimination on grounds of sexual orientation covering all EU Member States. The aim of this report is to assist the European Parliament when discussing the need for a Directive covering all grounds of discrimination listed in Article 13 of the EC Treaty for all sectors referred to in the Racial Equality Directive 2000/43/EC, namely, education, social security, healthcare, and access to goods and services. In addition this report will also bring a valuable contribution to the impact assessment carried out by the European Commission, with the aim of exploring the possibility of tabling a draft directive which would include these further areas. The project will entail the collection of official and unofficial data at national level in all EU Member States and comparative analysis at European level covering previous years until the present, as necessary to allow a good understanding of the issues involved. The project will also examine comparatively the existing relevant legal instruments, judicial data and case law at both national and EU level, which will be published autonomously. The final report will bring together the available data and information in a policy oriented document that will also highlight positive measures and initiatives both by public authorities and civil society. The project is ongoing and is expected to be completed in 2008.

- ***“The situation regarding racism in sport in the European Union and positive initiatives to combat it.”***

The project aims to collect the available data and information concerning the phenomenon of racism in and around sport events and activities, as well as good practices combating it across the European Union. The material collected will be analysed comparatively with a view to develop a comprehensive report, relevant educational and awareness-raising material and dissemination activities (e.g. conference). In order to avoid duplication and ensure added value the project will engage actively with selected key stakeholders at EU and national level and especially with the Council of Europe. In particular, the project will take into account ECRI's General Policy Recommendation no. 12 on combating racism and racial discrimination in the field of sport, the Council of Europe Recommendation (2001)6 of the Committee of Ministers to member states “On the prevention of racism, xenophobia and racial intolerance in sport” and the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches CETS No.120.

- ***“Good Practice Handbook for preventing and combating ethnic profiling”***

In 2008 the FRA conducted research on the theme of ethnic profiling with respect to different areas of law enforcement, immigration, customs and border control. The research was based on primary and secondary data collection. Interviews took place with key stakeholders – ministries, law enforcement agencies etc. – on current practices and identification of any ‘good practices’ in the area of recognition of and appropriate responses to profiling. The Good Practices Handbook, which will be published in 2009, aims at supporting officials, as well as others active in this field, to

prevent and actively combat ethnic profiling. It will include examples of good practices from a range of sources, and suggest models for effective intervention to recognise identify and prevent illegitimate profiling practices.

- ***“Pilot Media Project”***

The pilot media project constitutes another effort to improve data comparability. Based on a 2006/2007 feasibility study and consultation with experts the Agency completed this project in 2008. The pilot analysed how migrants and minorities are represented in a sample of print media in selected Member States and examined how issues of diversity are treated with a view to develop innovative methodologies and training material for journalists.

- ***“Media Diversity Toolkit”***

The Agency is now in the process of establishing itself as an important actor in the media diversity field. The relative success of the Media Diversity toolkit and the first training programme for journalists in association with the European Broadcasting Union (EBU) has further consolidated the position of the Agency in the field and as a partner of the EBU. The training programme continues to be developed and the Agency is now reaching out to a wider range of media organisations, which is particularly important as new media begins to play a more important role in general. This activity will ensure that the Agency continues to develop the toolkit and rolls it out in 2009.

- ***Training for EU Correspondents***

The Agency will organise a training programme together with a journalist training centre on training journalists on fundamental rights issues.

ANNEXES

OPENING SPEECHES