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Weighing Words: On the Governmentality of Free Speech

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Abstract

This article takes issue with those accounts of the right to freedom of expression that find a zero-sum game between power and freedom. It argues that by marking expression as a legal problematic, the right to freedom of expression regulates the force of an expression, and by doing so governs the (expressing *qua* juridical) subjects. When the question thus turns onto the subject, the subjects are required to be 'free in specific ways' in order to exercise their freedoms in an apt manner. In order to argue out these points, this article analyzes the case law of the right to freedom of expression from the theoretical lens of governmentality. The discussion begins by a reading of a set of cases brought before European Court of Human Rights: *Sürek v. Turkey*. Later, the dynamics of power and subjectivity are commented upon, by discussing the ways through which expressions merit a legally protected status. Finally, the article focuses on the complex interdependencies the right to freedom of expression form between an expressing subject and its juridical capacities on one hand, and between expressivity and the guarantor of this right on the other.

Keywords

European human rights law, Foucault, governmentality, subjectivity, the right to freedom of expression

> Insofar as one wants to be literally correct, it would be more appropriate to say that language speaks us than that we speak it.
>
> —Hans-Georg Gadamer, *Truth and Method*

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Introduction

Customarily, one is told that the right to freedom of expression is connected solely to the domain of expression. When there is a legal decision against an exercise of this right, it is only because that the subject has misused its right. Thus, between power and free speech, there is always a zero-sum game. In this article, the issue of freedom of expression is approached from another perspective. The perspective offered here takes language as one that partakes in the constitution of the subjects. The legal decision for or against the exercise of the right of freedom of expression, therefore, turns onto the question of the subject. I argue that by marking expressivity as a legal problematic, the right to freedom of expression both regulates the force of an expression and governs the subjects. It means that when the question turns onto the subject, that subject is then required to be 'free in specific ways' (Rose, 1989; Rose et al., 2006: 89) in order to exercise its freedoms in an apt manner.

In order to argue out these points, I analyze the case law of the right to freedom of expression. The analysis of the case law contends that the right to freedom of expression relies on certain power formulations in order to be constituted – and then to function – as such. Further, the right to freedom of expression is analyzed as being one that appropriates connected discourses (e.g. those that differentiate the artistic expression from the political) and institutional techniques (e.g. by requiring that the advertisement policies or patent laws be in line with the legal interpretation of this right) onto its domain. This analysis is then brought to bear onto the main thesis of this article: as expressivity becomes an object of government, the right to freedom of expression participates in the regulation of it in order to both optimize and regulate freedom.

In order to support this contention, I rely on the theoretical lens of 'governmentality'. Foucault used this concept to accentuate the importance of a government of subjects oriented to a calculated administration of lives, in contrast to the traditional problem of political sovereignty that stood, as it were, in a relation of 'transcendence' to its territory and inhabitants (Foucault, 2007: 136–142). With its focus on 'the broad sense of techniques and procedures for directing human behavior' (Foucault, 1997: 82), a governmentality perspective is useful in analyzing the issue of free speech, because it emphasizes the specific ways of investing into freedom of the subjects within a social body that enables an apt of exercise of freedom on behalf of those subjects to take place. This perspective then distances itself from those theoretical approaches that by opposing power and freedom, expression and being, and sovereign and autonomy are unable to account for a governmental exercise of power. With this perspective, then, it is seen *how* the right to freedom of expression delineates the broad contours of legally protectable as far as expression is concerned, and *how* by doing so it orients the domain of government to the problem of expression. This dynamic reflexively targets expressivity as a target of power by requiring that it be governed through an ensemble of 'institutions, procedures, analyses and reflections, calculations, and tactics' (Foucault, 1997: 107). If it can be argued out so, then this point is ontologically important. It means not only that power governs expressivity and governs through expressivity, but also that power affects the subjects because of the decisive role of language in their constitution. In sum, with this perspective, I flesh out the manner in which freedom and power intersect in the discourse of

rights to produce and manage subjects through freedom (Agamben, 2009: 11; Brown, 1995: 118; Esposito, 2008: 37–38; Foucault, 1983: 221; Patton, 1998: 64–77).

By looking at the right to freedom of expression as being a 'government of expressivity', this article attempts to fill an important lacuna in the governmentality studies literature (e.g. Ewald, 1990; Golder, 2013; Hunt and Wickham, 1994). If the focus of this literature has been on the tactics of government that manage 'free subjects, and only insofar as they are free' (Foucault, 1983: 221), then an absence of works studying the governmental techniques with which the issue of free speech is enmeshed seems all the more surprising. This point is academically and politically relevant because in legal and political theory the guarantee of the right to freedom of expression is presented as a guarantee of political freedom *tout court* (Dworkin, 2009: v–ix; Norris, 2008: 186; Waldron, 2012: 173). However, given the expanse of free speech, I only focus on the jurisprudence of the right to freedom of expression in the European human rights law. Apart from convenience, concentrating on European human rights law is useful because a number of commentators have noted its comparative political and legal effectiveness (e.g. Therborn, 2001: 83). Therefore, this empirical focus can help one ascertain the *regularities* that human rights require in order to operate, and which they (re)produce in order to function within a historical continuum (cf. Foucault, 1972: 229). Further, this focus steers away our attention from the violation of human rights in the 'global peripheries' with their 'outbursts of ethnic conflicts and slaughters, religious fundamentalisms, or racial and xenophobic movements' (Rancière, 2004: 297) in order to see the way human rights function at 'the center'.

The argument in this article proceeds in three parts. The first part introduces the discussion by reading a set of cases brought before the European Court of Human Rights (ECtHR): *Sürek v. Turkey*. The theoretical discussion of this case law works as a prism through which the broader issues of free speech and governmentality are explored in the next two sections. The second part comments on the dynamics of power and subjectivity in free speech. This is done by analyzing the techniques through which a legally protected status is granted to an expression. The third part then focuses on the role of the sovereign guaranteeing the right to freedom of expression. Predictably, the discussion in this article draws largely on the case law that has been selected for our reading.[1] With this major limitation, the aim of the article nevertheless is to draw a rough outline of a 'specific historical paradigm' (to draw on a phrase from Agamben) (Agamben and Ulrich, 2004: 609–610) of the right to freedom of expression by looking at it 'when it is doing its work' (Wittgenstein, 2009: cxxxv).

On the Dynamics of Subjectivities: Reading *Sürek v. Turkey*

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and

> are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. (European Convention on Human Rights (ECHR) Article 10: Right to Freedom of Expression)

In order to look at the way free speech functions, I begin by reading a specific case law: *Sürek v. Turkey*. What is of interest in this set of cases is that it deals with a single applicant. In two cases, his request was granted (*No. 1* and *No. 3*), while in the other two it was not (*No. 2* and *No. 4*). What is crucial to note here is the way expression merges with the subject who expresses, and the way the addressee relates with the world that those expressions produce. This set of cases involved a major shareholder in a Turkish limited liability company that owned an Istanbul-based weekly review *Haberde Yorumda Gerçek* ('The Truth of News and Comments'). All the four applications submitted by the applicant dealt with the actions of Turkish government against the review's handling of the Kurdish situation in southeast Turkey. ECtHR issued its judgment on July 8, 1999. In this section, I analyze three of the applications: *No. 1*, *No. 2*, and *No. 4*.

Sürek v. Turkey (No. 1)

On August 30, 1992, the review's issue no. 23 published two letters by its readers: *Silahlar Özgürlüğü Engelleyemez* ('Weapons cannot win against freedom') and *Suç Bizim* ('It is our fault'). The first letter commented on the 'war of national liberation of Kurdistan' against the 'fascist Turkish army' ready to commit a 'massacre' (para. 11). The second letter advocated the idea that 'if they won't give, then we'll take by force' (para. 11). In its judgment dated April 12, 1994, the Istanbul National Security Court (*İstanbul Devlet Güvenlik Mahkemesi*) sentenced the applicant to a fine as per the Prevention of Terrorism Act 1991 for the 'propaganda aimed at the destruction of the territorial integrity of the Turkish State' and for publishing racist speech (paras 15 and 18). The applicant appealed to ECtHR alleging violation of ECHR Article 6 on fair trial and ECHR Article 10 on freedom of expression. On February 20, 1995, the then-in-place European Commission of Human Rights (ECmHR) declared the application admissible.

Before ECtHR, the applicant claimed that the antiterror law rather than safeguarding his right to freedom of expression was itself an interference with it. This is because the said law did two things. First, it exempted itself from a critical use of free speech in the name of emergency. Second, it drew out a vague linguistic domain into which an expression cannot enter lest it through that very performative 'threaten the indivisible unity of the nation' (paras 45–47). Given the reach of an international court (ECtHR) and the specific procedure adopted by the legislating nation-state (Turkey), the measure was nevertheless deemed as being 'prescribed by law' by the Court. The question then turned onto the way expression operated in the light of such legalities. It was argued that the published letters could not be seen as 'an encouragement to violence' (para. 49). However, it was argued by the government that the words used in the letters were themselves 'threatening' (para. 50). This included, for instance, the label 'national liberation

struggle' instead of 'terrorist activities', which by implication praised crime and jeopardized security, and the proper noun 'Kurdistan' instead of the geographical label 'south-eastern Turkey' that endangered the territorial integrity of the Turkish state. When the violence of the words thus merged with the violent situation outside, violence was only fuelled further. Consequently, there was a 'legitimate aim' in screening the words that may deteriorate the situation further (para. 52). Was this interference necessary in a democratic society, as ECHR Article 10(2) requires? In order to identify this, the expression is to be read both backward into the mouth of addressee 'with particular regards to the words used' (para. 62) and then forward onto its effects on the social body 'with regards to the context in which they were published' (para. 62).[2] This then measures the subject of the right to freedom of expression vis-à-vis its expressions. Through this, the world that an expression conjures up is analyzed. This allows expressivity to surface as a target. Since expressivity is an enabling condition that stands in between the subject and its expressions on one hand and between expressions and the corresponding world on the other, regulating it sustains a world in which the things are placed in their proper social positions.

The analysis of expression in this case proceeds in two parts. First, it is seen that the 'labels such as the fascist Turkish army'', ''the Türkiye Cumhuriyeti murder gang'' and ''the hired killers of imperialism'' alongside references to ''massacres'', ''brutalities'' and ''slaughter''' stigmatized 'the other side' (para. 62). This entailed that the expression in question 'stirred up base emotions' (para. 62). Second, because the events since 1985 in the region had meant the imposition of an emergency rule in much of the southeast, the expression in question 'communicated to the reader that recourse to violence is a necessary and justified measure of self-defense in the face of the aggressor' (para. 62). Further, by naming the persons, the second letter also made those figures named vulnerable to 'the possible risk of physical violence' (para. 62). This point bears out another rationale: through the aforementioned performative, certain beings (i.e. the military officers) are conjured up as already vulnerable. It presumes that there are individuals existing within a society with violent tendencies desirous of directing such energies against those personalities. Although such segments do not account for 'the public' in general, these nevertheless exist within it as a component. It means that when the public is addressed, there is a need to keep such an aspect of the public in mind. Now, this means that the addressee who expresses is also to be measured as per the significations and the social effects of its expressions. It is only when each is brought to bear onto and then filtered through the instruments of human rights that it can be determined whether what has been expressed merits the status of free speech. Given that the expression in question could be seen as 'hate speech' and as 'glorifying violence' (para. 62), there was therefore a 'pressing social need' in penalizing it. Hence, in *No. 1*, the suppression of the applicant's speech did not constitute a violation of its right to freedom of expression.

There is a curious dynamic at work here constituting the subject of the right to freedom of expression in its peculiarity. The performative is to relate to the various flows of subjectivity for the constitution of the subject to take place. Seen from the domestic law, there is a subject who has to abide by the national law in order to regulate its conduct. Similarly, as per ECHR Article 6, there is juridical subject whose speech can only be put to test in a 'fair trial'. Seen from the angle of the then prevailing sociopolitical crisis,

there was a citizen of the Turkish Republic who needed to be careful in not reinforcing the antistate discourse at the moment when the State had placed an emergency regime in place. Seen from ECHR Article 1 Protocol 1, there was an owner of an Istanbul-based review media who had the right to the 'peaceful enjoyment of his possessions'. Alternately, seen from the communications' media law, there was an owner of a media who was subjected 'vicariously to the duties and responsibilities' (para. 63). This owner had to ensure that the content that its review publishes remained mindful of the public to whom it was being addressed, by 'not overstep[ping] the bounds' (para. 59). This simultaneously entails that there was already the public that precedes the address, even if later affected by it, which has the right to be imparted information and ideas in the most suitable manner (para. 59).[3]

For the subject to function as a *juridical* subject holding the *human* right to freedom of expression, it has to navigate this tortuous linguistic terrain interlocked between subjectivity and expressivity. Therefore, there is a speech that has to respect, even when it may question, the law that protects it. There is speech that is to be ruled by law that reads it. There is a speech that has to appreciate the delicacy of the emergency situation by circulating in an apt manner. There is a speech that takes place through the medium that the applicant owns as its private property. Because of this owning capacity, this speech may not be constricted unduly. On the other hand, there is a media platform that provides the speech with an outlet, and that must therefore ensure that the speech it mediates functions as per the communication rules and standards of the media. There is a speech that does not have to name the specific persons performing the specific acts, lest it may make them vulnerable to the possible acts of violence. There is a speech, which is already being constrained by the entities it has to address, even before the address, lest it undoes those very subjects. In this sense, different speaking voices cohere to constitute a subject in *No. 1*, as the one who by providing a platform to an expression overstepped the legal bounds, fueled violence in an already violent situation, did not fulfill the public's right to be informed appropriately, did not use its property as 'provided for by law and by the general provisions of international law' as ECHR Article 1 Protocol 1 requires, produced individuals as potential targets of violence by naming them, and one whose simple force of signature fanned violent divisions.

Sürek v. Turkey (No. 2)

On April 26, 1992, the review contained a news report providing information given at a press conference by a delegation on its visit to Şırnak village. The news report included an article detailing that the Şırnak police chief had been given an order to open fire on people. Further, it narrated a dialogue between the delegation and the Gendarme Commander, where the latter was noted to threaten the former by saying 'Your blood would not quench my thirst' (para. 10). In a judgment dated May 29, 1992, the Istanbul National Security Court sentenced the applicant to a fine as per section 6 Prevention of Terrorism Act 1991 for 'containing an allegation' and 'rendering officials mandated to fight terrorism target of terrorist attacks' (paras 11 and 13). The applicant appealed to ECtHR alleging an unjustified interference in his freedom of expression as per ECHR Article 10. On September 2, 1996, ECmHR declared the application admissible.

The applicant claimed that section 6 of the 1991 Antiterror Act forbade the disclosure of the identity of officials fighting terrorism. The effect this censor had was one where law itself opened up a protective space to those officials who are charged with executing it to violate law with impunity. Therefore, the applicant's exercise of freedom of expression in *No. 2* referred back to the rule of law, in a substantive sense, even if it overstepped the legal bounds as established by the 1991 Act. However, instead of reading the 'quality' of law in case, the Court acknowledged that the interference can be taken as being prescribed by law (para. 25), even when it could be seen that the legal procedure as per ECHR Article 6 relating to a fair trial may not have been adhered to (para. 54). Further, by naming individuals, the applicant had violated the 'right of the others' that in their specific capacity should not have been named or identified (para. 29). Similarly, by offering a narration on the contested matters, the interference in the applicant's freedom of expression can be said to have been taken in the 'interests of national security and territorial integrity which are legitimate aims under ECHR Article 10(2)' (para. 29).

Was the interference necessary in a democratic society, as ECHR Article 10(2) states? The applicant stated that the impugned data had formed an 'objective' news report from a press conference (para. 30). This meant that the publication in question only circulated a speech that had already been made public in accordance with the journalistic ethics and norms. Therefore, the speech was out there: repeated by other journalistic avenues and hence already existing as 'copyable' (para. 30). Similarly, the published words were not praiseful of terrorism (para. 30). In order to identify whether the interference was necessary in a democratic society and met a pressing social need, both the world narrated by the language and the world sustaining the language are analyzed. First, the act of tallying statements from the Governor and Gendarme Commander meant that 'the officers were now exposed to strong public contempt' (para. 37). This also entailed that by their documented statements, the officers themselves displayed violent tendencies that possibly went beyond the pale of law. Second, by naming them, the use of language remained insensitive to the 'situation of conflict and tension' (para. 36). Therefore, the report only aggravated the regional situation (para. 37). In this sense, the interference may be necessary in a democratic society.

However, did it meet a pressing social need? First, the report noted information from a press conference (para. 40). This meant that if the expression in question and the disclosure of information were incriminatory, then charges should have been brought by the government against everyone who were copying the statements: the press conference delegates, other journalists reporting it, the media outlets publishing it, and the webpages circulating it. Since 'other newspapers were not prosecuted' (para. 40), the applicant had only been singled out undemocratically. Consequently, the speech had created a sociolinguistic milieu in which it was being circulated. This meant that though law can make a specific expression accountable, the milieu itself (i.e. primarily the disclosure of officials' identity) could not be undone. Hence, the 'potential damage had already been done' (para. 40). On the other hand, the imperative requiring that the identity of the officers should not be disclosed also clashed with the duty of press to open matters of public concern (para. 41). This again meant that the said expression had to be tailored in a specific manner with respect to the public, to inform the public of the concerns that deal with it in order to make those matters discussable, while holding back those aspects that could

make the public direct its undesirable capacities on unbefitting subjects. The potency of free speech therefore caters to the potential violations of rights, which may possibly occur, while bringing such considerations preemptively onto the legal plane. Because of a certain friction (the rights of the press contra the rights of others, the right of public to be informed contra its right to be shielded off from exposure to violence, and the right of disclosure contra the right of secrecy), the interference was deemed disproportionate. Hence, in *No. 2*, there was a violation of the applicant's right to freedom of expression.

Let us reconstruct the dynamics within which the performative operates to constitute the subject in *No. 2*. Seen from the domestic law, there is a subject who seeks to reinforce law even when transgressing it in order to inform the sovereign of those who overstep law in the name of law. Alternately, there was citizen of a nation-state who had to respect the conditions of emergency imposed by the state. On the other hand, there was a legal subject placed into the national law, whose special antiterror case had to take place in a special court of law. From the perspective of ECHR Article 6, there is a holder of rights whose expression can only be analyzed by an independent and fair tribunal. Seen from the angle of the prevailing situation, there was someone whose reporting created certain officials as potential targets of terrorism by naming them. Seen from the perspective of the press, there was a media platform that only relayed information given at a press conference. Alternately, the subject had to address the public in the manner so that the information and the ideas are conveyed to strengthen pluralism without leading the public into the corners of violence. Viewed from Article 10(1), there is a subject having an expansive freedom of expression. Viewed from Article 10(2), there is a subject whose expression has to respect the rights of the other subjects (para. 29), among others.

For the free speech to function – and for its subject to be sustained – it has to navigate these flows. There is a speech that even when it may question law seeks to uphold the rule of law. There is a speech that has to be taciturn in view of the 'formalities, conditions, or restrictions' as per ECHR Article 10(2). There is a speech that has to take place in a manner that it can then vindicate itself and its subject before an independent tribunal. There is a speech that has to inform without an 'explicit' disclosure (para. 32). There is a speech that has to function as per the professional journalistic standards. There is a speech that repeats in a careful manner the statements already in circulation. Therefore, the subject in *No. 2* was one who by providing a platform to speech that did not praise terrorism, may have overstepped legal bounds, but only to show that law was also being trampled upon, and that named the officials, but only against a background of a spread of such information. Therefore, even if the performative in question interpellated the reported subjects as both 'acting unlawfully' and as the 'targets for terrorism', it had the utility of (in)forming the public and adding a matter of importance into the overall economy of speech.

Sürek v. Turkey (No. 4)

On March 13, 1993, the review's issue no. 51 published a news commentary '*Kewa* and *Dehak* Once Again'.[4] This article opined that the legendary battle between *Kewa* and

Dehak would be rekindled in the wake of upcoming *Noruz* (Spring Festival, New Year) celebrations. This was an allusion to an increase in the tension between the government and the rebel factions in southeast Turkey. In the same issue, an interview was also published of a representative of a banned political wing of the *Partiya Karkerên Kurdistan* (PKK), which defined the Republic of Turkey as 'the real terrorist' (para. 13). In a judgment dated September 27, 1993, the Istanbul National Security Court sentenced the applicant to a fine as per sections 6 and 8 of the Prevention of Terrorism Act 1991, after having earlier seized the editions of the review on March 14, 1993. These measures were taken because the expression disseminated a 'propaganda against the indivisibility of State' (para. 12). In its reasoning, the Istanbul court held the applicant accountable for the incriminatory words used: section of Turkish population as 'Kurds' and internal terrorist insurgency as an 'external war' (para. 18). The applicant appealed to ECtHR alleging interference with his right to freedom of expression. On September 2, 1995, ECmHR declared the application admissible.

Neither the lawfulness of interference (paras 42–45) nor its pursuance of legitimate aims (paras 46–49) was contested. The question therefore turned onto the question whether the interference was necessary in a democratic society or met a pressing social need. The applicant claimed that he provided only a platform to a speech but this did not mean endorsement of its content on his behalf. Similarly, although the news commentary was based upon prior editorial selection and review, freedom of expression nevertheless also extended to publishing opinions that may 'offend, shock or disturb', as ECtHR's case law explicitly states (*Handyside v. the United Kingdom*, para. 49; *Otto-Preminger Institüt v. Austria*, para. 49). Therefore, the applicant argued that the publication of speech in this case met the 'objective standards of objective journalism' (para. 50). However, the government deemed that by circulating threatening words the review disseminated harmful speech: showing Turkey as divided, PKK heroic and justified, Turkish Republic as an 'enemy' and 'terrorist state' (para. 51). Therefore, the force of glorifying words was enough to aggravate the existing difficult situation, which then meant that the situation in such a form (as a 'security threat') had been conjured up into being (para. 49). It is this reality that is constrained and regulated, when expressivity is governed.

In order to identify whether the interference was proportionate, particular focus was directed, similar to *No. 1*, at 'the content of impugned statements' and 'the context in which they were made' (para. 54). First, the use of labels 'Kurds', 'Kurdistan', 'terrorist State', and 'liberation struggle' might be seen as questioning territorial integrity of the state. However, the overall narration into which these words were inserted 'romanticized the Kurdish cause' by 'drawing on the names of legendary figures of the past' (para. 58). Because of its literary overtones, the exaggerations were rather metaphorical devices, like the use of phrase 'it is time to settle accounts' (para. 58). Because of its aesthetic undertones, the effect of expression was merely one of description of an awakening of collective sentiment. Therefore, once expression is disclosed as having an aesthetic symbolism, it merits a different consideration. Unlike the political or the commercial expression, it is not the form of aesthetic expression that is primarily the question but its effect which may, in this case, come under the rubric of 'an appeal to violence'. Precisely because the said expression bordered both

the political and the aesthetic, its violence was absorbed by the artistic and its fiction by the political. This also means that what exists in art cannot be subjected to the criterion of corresponding mechanically with what exists in fact, since what exists in art cannot be disassociated from the *way* it is made to exist in it. For the purpose of law, the artistic expression, despite the 'excess' of its significations, seldom crosses over from expression into the threshold of threatening practical action, and can therefore more readily be included into the protected domain of free speech. Similarly, in the interview published, there was 'hard-hitting criticism of Turkish authorities' (para. 58). However, through the careful use of words and the possibility of opening oneself to other nonviolent alternatives, the interview was more of a 'hardened attitude of one side to the conflict, rather than a call to violence' (para. 58). Therefore, the tone swayed between the hardened and the conciliatory. This meant that both the first speech (identified as artistic) and the second speech (identified as political and partially conciliatory) could neither be construed as emanating from the violent subjects nor utilizing a platform to promote violence (para. 58). Hence, in *No. 4*, the speech could be seen as 'free speech' and there was violation of the applicant's right to freedom of expression.

Again, there are various flows of subjectivity that work upon the performative to determine one as a specific subject. Seen from the domestic law, there is a subject who portrays antiterror activities in positive tone and publishes interviews of a banned organization. Then, there is a subject living in a democratic society where it is required to publish unsavory opinions in order to reflect and sustain pluralism. Seen from Article 10(1), there is a subject who through his its speech can exercise self-fulfillment. Seen from Article 10(2), there is a subject whose speech has to respect the territorial integrity and the indivisibility of the state. Similarly, there is an owner of media platform who only provides a speech with an outlet. However, in providing it with an outlet, the subject is also seen as responsible for it. Therefore, the speech only becomes free in virtue of these flows. There is a speech that may portray antiterror activities in a certain tone, but because of its artistic underpinnings it cannot be seen to incite violence. With the same logic, there is an aesthetic speech that may produce a certain unsavory effect on those that it criticizes, but this does not automatically entail that it may incite others to explicit violence as well. There is a political speech that tends to question the necessities of the state and the existing democratic society, but whose underlying meanings tend to subliminal because of its artistic undertones. Therefore, the subject in *No. 4* was the one who provided a platform to a speech that romanticized, informed not endorsed, fulfilled duties of media by informing on divisive opinions, published a narration clothed in a literary garb, and whose language therefore did not incite others to violence. Similarly, through its performative, the subject fulfilled its roles (owner of review, press in a democratic society, and publishing useful speech) with appropriate effects (pluralism, information, and public discussion).

Having analyzed *Sürek* in some detail, the remaining discussion now expands its orbit in order to comment on the way expressivity is governed. In order to connect the question of power to the right of freedom of expression, the next two sections intervene into the broader case law of ECtHR, while largely remaining indebted to the reading of *Sürek*.

Powers of Expressivity: The Signatory, Signified, and the Signature

> As once, he could have evoked the foreign spirit simply by modifying a few terms; now he is himself evoked by a simple change in the play of words. (Maurice Blanchot, *The Infinite Conversation*)

In the case law of the right to freedom of expression, what is important to note is the way an expression is made to speak and the way it turns back onto its subject.[5] As expressions speak, the addressee is then governed in the light of expressions' significations. As a result, the evaluation addressing the issue of legal protection of an expression places both the signatory and its corresponding world onto 'the scales of words' (to borrow a phrase from Gadamer) (Gadamer, 2003: 398). The signatory is then placed into the flows of subjectivity in order to determine the place it and its signature occupies in the overall economy of speech, as can be noted in *Sürek*, for instance. It is therefore not that a juridical subject misuses its set of rights; the subject in its peculiarity is itself the process.[6] It is this process that equates the signatory and the juridical subject, where it is because of its juridical status that the corresponding expressions can be problematized. Then, the legal decision concerning freedom of expression does not simply tell that this specific expression cannot be protected, but more fundamentally that this specific subject position is untenable. This means that the subject whose *human* right to freedom of expression is to be guaranteed by a *sovereign* under the *rule of law* is a *juridical* subject whose expressivity turns up as a matter of *legal* interest. Not only does the power of language as exercised by the speaking humanizing subject, but also the power over the humanized subject as exercised by language, generate techniques of governing the human subject in the discourse of human rights.

The task of determining which of the specific expressions can be legally protected draws out a limit within which alone can expressions be legally protected. It leads the sovereign guaranteeing the right to freedom of expression into a connected power terrain as expressive juridical protocols get oriented to the question as to what can be expressed and which specific subjects are to be listened. Then, the legal decision to regard certain utterances as inadmissible and protect certain others entails a decision as to which category of subjects can be legally sustained. From the other side, this dynamic reflexively draws out certain limits that are utilized by the subjects themselves in order that they may speak and be listened to. This connection betrays an interest in the performative wherein speech and subject interpenetrate (Althusser, 1971: 170–175; Butler, 1997: 11). For example, the legal prohibitions on denial of the Holocaust or its various aspects thereof (e.g. *D.I. v. Germany*, *Garaudy v. France*), or ban on symbolism and rhetoric associated with National Socialism (e.g. *Kühnen v. Germany*, *Schimanek v. Austria*), work not only in limiting the proliferation of certain expressions, but more fundamentally in forestalling the (re)production of certain subjects.

Two dynamics, working in tandem, are operative here. First, a subject is formed out of singular instances as unitary and unified, who thenceforth 'exists'. Through language, what takes place is one's own 'gathering (*versammeln*) into the appropriation'

(Heidegger, 1976: 190). It entails that the subject is free both as a gatherable 'effect' and precedes itself as a specific appropriable 'free body'. Free speech in this sense certainly optimizes the domain of expression. But, it is something more as well: it opens up a field where the subjects may recreate themselves intra-subjectively. It is here that the second dynamic comes to fore. Since the multiplication of difference requires that the practices be allotted their appropriate social place, there is always a need to regulate this multiplication so that freedom can be aptly (re)produced. The jurisprudence of free speech therefore marks expressivity both as a domain of freedom that ought to be protected and as a problem that needs to be regulated. Resultantly, expression is an exercise of freedom on one hand, and an act that needs to vindicate its freedom before law when summoned on the other. When summoned, expressions express in what manner the signatory bears freedom. This may range from an expression being an exercise in 'self-fulfillment' (*Giniewski*, para. 43) to the signatory fulfilling the given 'duties and responsibilities' (as among all the convention articles Article 10(2) uniquely makes reference to).[7] In this sense, the effectiveness of the discourse of human rights does not lie in simply ensuring that its norms be executed legally, but in enabling the conditions that sustain it to be (re)produced in the social body.

Further, it must be appreciated that language is fundamentally oriented toward the others that it addresses. This is to the extent that language gives the addressed a 'certain social existence' (Butler, 1997: 2, 5; Heidegger, 1976: 192). In this sense, what is signified by an expression logically brings the addressed into consideration. At time, when the other is not present, as it is in the written forms of expression, then it has to be brought more forcefully into being as an already formed entity. Then, at such moments, expression has to be cognizant of the public that is already there with its being (say, collectiveness, uniformity, shared goods, obligations, and concerns) and interests (say, maintenance of democracy, rigorous debates, and social needs) or 'the readers' who are there with their inclinations (say, violent and literary). Similarly, the content of the visual media, because it relies on a medium that has an immediate and powerful effect, is more stringently measured as per its sensitivity to its 'viewers' and 'audiences' having their peculiar sensibilities (cf. *Pedersen and Baadsgaard v. Denmark*, para. 79; *Murphy v. Ireland*, para. 74). It means that the forceful intervention that expressions make into the being of the addressed is to be delimited by the markers of the permissible. By determining in what manner does an expression produce effects on the social body (healthy debate and effective incitement), with what intensity and through which medium (Internet blog and public rally), and what specific expressions can then be legally allowed for (fully tolerated and merely tolerable), there takes place an approximation to the 'total [speech] situation' (Austin, 1962: 52). The overall impact may range from an expression being 'capable of furthering progress in human affairs' (*Giniewski v. France*, para. 43) to serving the 'general interests' (*Markt Intern v. Germany*, paras 32–36).[8] This rationale inscribes the legal protection of expressions as free speech onto the notions of necessity, whose changing dynamics consequently affect what is to be understood as free speech (cf. *De Becker v. Belgium*, The Facts, section 11).

Further, while reading *Sürek*, we noted that the signature both draws on and intervenes into the field of social difference, where the content of the rights that the signatory bears is always specific. In this sense, one cannot approach the right to freedom of

expression with either the grid of equality or that of inequality, since the right to freedom of expression does not require that the signatories be uniform. Built into the very fabric of free speech, there is logically hosted a regimentation of speech with its varying social significations. What is however important is that human rights not only oversee the expressions with regard to the legal rules on patents, media privileges, licensing, copyrights, advertisements, content display, and commercial secrecy, among others, but also pull those very laws and policies within its purview. The obverse of this is that such legalities are not solely enacted with due regard to the workings of the right to freedom of expression, rather it is through such installments that difference is *governed* to *produce* free speech.[9] It may be sound to object that free speech hands over everyone a formally equal right to free speech (*isegoria*), but, given the variance of speaking positions, the substantive impact of speaking freely (*parrhêsia*) remains unequal (cf. Brown 1995: 114; Marx, 1994: 9). However, the efficacy of the right to freedom of expression lies in its ability to *regulate* the produced asymmetry between the interlocutors. Now, for sure, an owner of a media outlet possesses better opportunities to exercise the right to freedom of expression than the 'ordinary' people that that media interviews. However, the right to freedom of expression subjects the former 'vicariously to the duties and responsibilities which the editorial and journalistic staff undertake in the collection and dissemination of information to the public' (*Sürek No. 1*, para. 63). Despite the graded categorizations, it does not entail that occupying a certain subject position makes everything freely sayable and legally protectable for that specific subject, and it is this capacity of governing asymmetry that optimizes freedom.

In this sense, as expressivity is targeted as an object of government, law does not have to problematize every expression. Instead, as can be seen in *Sürek*, once policies regarding media and the rules on content have been defined, and appropriate legal procedures have been fulfilled, among others, expression is to operate on its own within these constrictions. What is done here in the government of expressivity is that the very possibility of language use becomes analyzable, where at time both the addressee and the addressed exist as certain subjects, such as those in policy formulations, bureaucratic documentations, official statistical accounts, and quantitative representations, among others, at times without their presence and without their speech acts taking place. The role of law is to identify the parameters through which this overall expressive economy can be governed 'at a distance [and] in the proper way' (Foucault, 1977: 11; Foucault, 2007: 46; Rose and Miller, 1992: 173, 181).[10] There is neither the substitution nor the redundancy of law here, but interdependencies that tie it to the broader discursive practices. Law nevertheless occupies a strategic role in order to ensure that the systemic functioning remains at optimum (Foucault, 1978: 144; Rose and Valverde, 1998). It is for this reason as well that even *human* rights become concrete when there is a *political* guarantor *legally* ensuring the universal rules associated with it by backing it with a *coercive but nevertheless lawful force* (Arendt, 1973: 90–103). Now, when problem cases arise, the sovereign is to then interfere explicitly with its legal arm so that an optimum is sustained. Thus, free speech requires peculiar investments of power and legality in order to be constituted as such.[11]

Further, the reliance of free speech on specific modalities of power produces two general problem categories. When it comes to the jurisprudence of freedom of expression,

the politically relevant question is what kind of expressions may not deserve legal protection and what kind of expressions may not require it. First, there can be expressions that may certainly be free, but still remain outside the sphere of law. The mismatch between freedom and legality means that such expressions cannot qualify as a protected free speech. One can take here a video message from an effective secessionist group as an example. In this sense, freedom that may never be disclosed as a target and an object of government does not merit the definition of freedom. In the second case, there can be expressions that are disciplined and controlled, but still remain beyond the scope of law when it comes to the optimization of their circulation, such as the scientific ones for example. In the case of science, what is important to note is that it can be the use of science (functionality) that can become a part of a debate as per the right of freedom of expression, but seldom the truth (its scientificity) of the world opened up by the scientific discourse (cf. Foucault, 1991: 58). The fact that there can be truth claims, such as the scientific, that because of their veritable status do not require juridical protocols of protection points to a more complicated relation between truthfulness and free speech. When it comes to the interrelation of free speech and truthfulness, two limit categories can be discerned. First, in general cases, the jurisprudence of free speech does not require truthfulness as an essential precondition in order to protect an expression as free speech, since requiring such a fulfilment in the case of 'value judgments' infringes 'freedom of opinion itself', as ECtHR noted in *Dichand v. Austria* (para. 42; cf. *Dalban v. Romania*, para. 49). On the other hand, in certain cases, even when an expression 'is true and describes real events' it cannot be granted the status of free speech in order to respect, for instance, 'privacy' or 'commercial confidentiality', as ECtHR noted in *Markt Intern* (para. 35). The government of expressivity can then be seen to incite expression when it is useful but untrue in one case, and to limit it when it is true but infelicitous in the other.

Of all, then, it is crucial to note that before expressions become the object of analyses, the specific vocabularies in which the signature occurs have to be disclosed as analyzable in the first place, along with their varying gradations. The analyses of words, content, medium, genre, and methods later operate as important building blocks in constructing the edifice of free speech. Such a possibility afforded through language makes possible the establishment of relationships and cross comparisons in the legal deliberations. It is of use therefore to see what kind of vocabulary, with which an expression is signed, merits what kind of status in the jurisprudence of freedom of expression. This point is important since in human rights the legal protection that the artistic has is different from the political, and in the same vein, the political merits different consideration than the commercial.[12] Therefore, the expanse and the privilege of free speech are then determined by the rationale according to which an expression in question is merited the status of the political, the aesthetic, the commercial, and the theological, among others. It means that one becomes a different juridical subject of rights bearing different duties, if the signatory is seen as a politician, artist, property owner, religious, and so on.[13] This dynamic enables law to apply differing margins of appreciation to the various types of expressions depending 'on the context and on the mix of interests at stake' (Mahoney, 1997: 379). It also entails that there can be limit cases, where the political may turn seditious or the aesthetic obscene. At such times, the role of law is to rule the expression by determining in what manner and through which rationale the category stretch or crossover can be

protected.[14] In this sense, the methods and strategies that enable an understanding of the expression thus partake in the very being of the subject understood. The handling of language then functions reflexively in that it is seen to correspond with and reflect transparently the subjects. In sum, the legal decision reverberates around the mechanism that 'distributes speakers among the different types of discourse' and 'appropriates those types of discourse to certain categories of subject' (Foucault, 1972: 227).[15] Then, it is not that there is an interpretation imposed on the 'signs': each event is already an interpretation impacting the signature and the signatory (cf. Foucault, 1990: 64–66). What is remarkable here is the way the framework of the right to freedom of expression draws on multiple logics, rationalities, and investments of power to function as such. By doing this, it not only discloses expressivity as a general object and brings it onto a governmental plane but also governmentalizes the being of the sovereign guaranteeing the right of freedom of expression. It is this question, of the sovereign, to which the next section turns.

Summoning the Logics of the Significations: On the Sovereign and the Signature

> I must say words as long there are words, I must say them until they find me, until they say me. (Samuel Beckett, Molloy)

Precisely because the subject may either rearticulate expression unpredictably or escape particular schematic forms (Butler, 1997: 41; Gadamer, 2003: 401), expression is needed from the subjects so that the way performativity relates to permissibility can be accounted for. In this sense, when a certain expression is not protected (say, as a threat to democracy) and its corresponding subject abandoned (say, as nonintegrative), the limits of the legally tolerable are charted out through language. The very fact that the sovereign is to stand at distance, intervene at particular moments in order to optimize the overall economy of speech, creates a certain moment of unease. Since language evades any foreclosure (Gadamer, 2003: 401, 447), the power working through it remains vulnerable to falling short. Since the sovereign nevertheless has to analyze language in order to protect it, the power guaranteeing free speech is further engaged because of this vulnerability.[16] The way free speech functions in human rights therefore enables an attentiveness toward the use of language by reading its significations (nonviolent, useful, and disturbing), dividing it onto a grid (political, scientific, and commercial), generating data and knowledge (indexes of freedom), and establishing the bifurcations of truths (provocative/violent, controversial/hateful, and offensive/threatening). These tactics both enable an expression to be made free and reflexively inform the sovereign of those spaces where it has remained unable to conduct the government in the best way. At the moment when the sovereign simply intervenes into the domain of expression in order to limit it, regardless of the conditions established on the basis of such truths, it steps out of the juridical fold of the protection of freedom of expression as per the human rights discourse.

The peculiar truths and conditions under which the sovereign is to guarantee the right to freedom of expression explain the paradoxical but primordial relationship between free speech and the sovereign, that is, free speech can aim at anything, including the sovereign, but it is also to be protected by the sovereign. This means that the sovereign is not the one who primarily 'decides on the state of exception'(Schmitt, 2005: 1), but the one interlocked in between the legal norms of human rights on the one hand and the governmental practices optimizing the lives of the population on the other (Rose, 1996: 43–44). Consequently, the politically important question is that which specific guarantor is able to target expressivity as an object of government, through what kind of mechanisms, under what truth conditions, and generating which forms of power. It is crucial because the guarantor who is able to perform such a task appropriates sovereignty onto itself in the process.

Apart from the investments that constitute and sustain one's free speech, expressivity is targeted as an object of government in another sense as well. It is in the sense of determining the specific force that a signature generates and in what manner may this be sieved through the instrument of human rights. The question then is the regulation of this force in the apt manner. Here, two dimensions of this aspect can be selectively looked at. First is the connection of expressivity to violence. Now, it is true that in human rights it is difficult to legally allow for calls that effectively incite the others to pure violence within a specific nation-state, such as those calls that present violence as both 'necessary and justified' (*Sürek v. Turkey (No. 3)*, para. 40). Further, the same rationale makes it difficult to allow groups to exercise their right to freedom of expression and association who may have connections with internally operative organizations that 'advocate the use of violence' as a part of their political program, as the Venice Commission guidelines state (VC, 1999: 4). For example, this point can discern in *Herri Batasuna v. Spain* and *Etxeberria v. Spain* where ECtHR upheld the decisions of the Spanish authorities to cancel the candidacy of certain electoral groups in Basque country in the light of their possible links with the banned *Euskadi Ta Askatasuna* (ETA). Contrastively, however, calls for explicit violence in another nation-state, directed toward those others that are members of a different political organization, are protected by human rights.[17] In this sense, demanding tougher economic and political sanctions against another nation-state or protesting peacefully and lobbying in favor of participation in a foreign war (that may respectively threaten the livelihood and the very being of humans out there) is allowable when it comes to the jurisprudence of the right to freedom of expression. In order to explore the interconnection of violence and free speech, *Sürek* is also a useful case in point. In this case, it is not the overall milieu of violence, along with its objectives, necessities, and rationale, which also needs to be tested through with respect to the standards of human rights, but only the specific acts taking place within such a bracketed situation (cf. *Ireland v. the United Kingdom*, para. 149). It means that the present is bracketed not in the sense that one does not determine through the discourse of rights the entire historical situation of nation-building and republicanism in Turkey, but in the sense that even within the then violent situation of counterinsurgency only specific acts of violence, linguistic or otherwise, turn up as a legal question.

The said dynamic however is not in contradistinction to free speech because the freedom of subject stands in between the circumscription of subjectivities and the

circumspection of language. The legally protected domain of free speech therefore does not eliminate violence, broadly construed, but is itself related through complex transactions to violence. One needs to study here how free speech enables the sovereign to *order* violence: that is, by helping it frame violence (in *Sürek:* the violence of the speech in question), explore its modalities, intensities, and effectiveness (in *Sürek*: the relation it forms with the violence that is existing in the southeastern Turkey, whether this violence remains within or exceeds the threshold of the tolerable, what is its social impact and political efficacy), and then enabling the sovereign to deal befittingly with the violence disclosed as 'illegitimate' (in *Sürek*: not giving too much space to the rebels expressing the dismemberment of the Turkish Republic, suppressing that speech that redirects violence onto the representatives of state). What is essential to note is the fact that the sovereign guaranteeing the right to freedom of expression is, precisely because of this process, enabled to channelize violence by shielding off those claims to sovereignty from violence that it upholds, while deflecting violence toward those that it does not (cf. Asad, 2007: 26). Resultantly, this process ensures that violence is not assured a reality outside law and is arrested in a juridical context (cf. Benjamin, 1996: 239).

Second is the connection of expressivity to the other and the self. Now, the force with which an expression can rightly impact the other and the signatory itself in turn varies. From the perspective of law, it is differently permissible when it is directed toward someone belonging to a legally recognized ethnic minority than someone belonging to a criminal network evading law, for instance. In both the cases, expression can be seen as an extension of the self of the addressee. However, the way one's self-expression is then posed as libel, hate speech, intimidation, personal insult, or the violation of rights and reputations of others depends on the life that that signatory bears, the life toward which that signature is directed, and the way the signature takes place. In *Sürek*, for example, expressions were contained as violating the respect for the rights and reputations of others when directed against the civil servants or as being hate speech when directed toward the ethnic Turks. However, from the other side, the legal safeguard against such misuses was not available for the Kurdish rebels, who in their capacity as political partisans minimize the full set of enjoyable human rights. This also means that the flow of subjectivities in which 'lives' are situated already bear a certain meaning for their agency and for their subjection. This ontological disclosure of a specific life goes on to shape the politico-ethical question that determines the threshold of violence to which a life in its peculiarity can be exposed, that is, by the sovereign, by the others, and by itself. In cases where the force of a signature is excessive, the relevant question becomes to see the manner in which it is signed, its directionality toward the social issues, the way it impacts the addressed, and the impact it has on the addressee and on the social body at large.

This means that there are two correlations. First is between the predicate and the subject on one hand and between the significations of an expression and their social operability on the other. Second is between the signatory and the flows of subjectivity on the one hand and between the significations of an expression and their legal regulation on the other. There are thus complex transactions that already relate one's expressive capacity to the juridical field. For, if the subject of freedom of expression 'acts in and through' language (Butler, 1997: 11), and if one's expressions are to be impacted by the notions like 'territorial integrity' or 'prevention of disorder' or 'national security' or 'public

safety' in order to become protectable (as Article 10(2) states), then this does not simply entail either that these notions remain in the abstract or that expression has to make room for them, but that these are what every subject bears (has to bear?) via language in its very being. This mechanism also goes on to inform other rights that refer to the right of freedom of expression: freedom of thought and conscience, assembly and association, protest and free self-development. The net effect, then, of all this is to identify a certain shape that the free self-expression of the subjects has to have (cf. Asad, 2009: 27–28; Butler, 1997: 97–98). If the right to freedom of expression is thus entangled with a sovereign for its protection as per Article 10(1) and its exceptions as per Article 10(2), then this entails not only that the sovereign guarantees the human rights associated with it or that as a potentiality the entire expressive domain comes under the juridical frame, but also that this right reinforces the 'realness' of the sovereign that is guaranteeing it as a right (cf. Foucault, 2007: 118, 239; Veyne, 1997).

In Lieu of 'a Last Word'

> If it were not possible to communicate general standards of conduct which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist. (Herbert L. A. Hart, *The Concept of Law*)

Language permeates law. Even when through law language is analyzed by identifying what qualifies as a protected speech and what not, it is law as well which is accessed through and determined by language. At the moment then that bodies are named and called, inscribed and read, a complex power mechanism works on the subjects. The thread of power lying at the interconnection of law and language becomes clear when one notices that only the nameable is temporal and can be subjected to the tactics of temporality.[18] This peculiar nexus then governs the subject thus constituted. Subsequently, the manner in which those subjects express themselves brings to the fore the manner as per which the dynamics of power unfold. It is this peculiar movement of subjectivity that has been read in this article by focusing on free speech. Consequently, it is in the *way* it relates to the speech – if expression is to be seen as a certain 'possession' – that both the possessor (the subject) and the possessed (its *logos*: world, reason, and word) become free.

Further, this article has argued that the question of free speech is tied to the issue of a government of expressivity. It is because of this dynamic that the right to freedom of expression is already connected to the flow of subjectivities, techniques of ordering violence, rationalities of establishing the gradations among the speakers, the historicity of social practices, the technologies of and the policies relating to communication, and the legal rules and regulatory standards. Alternately, expressivity cannot be governed if it is not tied to a peculiar production of freedom through free speech. In this sense, despite a peculiar structural formation that constitutes free speech in human rights, the fold of difference remains fundamentally open and contingent, enabling inclusion of diverse expressions and subjectivities under the banner of free speech. Resultantly, governing

expressivity both concerns itself with the question as to how the government is to be conducted and as to how the conduct is to be governed (Dean, 1999: 27; Foucault, 1983: 220–221; Foucault, 2007: 503). In this sense, free speech not only requires that there be a specific kind of polity and subjects in order to function as such, but more fundamentally realizes both at the same time that it realizes itself. From this perspective, then, freedom is the reference point, the instrument, and the effect of governmental praxis (Foucault, 2008: 62–64). This means that the techniques of government are consequently generated by the force working *on* free speech and the force produced *by* free speech.

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Notes

1. Given that this article focuses on a specific case law set and anchors its discussion largely into it, the reference to the broader case law remains restrictive. This however is not to deny the existence of other leading European cases on free speech that can be taken up with effect in order to trace the different lines of force through which the right to freedom of expressions works, such as: *Goodwin v the United Kingdom* [1996], Application No. 17488/90, Judgment 27 March 1996, European Court of Human Rights; *Sunday Times v the United Kingdom* [1979], Application No. 6538/74, Judgment 26 April 1979, European Court of Human Rights; *Wille v Liechtenstein* [1999], Application No. 28396/95, Judgment 28 October 1999, European Court of Human Rights; *Open Door and Dublin Well Woman v Ireland* [1992], Application No. 14234/88 and 14235/88, Judgment 29 Oct 1992, European Court of Human Rights; *Informationsverein Lentia and Others v Austria* [1993], Application No. 13914/88, 15041/89, 15717/89, 15779/89, and 17207/90, Judgment 24 Nov 1993, European Court of Human Rights; *Jersild v Denmark* [1994], Application No. 15890/89, Judgment 23 Sep 1993, European Court of Human Rights; *Oberschlick (No. 2) v Austria* [1997], Application No. 20834/92, Judgment 1 July 1997, European Court of Human Rights; *Hadjianastassiou v Greece* [1992], Application No. 12945/87, Judgment 16 Dec 1992, European Court of Human Rights; *Lehideux and Isorni v France* [1998], Application No. 24662/94, Judgment 23 Sep 1998, European Court of Human Rights; *Animal Defenders International v United Kingdom* [2013], Application No. 48876/08, Judgment 22 April 2013, European Court of Human Rights; and, *Zana v Turkey* [1997], Application No. 18954/91, Judgment 25 Nov 1997, European Court of Human Rights.
2. In *Sürek and Özdemir v Turkey*, the joint concurring opinion of judges Palm, Tulkens, and others, argued that more weight should be accorded in European Court of Human Rights judgments to the milieu in which the expression takes place, which may include considerations as:

   > Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the center of violence or on its doorstep?

3. In *Fuentes Bobo v. Spain*, European Court of Human Rights emphasized that 'Article 10 of the Convention [did] not guarantee unrestricted freedom of expression, even in press reports on serious questions of general interest' (para. 45).

4. Both these characters are from Kurdish folklore. As narrated by Kurdish nationalists, Noruz marks the overthrow of the oppressive Assyrian King Dehak by a popular uprising led by the legendary hero Kawa.
5. By using the concept of signature, inspired from Derrida's reading of Austin (Derrida, 1988: 19–20), three things are emphasized. First, language precedes the subject who utilizes it and partakes in it. Second, in the jurisprudence of free speech, when an expression is problematized, it may in certain cases take place within a chain of language users and rely on specific historicity. In Sürek *No. 4*, for instance, this includes the journalist who interviews Partiya Karkerên Kurdistan member, the reporter who composes the interview, the content editor who edits, the major shareholder of the review, and so on. By virtue of being appended to this chain, by simply having one's signature inserted into it, one's expressivity and one's status as a subject is problematized. This means that there can be various signatories within a specific signature. Third, as a concept, the accent of signature is not on presupposed immediateness, either that of the addressee or that of the addressed. This is helpful when one sees that the right of freedom of expression allows that the visually expressed and the spoken/written word to be preemptively analyzed, as in certain cases where it is determined what impact the readable or the visual will have on the social body even before it reaches its targeted recipients. Further, the concept is also useful in appreciating the way that what is expressed bears the imprint of a specific technological assemblage that mediates it.
6. Since the specific juridical subject of the right to freedom of expression is placed into the flows of subjectivity and orders of knowledge, performativity is not performance (Butler, 1993: 223–241).
7. See, more generally, Macovei (2004) for a concise discussion on the duties and responsibilities of the right holders of Article 10.
8. The approximation can never completely be an appropriation. This is noted by Austin himself as he notes that 'it is inherent in the nature of any procedure that the limits of its applicability, and therewith, of course, the ''precise'' definition of the procedure, will remain vague' (Austin, 1962: 31). This however is precisely the strength of free speech as governmentality, a point we come across in the next section.
9. If the signatory and its acts are performative, then this also entails that the subject is not prior to the performative and that it itself is a process. This means that the effectiveness of free speech remains precisely in opening up a field of difference that the sovereign may order but not in itself completely determine.
10. One cannot therefore equate the process of the constitution of subjects, including their juridical being as subjects of rights, with the acts of justification on behalf of those subjects (e.g. Forst, 2011). Hence, the paradox: either justification precedes subject formation and is ineffective or it follows the latter and is redundant. Therefore, one has tautology: the subjects of human rights can be justified human rights once they have already been constituted as the subjects of human rights. This however leads to a more troublesome conclusion: for those who can neither justify themselves through nor accept from the others the justifications that utilize the moral vocabulary of human rights may not enjoy the full set associated with it.
11. Given this exquisite intersection of law and language, it can be appreciated why it becomes difficult to legally protect a speech that explicitly counsels the overturning of the rule of law, effectively beseeches the violation of law or obstructs the course of justice, or subjects the

courts of law to a constant contempt (e.g. *Zihlmann v. Switzerland* and *Jääskeläinen v. Finland*). In a similar vein, those expressions may never turn up as protectable under European Convention on Human Rights Article 10 whose very rationale is to go against the 'text and spirit of the Convention' (*Witzsch v. Germany*, para. 3).

12. In *X and Church of Scientology v. Sweden*, the European Commission of Human Rights stated that:

> the level of protection [accorded to 'commercial' speech] must be less than that accorded to the expression of 'political' ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention [were] chiefly concerned. (p. 73)

In a discussion on the case law of the European Court of Human Rights, it has been noted:

> The indications are that commercial expression is not regarded as so worthy of protection as political or even artistic expression and that some considerations which make expression value in the political context may not apply in quite the same way in the commercial environment. (Harris et al., 1995: 402)

The same writers therefore consider it possible to discern 'different categories of expression' (Harris et al., 1995: 396).

13. In Handyside, European Court of Human Rights observed that:

> whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society." (para. 49)

14. Hart notices that even when one discerns legal categorizations as 'open textured' (Hart, 1994: 126, 128), it should not detract one from their practical usefulness and effective social role (Hart, 1994: 126–130).
15. In this regard, Rose notes:

> If language is organized in regimes of signification through which it is distributed across spaces, times, zones, and strata, and assembled together in practical regimes of things, bodies, and forces, then the "discursive construction of the self" appears rather differently who speaks, according to what criteria of truth, from what places, in what relations, acting in what ways, supported by what habits, routines, authorized in what ways, in what spaces and places, and under what forms of persuasion, sanction, lies, and cruelties? (Rose, 1998a: 178)

16. Because of this, law turns out to be both necessary and possible, but neither perfect nor exhaustive, as Cover notes (Cover, 1986: 1613).
17. Even if one may argue that human rights itself does not produce a human-other, it is correct to discern that human rights remain constitutionally unable to do away with the anthropological notion of 'the other'. It means that when a polity projects the other based on politics or territoriality, human rights only work to regulate the relation between this citizen-human within and the noncitizen-human without.
18. The primordial connection of life, language, and power is succinctly captured by Lacan in his observation that 'the name is the time of the object' (Lacan, 1988: 169). In a similar vein, Rose notes that 'language not only makes acts of government describable; it also makes them possible' (Rose, 1999: 28).

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