

**FROM SOCIAL CONFLICTS TO HUMAN RIGHTS: THE
NORMATIVE MEANING OF HUMAN
RIGHTS IN RAINER FORST**

*Dos Conflitos Sociais aos Direitos Humanos: O Significado
Normativo dos Direitos Humanos em Rainer Forst*

*De los Conflictos Sociales a Los Derechos Humanos: El
Significado Normativo de los Derechos Humanos en Rainer Forst*

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Abstract

Universal Declaration of Human Rights (UDHR) 70th anniversary is being celebrated in 2018. On the other hand, people are still arguing about the political, juridical, social and civilizational gains it has provided. Such discussions, however, focus on peripheral aspects of Human Rights, losing sight of what could be understood as its highest normative gain. Whenever arguments are not completely rectified, they dissociate from the social demands that actually gave them meaning and relevance. From this scope, the article intends to reconstruct the conceptual and argumentative aspects of Human Rights from the critical theory of relations of justification by Rainer Forst, in which

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Human Rights are interpreted as arising from a fundamental right to justification. This fundamental right, in Forst's theory, is interpreted as being part of the "deep grammar" of social conflicts. According to the Forstian theory, we argue for an interpretation of Human Rights capable of encompassing the multiple aspects of these rights, avoiding reductionism and unilateral interpretations of it. This presentation has been divided into three parts. First, it presented some traditional "pictures", current forms of referring to Human Rights and its characteristics, against which another picture will be proposed, in order to place social conflicts and rejections of injustice as a starting point for the Human Rights. Next, the Forst's principle of justification and the recursive argument that led to it was discussed. Finally, a critical interpretation of the Forstian proposal, which dealt with the purposes that his theory is allegedly seeking, was carried out.

Keywords: social conflicts, human rights, social justice, justification, Rainer Forst.

Resumo

A Declaração Universal dos Direitos Humanos (DUDH) celebra seu septuagésimo aniversário em 2018 e muito se discute sobre os ganhos jurídicos, políticos, sociais e civilizatórios que esta teria proporcionado. Por vezes, contudo, tais discussões focalizam aspectos periféricos da noção de direitos humanos, perdendo de vista aquilo que pode ser entendido como seu ganho normativo maior, quando não os reificam completamente, desvinculando-os das reivindicações sociais que de fato lhes conferem sentido e atualidade. Dessa perspectiva, pretende-se neste artigo reconstruir os aspectos conceituais e argumentativos dos direitos humanos a partir da teoria *crítica das relações de justificação* de Rainer Forst, em que estes são interpretados como decorrentes de um direito fundamental à justificação. Este, na teoria de Forst, é interpretado como sendo parte da "gramática profunda" dos conflitos sociais. Recorrendo aqui à teoria forstiana, argumenta-se em favor de uma interpretação dos direitos humanos capaz de abarcar em si os múltiplos aspectos desses direitos, evitando interpretações reducionistas e unilaterais destes. A apresentação será dividida em três partes. Primeiramente, apresenta-se algumas "imagens" tradicionais, formas correntes de se referir aos direitos humanos e suas características, contra as quais será proposta outra imagem, que coloca os conflitos sociais e a rejeição das injustiças como ponto de partida para os direitos. Em seguida, discute-se o princípio de justificação forstiano e a argumentação recursiva que conduz a ele. Por fim, realiza-se uma interpretação crítica da proposta forstiana, dentro dos propósitos a que esta se propõe.

Palavras-chave: justiça social, direitos humanos, conflitos sociais, justificação, Rainer Forst.

Resumen

La Declaración Universal de los Derechos Humanos (DUDH) celebra su septuagésimo aniversario en 2018 y mucho se discute sobre los beneficios jurídicos, políticos, sociales y civilizatorios que esta habría proporcionado. A veces, sin embargo, tales discusiones se centran en aspectos periféricos de la noción de Derechos Humanos, perdiendo de vista lo que puede ser entendido como su logro normativo mayor, cuando no los reifican completamente, desvinculándolos de las reivindicaciones sociales que de hecho les confieren sentido y actualidad. De esta perspectiva, se pretende en este artículo reconstruir los aspectos conceptuales y argumentativos de los derechos humanos a partir de la teoría crítica de las relaciones de justificación de Rainer Forst, en que estos son interpretados como derivados de un derecho fundamental a la justificación. Este, en la teoría de Forst, es interpretado como parte de la "gramática profunda" de los conflictos sociales. Recurriendo aquí a la teoría forstiana, se argumenta a favor de una interpretación de los Derechos Humanos capaz de abarcar en sí los múltiples aspectos de esos derechos, evitando interpretaciones reduccionistas y unilaterales de estos. La presentación se dividirá en tres partes. En primer lugar, se presentan algunas "imágenes" tradicionales, formas corrientes de referirse a los derechos humanos y sus características, contra las cuales se propondrá otra imagen, que coloca los conflictos sociales y el rechazo de las injusticias como punto de partida para los derechos. A continuación, se discute el principio de justificación forstiano y la argumentación recursiva que conduce a él. Por último, se realiza una interpretación crítica de la propuesta forstiana, dentro de los propósitos a que esta se propone.

Palabras clave: justicia social, derechos humanos, conflictos sociales, justificación, Rainer Forst.

Human Rights are commonly understood as a civilizing achievement that will make societies more democratic and just, replacing barbarism with solidarity. Such an understanding is sometimes followed by the expectation of a more harmonious, tension-free society, which is itself an expression of the consolidation of these rights, understood as the right answer, capable of settling all political disputes.

This presentation addresses this "picture" of Human Rights, arguing in favor of another, more apt to capture their normative meaning. According to the idea defended here, Human Rights cannot be understood only as the result of legislative deliberations, as a set of right

answers to political questions already taken by “competent” people or, a mere catalog of claims accepted by some international justice courts. Human Rights should be understood as a normative achievement, as a guiding policy criteria capable of being updated as such, avoiding unilateral images, reflecting on the presuppositions of rights.

One of the most notorious theoretical expressions in recent years, which sought to carry out the reflective aspect of human rights, is Rainer Forst’s critical theory of relations of justification. According to it, a theory that actually captures the core meaning of human rights needs to make explicit what their normative claims fundamentally express.

In order to examine those facts, this presentation was divided into three stages. The first step was to recognize the limitations of the commonly held picture of human rights, where they were interpreted as timeless, transcendent and context-free truths. As a result, we hope to point toward the need for another picture, more appropriate to capture the meaning of these².

On the second part, Rainer Forst’s reflexive (and critical) interpretation of human rights is examined. According to it, Human Rights were intrinsically related to social conflicts, since claims for rights arise from attitudes of social injustice’s rejection. Such attitudes, according to this interpretation, present a central content presupposed in every claim for rights, translated in what Forst called the principle of justification. In this way, this principle will also be the explanation of the normative meaning of social conflicts and the claims for rights that they carry.

On the third part, a critical comment was made on Forst’s conception, examining whether it is, in fact, capable of fulfilling the critical and constructivist purposes that its conception proposes. In short, the proposed objections assert that his principle of justification fulfills preferably a

² At this stage, we will present some challenges for a non-partial interpretation of human rights. Namely: first: overcoming of ethnocentrism (Forst 2007, page 204); second: overcoming the hierarchical relationship between law, morality and politics (Habermas, dispute Rawls and Habermas); third: respect non-hierarchical coexistence) of the public and private autonomies.

negative (or critical) rather than a positive (or constructivist) role for the interpretation of any conflict situations, where rights are claimed.

Finally, a few brief conclusions have been given on how it is possible to hold together the tasks of a conception of Human Rights that is both critical and constructivist. In order to this reconciliation be possible, it must be acknowledged that each of these tasks brings their own difficulties to a theory.

Pictures of justice, pictures of human rights

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.— That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed (US Declaration of Independence, July 4th , 1776, italics added).

It is very difficult not to be captured by the resonant and redemptive words of the declarations of rights at the moment we read them. The texts of the Universal Declaration of Human Rights (hereinafter UDHR), other declarations of rights that preceded it, plus the strong conviction that human rights have value are overflowing. Not only do they have value, as they are worth in a “self-evident”, objective, inalienable and irrevocable way.

The “normative force” of these rights is usually reinforced by images, which remain as a discursive element, as a rhetoric that gives strength to rights, suggesting a picture (a certain way of seeing) of these rights³. Therefore, in a manner analogous to what can be said about justice, it is possible to bring to light an exemplary picture of human rights that have solidified in history. Amongst them, is the famous image of Eleanor

³ Here, we refer to Forst's (2012) understanding of “picture” which he take from the famous Wittgensteinian example of the duck-rabbit image. The picture is not the image itself. It is rather a conception we made from or the meanings we attribute to the image.

Roosevelt holding the freshly promulgated UDHR in 1948. Some aesthetic attributes of the image would represent the attributes of the notion of human rights: its self-evident, irrevocable character, its intrinsic validity, its universality, and its sometimes transcendent character. After facing the atrocities of the recently concluded World War II, the publication of the UDHR emerged as the institutional zenith of human dignity, a redemptive response that consolidated a powerful discourse, which has strong value until today - for our luck ⁴.

It is possible to ask, however, whether the above-mentioned attributes would be properly characterized in this picture. Another picture, in contrast to this, would give less emphasis on the institutional and legal side of Human Rights, focusing instead on the social conflicts from which claims for rights arise. This is the case, for example, with the struggle of social activist Malala Yousafzai, a Pakistani student who fought for the human right to education and culture in a society dominated by the Taleban regime, in which women are denied the right to attend to school⁵. This conflict Malala is involved with points to another picture of rights: that the Human Rights, along with the qualities above mentioned, must be historically affirmed.

⁴ Some of these images are especially striking, such as the image of Eleanor Roosevelt holding (and reading) the printed version of the Universal Declaration of Human Rights, as well as that of so many other people, adults and children, in the same position. On this, see: <https://www.unmultimedia.org/avlibrary/asset/1093/1093412/>. Some of them keep analogies with the image of Moses, holding the tables of law, as they are known in English), portrayed in various paintings. Aspects in common, such as the light that pours on, being reflected by the documents, seem to illustrate their alleged validity. This, as we know, is made explicit by attributes such as: its self-evidence, irrevocability, the fact that we are all subject to its normative requirements, the fact that the laws written by these cannot be granted or revoked by governments, but only recognized, respected. See also: RENI, Guido. Moses with the Tables of the Law. About 1624, oil on canvas. Borghese Gallery, Rome. In: https://upload.wikimedia.org/wikipedia/commons/1/14/Guido_Reni_-_Moses_with_the_Tables_of_the_Law_-_WGA19289.jpg. Access in 07/31/2018.

⁵ As it is already known, Malala was shot by members of the Taliban group who did not accept their fight for the universal right to education. As a result, she became an UN ambassador where, among her duties, she gave voice to the UDHR (which reinstates the about what image of human rights we should have in mind). Further details on the history of Malala can be found at: <https://www.nytimes.com/2017/10/10/world/europe/malala-yousafzai-oxford.html>. Further details at: <https://www.bbc.com/news/world-asia-23241937>. Details on the website of the Malala foundation, where you can find the following sentence: "I tell my story not because it is unique, but because it is the story of many girls". See: <https://www.malala.org/malalas-story>. Accessed 08/14/2018.

That is, for rights to be valid, historically situated subjects must give voice to their validity, conflicting in the cases where it has not been recognized.

For this reason, considering the importance of historical affirmation for the notion of rights means, among other things, elaborating a theory that takes into account the conflicts within which the rights are affirmed. Social conflicts, more than a simple starting point to vindicate rights, are themselves a key notion to understand and access the content of the Human Rights⁶.

The role of social conflicts in the notions of social justice and human rights has gained value in several theorists⁷. Some of them in particular claimed the importance of examining social conflicts to reflect on both notions, stating that any theorization of rights should start from this exam. This point of view was based on an interpretation of Forst's critique of the traditional picture of justice, which focuses only on the distributive aspects of justice, made in his famous article *Two Pictures of Justice*. Analogously to criticisms of a merely distributive understanding of justice, it is possible to criticize the biases of the recurring image of Human Rights described above.

Among the criticisms to be elaborated, we can mention the following:

- 1) the traditional picture of Human Rights does not question how human rights arose in the world, neglecting the social contexts that gave them meaning. That is, emphasizing a certain interpretation of such rights in which they are understood as self-evident, irrevocable and non-grantable truths that should only be acknowledged, ends up neglecting the historical struggles and bloodshed through which rights were recognized.

⁶ A contribution to the debate proposed here can be found in Portuguese in Comparato (2017), a Brazilian lawyer, writer and jurist, who presented the notion of an "historical affirmation of human rights". With this notion, he means that human rights should be claimed and gain expression through different speeches through history. Specifically, Human Rights arose when people expressed claims for and negotiated the meaning of certain rights. This notion is closely related to the interpretations with respect to the importance of the social conflicts that we present here.

⁷ Just to mention some of them: Comparato (2017) and Hunt (2007), including authors the tradition of critical theory such as Nancy Fraser, Jürgen Habermas and Iris Young.

As a result, rights are misunderstood as timeless truths, with no connection to social contexts;

2) also, this picture of human rights neglects the deliberative role of politics involved in their elaboration. In other words, by emphasizing the irrevocable and non-endorsing (non-endorsable) character, by mentioning them as a condition for the legitimacy of governments, the traditional image of human rights tends to reduce political procedures to the task of merely observing rights previously established⁸. Governments of developing countries, which are often blamed for failing to comply with the UDHR's recommendations, ignore the fact that the wealthier countries have also faced problems in compliance - or are still facing them;

3) moreover, according to the same image, speeches in defense of human rights, or that claim them, are legitimized by the language established in the UDHR. That is, in assuming that the Human Rights published in the Declaration are self-evident and valid for all, there is a risk of making it standard language for argumentation of claims for justice because such assumptions would lead us to disregard the discourses of justice produced at a local level. When this image is adopted, it is possible to speculate the effects of this on the self-image of those who claim rights. They may doubt as to whether or not they have a right, by measuring their claims to the Magna Carta's discourse, when in fact they have a genuine claim for rights⁹. Assuming

⁸ That is, it is a difficulty, faced by partial and one-sided visions of human rights, in integrating the moral, political and legal aspects of these. On this, see Forst (2017, p.74). Doing a proper integration of these aspects is a condition without which human rights would cease to be current and would become manifesto rights, incapable of being realized here and now.

⁹ On this aspect, it is worthwhile to think about the Rawlsian notion of person, meaning that subjects of justice need to see themselves as "self-authenticated sources of valid demands", resorting here to the concept of "moral person, free and equal," elaborated by John Rawls: "The second respect in which citizens view themselves as free is that they regard themselves as self-originating sources of valid claims. They think their claims have weight apart from being derived from duties or obligations specified by the political conception of justice, for example, from duties and obligations owed to society" (RAWLS, 1985, p. 242). In other words, it is not

that this image effectively has effects in today's world, it would entail a neglect of the meaning of rights struggles here and now. Many of these, which took place in undemocratic societies, have their meaning "merely translated" in the language of the statement, which makes us lose sight of their meaning and potential for mobilization.

4) finally, this partial image of human rights offers a misinterpretation of the nature of injustice itself, interpreting it as a deficit in terms of access to rights (in general, social rights, the so-called "3rd age rights"¹⁰). It is common to think of socio-economic indicators that present these assumptions. In this case, one tends to lose sight of the importance of so-called political and civil rights (the so-called 1st generation rights), which generally escape a purely quantitative measurement when assessing injustice. Even in an evaluation that incorporates qualitative measurement criteria a lot of disagreement remain; especially when it comes to assessing whether a society is indeed democratic, whether it fulfills requirements not only procedural but also cultural, that define an effective democratic regime¹¹. In such cases, it is difficult to apprehend central components of the phenomenon of injustice (which are shown by lack of voice on the part of the injured ones), that is, the possibility of expressing themselves as to their interests and having room for their demands to be heard. Moreover, such an image of human rights presents difficulties in identifying situations in which deprivation of rights occurs, not because

enough that rights are understood as valid, but also that people feel empowered to claim them and see themselves as deserving them.

¹⁰ On the discussion about generations of rights and the different stages on the achievement of rights, see Bobbio (1996).

¹¹ One might think that if the procedural aspect of democracy were ensured, this would have enormous transformative potential for societies marked by recurrent and systemic injustices. However, this is only part of what would be required for the full exercise of human rights. On the attempts to measure democracy in the world, we can think of that of Dahl (1971). Nevertheless, even this attempt does not necessarily evaluate the cultural aspects of democracies, including the openness, in public debate, to deal with hard questions.

of socioeconomic or structural deficits in some societies, but because of the systematic denial of rights by sectors of the society in question.

This is not to say that the language of human rights should be abandoned, much to the opposite. The language of human rights has its merits, starting with the creation of a political language of mediation between societies which, in practice, in addition to the rhetorical power it presents, also establishes a common work plan that would, in fact, enable a world of peace and solidarity if it were followed. In the same way, it allows subjects worldwide to recognize and evaluate the achievements in terms of rights, perceiving their relationship with the improvement of living conditions. Many gains could be mentioned¹². Therefore, instead of criticizing the language of Human Rights as such, it is a matter of pointing out the biases it presents, as well as the ways to avoid it.

Due to these reasons, authors such as Forst say that it is possible to think of another image of human rights, more apt to express it, avoiding one-sided understandings. This would have been presented in his critique of relations of justification.

At first sight, according to Forst, it is perceived that people constantly claim for rights such as the right to education, the right to health, the right to work in health care, etc ... They do it because they find that the social context in who live denies them these rights. That is to say, in this interpretation, the claim for human rights arises in the world from the local, situated experience of injustice, that acts as a trigger for the challenge of the current norms¹³.

¹² Others, for example, would involve the importance of human rights to demarcate what would be a relation of respect and consideration among human beings, and the violation of any of those would offer a thermometer of the situations in which this relationship would not be guaranteed (see FORST, 2017, page 75).

¹³ In other writings, Forst (FORST, 2011b, pp. 32-3) presents the concept of justice as opposed to the concept of arbitrariness, in the sense that justice arises in the world as a counter position to s arbitrary social relations.

Nevertheless, from a reflexive point of view, claims like those really express the demand to be treated as an autonomous subject, capable of interacting with others as an equal at the deliberation of common norms. In Forst's own words:

Preceding all demands for concrete human rights, there is one basic right being claimed: the right to justification. In my view, this type of dissent and conflict - internal to a society and culture - is the actual context in which the claim to human rights arises (FORST, 2011a, p. 205).

According to Forst's thesis, presented in this passage, claims for human rights are always local claims, carried out by subjects around the world. Nevertheless, from a reflexive point of view, all of them place a basic claim, which precedes them: the claim for the right to justification.

A basic right to many rights: the right to justification

The thesis in favor of a fundamental right to justification is to argue in favor of a normative element within social struggles. The argument, that the very act of challenging the validity of rules, carries with it presuppositions about who the contestants are from a normative point of view. But it is not just that. In the context of social conflicts, this means that subjects who question the validity of social norms disagree on how a society should be organized also call into question other issues, such as "what does it mean to justify a rule?" Similarly: "what does it mean to consider a valid norm?". One way or another, these questions underlie public discussions in conflicts when subjects diverge and use justifications (in the form of arguments and evidence) in order to make their point of view publicly valid.

By justifying a rule, roughly, one can understand the activity of providing grounds for the fulfillment of a norm in such a way that they meet the judicious examination of those from which such compliance is expected. On the other hand, to consider a valid norm is to identify

that there are good arguments that speak for its compliance, or at least that there are not enough convincing reasons to reject it, and you can also expect others to accept it as well. Both criteria are connected when answering practical questions. That is, it is assumed that the norm can be universally valid for the generality of those concerned, without any person being neglected in its fulfillment. In the same way, considering that norm is equally valid for all, and unconditionally, it is assumed that people can reciprocally agree with their justification, sharing the reasons in favor of it. It is 'first-order insight', the explanation of what we mean when we consider a norm to be valid, justified, or even unconditionally valid.

From this characterization, of what it means to justify a norm unconditionally Forst assert what he calls "second-order practical insight" (praktischen Einsicht zweiter Ordnung) or "recursive insight" (rekursiven Einsicht). It is "a second-order practical insight, in contrast to first-order insights about justified norms, namely, insight into a fundamental moral duty of justification" (FORST, 2007a, 93). Theoretically, it is a recursive turn, from the explanation of how subjects justify norms in practical contexts and what a justified norm means in these contexts, towards the elaboration of a moral point of view, drawn from these.

This 'moral point of view', or 'second order' insight, consists of what Forst called the principle of justification, which is the core of his theory¹⁴:

the principle of reciprocal and general justification, according to which every claim to goods, rights, or freedoms must be grounded reciprocally and generally, whereby one side may not project its reasons onto the other, but must discursively justify them. (FORST, 2011a, p. 194).

¹⁴ Although the principle of justification is the conceptual core that articulates Forst's entire work and sums it up, it is possible to identify different moments and roles that it plays in his theory. It is possible, for example, to identify it as a universal principle of morality, as a meta-principle of justice, as a criterion for the reconstructive analysis of discourses of justification, and it is also used as an immanent criterion for social criticism. More details of this ambivalence can be found in Sell (2018, p.158 passim).

This principle is what, according to Forst, we achieve when we proceed recursively towards the conditions of justification of norms. In other words, it is a movement that resorts to what we consider to be conditions of validity for practical judgments when discussions on norms are at stake. These conditions can be summarized as reciprocity and universality¹⁵.

By reciprocity, Forst (2010, pg. 216) understands what “is embedded in the structure of justification of norms: since they speak for all, everyone has to speak through them.” In other words, since standards should apply equally to all, they must be justified in an equally acceptable way for all, for reasons that everyone can identify as their own. Forst (2007a, p.82) understands generality as the formal requirement that immediately follows the norms’ claim to validity. That is, to be accepted by all, everyone must be able to express his endorsement to the rules by different reasons. This also requires that standards which are intended to be valid need to be supported by reasons that people can accept as theirs.

The second-order insight which leads to the formulation of the principle of justification, according to Forst, is only complete, with the right to justification (*Recht auf Rechtfertigung*) and the duty of justification (*Pflicht von Rechtfertigung*) corresponding to it. For, from the principle of justification, each participant can see himself as having the legitimate claim to be a subject of justification. That is, from the principle of justification, everyone can be seen as normatively authorized to be a “co-author” of the political, social world and economic environment in which one lives¹⁶.

¹⁵ Sometimes it is referred as “generality”. The idea of a recursive justification for the principle of morality is a contribution by Onst O’Neill (1989), assumed by Forst in his *Contexts of Justice*. According to it, a principle of construction of moral norms can be seen recursively making explicit the presuppositions of justification of moral norms. Forst (2010, p.232), however, abandons O’Neill’s conceptions of reason and morality because it does not allow to differentiate the contexts of justification.

¹⁶ This, according to Forst, is the constituent element of a radical conception of justice, according to which subjects claim the right of being co-authors of the normative world in which they live (2007a, pp. 299-302). In its discussion of human rights, the right to justification can be seen as the most accurate presupposition for its foundation and understanding of its normative sense, as pretenses that we cannot deny to others in a reciprocal and general way. In this perspective, the right to justification can be seen as the reflective presupposition of human rights, which is

The right to justification does not only reflect the formal conditions of validity of norms but also reflect the “deep grammar” of social conflicts. It is, first of all, something that participants can demand from each other in a context of justice when the justification of common norms is involved. Such an understanding allows us to value the normative potential embedded in social conflicts, since claiming reciprocal and general justifications for norms does not imply that the presuppositions of the discursive use of reason can stand in their own right.

Some critical remarks

With its theory based on the idea of a right to justification, the interpretation of human rights offered by Forst would avoid the obstacles traditionally associated with interpretations of rights present in the UDHR. Amongst them, the accusations of “westernization,” “ethnocentrism,” of privileging abstract morality to the detriment of politics and effective claims made by subjects here and now, among other criticism. The most important aspect for the debate proposed here: its approach would avoid the limitations of what has been characterized above as a traditional image of human rights.

However, a closer look would allow us to ask: can Forst’s theory really dismiss the traditional image of Human Rights and the rhetorical aspect it gives them? Or again: what is the importance of the rhetorical aspect for the pursuit and search for rights? Within the very purposes for which the Forst conception is proposed, it is possible to think about some difficulties for the realization of its proposal.

At first, we might think on his critique of relations of justification as acting in two moments or two distinct situations: one would be, so to speak, the “negative” moment, and another, the “positive” moment¹⁷. The negative mo-

not subject to the objections of ethnocentrism and can be seen as an explicit presupposition throughout history, when the charters of rights were elaborated (2011b, p. 53-4).

¹⁷ In a recent publication, Forst (2017b, p. 26-30) identifies three different moments when his critique of relations of justification take place: 1) the first moment, in which agents of jus-

ment would be the one in which subjects place themselves against social and political relations considered arbitrary, rejecting abided rules or demanding justifications for them. In the case of human rights struggles, we can think of the times when it comes to demanding justifications for norms, for instance, that girls are denied schooling, that low-income people cannot vote, etc...

Another moment, the “positive” moment, would be the production of justified standards. In the context of Human Rights struggles, this moment would be represented by the elaboration, in the terms that Forst called, of a justified basic structure, meaning with this expression a social order where rights would be guaranteed¹⁸.

It is possible to think of characteristics for each of those moments. Perhaps the most important of them, which distinguishes both, is the requirement of consensus. Although the consensus is not demanded at the first moment, it is a necessary condition for the second. While to question the validity of norms and demand justifications for them, it is only necessary that people feel dissatisfied, that they manifest their “sense of injustice”, that is, by questioning the norms in force based on reasons, in the second case things go differently. When it comes to producing an order of justified norms (a justified basic structure), it is not only necessary for people to be willing to deliberate or to give consent for acceptable standards for reasons: it is also necessary for people to share reasons to endorse these norms and agree on reasons in order to come into consensus.

The aspects related to the second moment, the moment of the construction of the norms, as well as the difficulties that they bring to a

tification reject the so called status quo social norms (or even demand justifications for them); 2) the second moment, when such agents deliberate about the appropriate norms to regulate their interpersonal relations, and; 3) the third moment, the universe of “justified social norms”. That is, the group of norms that could attain reciprocal and general validity in a non-violent and non-oppressive deliberation.

¹⁸ In this sense: “Justice requires that those involved in a context of (positive or negative) cooperation should be respected as equals. That means that they should enjoy equal rights to take part in the social and political order of justification in which the conditions under which goods are produced and distributed are determined”(FORST, 2014, p. 25).

Human Rights theory give room to elaborate a critic to Forst's constructivist intent. Because, by offering a Human Rights theory that is both critic and constructivist, it is possible to see that both tasks have their own difficulties, as seen above. The activity of criticizing norms considered to be arbitrary does not necessarily require people to share neither large number of reasons nor a common moral point of view.

On the other hand, to construct justifiable norms requires people to stay within deliberative practices and want to carry forward arguments based on fundamental reasons which other people can also agree upon. It is in the process of building the justified norms that disagreement, the core characteristic of conflict, shows its obstacles to Forst's theory of Human Rights.

It is possible to build this criticism by reference to John Rawls's idea of burdens of judgment¹⁹. According to this idea, even in ideal theory scenarios, where people are expected to be willing to reason with one another, some forms of disagreement tend to remain. But it also means that the more specific and contextual the information is the more people tend to be influenced burdens of judgment when assessing rights and duties. To the extent that people go from protesting against rules considered unfair to the affirmation of what the fair rules should consist of, the greater the tendency is for dissent and conflict. As an example: it seems simpler to demand justifications for the rules that girls should not attend a school or poor men should not vote, questioning such rules, than stating exactly how an education system or electoral system should work.

If this criticism is correct, from the first moment to the second moment, the weight of so-called "burdens of judgment" tends to be greater. Consequently, the requirement for reasonableness of reaching consensus tends to be higher.

Of course, it is possible to think about Forstian answers to this criticism. The most important one perhaps could be something like this: it is not the task of a critical theory of Human Rights neither to produce

¹⁹ Rawls (2005, p. 55).

speeches or even some specific set of basic rights nor to prescribe public policies to make those rights effective, not just manifesto rights. In other words, a critical theory aiming to identify social practices for social forms of life free from domination should deem these social agents capable to deliberate autonomously about rights and justice.

In fact, people around the globe are already displaying protest banners and carrying on speeches on social justice, both presenting several arguments for rights and a more just society. They also present different answers for the social challenges people themselves have identified, different ways of political action for making people more autonomous and emancipated. Critical theorists do not necessarily say (or have to say) something new comparing what people have done in political terms.

Nevertheless, social conflicts tend to remain and disagreement tend to be part of deliberative processes in societies around the globe (including non-democratic societies) whose members believe it is possible to achieve a more just cooperation. For those scenarios, it would be an important political contribution if a theory on Human Rights offers a public argumentation for rights capable to help agents of justification to be reasonable in face of divergence.

This is an important aspect to notice, that conflict occurs not only when deliberative institutions are absent, but also when citizens deliberate in democratic institutions. In this sense, it would not be enough to expect the principle of justification itself would help people in disagreement to settle their disputes. Perhaps, it also a matter of showing how a reasonable consensus is possible, what values could stand beyond the community values in dispute and which arguments can be the object of a more substantial consensus.

Conclusion

The exercise involving two pictures of Human Rights, despite the exaggerations involved in the depiction of the first picture, presented a

real challenge to any theory of rights: that is, to explain how rights can be understood part of protesting voices claiming for justice here and now.

We tried to present Forst's theory as an answer to this challenge. According to this answer, his theory was able to identify the rational aspect of social conflicts, giving them relevance to a theory of Human Rights. It was also shown that his theory avoids some gaps currently associated with speculations on the normative validity of rights.

Nevertheless, it was also examined that Forst's theory tries to embrace to different tasks, namely, social criticism and normative constructivism. In doing so, we argued that it is subject to criticism concerning the fulfillment of both tasks. If this criticism is right, it would lead us to the conclusion that his critic to the relations of justification faces different challenges when it is intended as a critical theory of rights, and when it is proposed as a constructivist theory aiming to design the just institutions.

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