



FROM COMPLIANCE TO JUSTIFICATION: ADDRESSING DIGITAL MARGINALIZATION IN CONSTITUTIONAL DEMOCRACIES *

Da conformidade à justificação: abordando a marginalização digital nas democracias constitucionais

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Abstract: This paper explores how mass polarization, social discrimination, and structural injustice emerge in the digital realm, a domain that challenges traditional legal and ethical frameworks. As digitalization shapes society, ethical and community perspectives enter debates with normative claims often hard to justify transparently. To address this, the paper engages with Rainer Forst's philosophy and critical theory. It argues that risks of domination online cannot be addressed by technical transparency alone. Instead, they require a commitment to justification as a normative practice. Applying Forst's idea of justificatory power, the study shows how digital technologies reinforce dominant orders. Algorithms and data infrastructures both reflect and perpetuate structural inequalities. Accountability, therefore, must be reframed beyond compliance or procedural openness. It should demand justifications that withstand reasonable

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scrutiny and affirm equal standing. This approach supports resisting structural injustice and advancing democratic values.

Keywords: Justification. Digital Ethics. Normative orders. Structural Injustice. Critical Theory.

Resumo: Este artigo explora como a polarização em massa, a discriminação social e a injustiça estrutural emergem no domínio digital, um espaço que desafia os marcos legais e éticos tradicionais. À medida que a digitalização molda a sociedade, perspectivas éticas e comunitárias entram em debates com reivindicações normativas muitas vezes difíceis de justificar de forma transparente. Para lidar com isso, o artigo dialoga com a filosofia e a teoria crítica de Rainer Forst. Argumenta-se que os riscos de dominação online não podem ser enfrentados apenas com transparência técnica. Em vez disso, exigem um compromisso com a justificação como prática normativa. Aplicando a ideia de poder justificatório de Forst, o estudo mostra como as tecnologias digitais reforçam ordens dominantes. Algoritmos e infraestruturas de dados refletem e perpetuam desigualdades estruturais. A responsabilização, portanto, deve ser reformulada para além da conformidade ou da abertura processual. Deve exigir justificativas que resistam ao escrutínio razoável e afirmem a igualdade de condições. Essa abordagem apoia a resistência à injustiça estrutural e o avanço de valores democráticos.

Palavras-chave: Justificação. Ética Digital. Ordens normativas. Injustiça estrutural. Teoria Crítica.

Introduction

Truth is a mirror fallen from the sky, shattered into as many pieces as there are inhabitants on Earth. The ancient Arabic proverb invoked by Francisco Balaguer Callejon elucidates the meaning of representative democracies as pluralistic democracies: in them, it is necessary to consider the truths *of others*. The objective here is not to understand “the whole” truth, but to construct a “[...] common truth, based on transaction, consensus, and compromise, fundamental elements in constitutional democracies”.¹ Critical relativism is a theoretical premise of democratic constitutional systems—it is what makes them dynamic. Aiming to reach “the truth,” as a static, absolute, and revelatory object, is what populist political movements intend, and the result is the establishment of autocratic regimes—the opposite of democracy.²

But the search for truth is different from the search for *validity*. Amidst social reality, diverse and plural collectivities must decide—and, subsequently, act. And what makes such action, that is, this exercise of political

¹ CALLEJON, Francisco Balaguer. *A constituição do algoritmo*. Rio de Janeiro: Forense, 2023, p. 53.

² CALLEJON, *A constituição do algoritmo*, p. 100.

domination, just or legitimate? ³ What attributes are necessary for the normative validity of a legal order? More broadly, how can we justify “norms that claim universal validity—whether legal or moral”?⁴ If democracy is the political practice of justice,⁵ should a theory of justice be formulated based on the current political reality—thus limiting itself to “what is possible and acceptable”⁶ — or, on the contrary, should it arise “from a rational construction” that formulates abstract moral principles, subsequently applicable to specific contexts? And what would explain the abrupt “self-inflicted regression”⁷ that entire nations are experiencing today—“an absolutely new and, from now on, ever-present form of moral disintegration”⁸ of collectives willing to lower cherished civilizational standards of their own time?

These are some of the questions that lie at the heart of the philosophical project developed by Rainer Forst. Returning to the apparent incompatibility between an approach that is simultaneously attentive to the particular and the universal – a theme that constitutes Hegel’s main criticism of Kant’s work and which is linked to the debate in the first chapter on the different ways of understanding the world – Forst argues that it is possible to organize a moral philosophy capable of formulating a moral universalism—a typical claim of liberal thought—that is, at the same time, sensitive to particular and historical contexts—a claim that is, in turn, always present among communitarian critics. The basis of his theorization is grounded in a *higher principle*, namely, “the principle of reciprocal and universal justification”,⁹ that is, a fundamental right to justification, whose respect would be required in moral terms.¹⁰

But what can political philosophy do when developments in the field of artificial intelligence are advancing at such a speed that they are now “decisively determining the most important social, economic, and political

³ FORST, Rainer. *Justificação e crítica: perspectivas de uma teoria crítica da política*. São Paulo: Editora Unesp, 2018, p. 13-14.

⁴ FORST, Rainer. *Contextos da justiça: filosofia política para além de liberalismo e comunitarismo*. São Paulo: Boitempo, 2010, p. 278.

⁵ The statement is by Forst and seeks to say that democracy depends on the establishment of “[...] structures of fair and effective public and general justification, in which those who are subject to unregulated rules and domination can become subjects of justification and authors of norms, who are able to participate as equals among equals in the co-determination of the normative order to which they belong.”. FORST, Rainer. *Noumenale Republik: kritischer Konstruktivismus nach Kant*. Berlin: Suhrkamp Verlag, 2021, p. 235.

⁶ FORST, *Justificação e crítica*, p. 13-14

⁷ A expressão é citada por Rainer Forst, que a atribui originariamente à Habermas (*selbst-verantwortete Regression*. HABERMAS, Jürgen. *Auch eine Geschichte der Philosophie*. Die okzidentale Konstellation von Glauben und Wissen. Berlin: Suhrkamp, 2019, v. I, p. 174 (emphasis added).

⁸ HABERMAS, *Auch eine Geschichte der Philosophie*, p. 174.

⁹ FORST, *Justificação e crítica*, p. 51.

¹⁰ FORST, *Justificação e crítica*, p. 51.

processes”¹¹ of today, often without adequate (or even possible) public justification?

For Frankfurt University researcher Christoph Burchard, this is a broader phenomenon: the emergence of what he calls an “Prediction Society” (*Prädiktionsgesellschaft*). In this society, the main political, economic and even legal decisions are no longer taken on the basis of free and plural argumentation between peers and their reflections, but by the decisive influence of a “probable future”.¹² Thus, the map that indicates the most important decision-making directions of this new form of social organization is no longer constructed by taking seriously an “open future,” typical of plural societies—whose individuals always clamor for justifications—but rather based on the evaluation of past data, collected and processed.¹³ For Burchard, this change directly impacts normative orders, which have always needed to support changes justified only when faced with the power of justifying criticism. Authority is now delegated to data mapping and new prediction techniques.¹⁴ But who draws the maps – and why?

This paper explores how phenomena such as mass polarization, social discrimination, and structural injustice are emerging in the digital realm, a domain that challenges the boundaries of traditional legal and ethical frameworks. As digitalization increasingly shapes society, ethical and community perspectives enter the public debate, often advancing normative claims that are difficult to justify in a transparent and universally acceptable manner.

To address these challenges, the paper engages with the philosophical frameworks of Rainer Forst and related traditions of critical theory. It argues that the risks of domination in digital environments cannot be met by technical transparency alone but require a deeper commitment to justification as a normative practice. By applying Forst’s conception of justificatory power, the study highlights how digital technologies, algorithms, and data infrastructures both reflect and reinforce dominant normative orders.

Ultimately, the paper calls for a reframing of accountability in the digital age: not as mere compliance or procedural openness, but as a demand for justifications that can withstand reasonable scrutiny and that affirm

¹¹ BURCHARD, Christoph. Von der “Strafrechts”ordnung der “Prädiktionsgesellschaft zur Strafrechts”ordnung” des liberalen Rechtsstaats. In: FORST, Rainer; GÜNTHER, Klaus (org). *Normative Ordnungen*. Berlin: Suhrkamp Verlag, 2021, p. 553-579, here p. 553.

¹² BURCHARD, Von der “Strafrechts”ordnung der “Prädiktionsgesellschaft zur Strafrechts”ordnung” des liberalen Rechtsstaats, p. 553.

¹³ BURCHARD, Von der “Strafrechts”ordnung der “Prädiktionsgesellschaft zur Strafrechts”ordnung” des liberalen Rechtsstaats, p. 553.

¹⁴ BURCHARD, Von der “Strafrechts”ordnung der “Prädiktionsgesellschaft zur Strafrechts”ordnung” des liberalen Rechtsstaats, p. 553.

the equal standing of all affected. This perspective provides a foundation for resisting structural injustices and ensuring that digital technologies contribute to fairness, legitimacy, and constitutional democratic values.

1. Digital symptoms of a dominant and unjustifiable normative order

In 1973, Alexander Sawchuk, the engineer responsible for developing the *JPEG* image file format, was looking for the “perfect image” that could be scanned to optimize and test the results of his creation; this image should be bright and present a complex mix of colors and textures, as well as containing a human face. The image chosen, which would be reused over the next five decades as a reference for measuring the quality of image processing in software such as *Google Images* or Apple’s smartphone cameras, was that of model Lenna Söderberg, taken from an essay for the Swedish edition of *Playboy*.¹⁵

For Alexander Mosea, the photograph chosen as a paradigm symbolizes the “original sin” of the sexist bias that silently permeates the development of the digital ecosystems that today constitute the stage for public debate. If misogynistic and racist preconceptions have always occupied the public debate, virtual forums such as *4chan*¹⁶ and *Reddit*¹⁷ are true catalysts for a “culture of humiliation”¹⁸ that uses sarcasm to propagate extremist ideas and, at the same time, shield itself from the responsibility arising from their manifestations. Monea identifies these digital strongholds of radicalization as the “*manosphere*”: a myriad of movements that, although heterogeneous, share a deep sense of biological normativity regarding the social roles to be played by men and women, using pseudo-scientific rhetoric that seeks both to justify repressed sexual anxiety — a trait present in the *geek* culture widely shared by programmers in Silicon Valley — and to legitimize reactionary stances toward various minority groups.

But this *manosphere* goes beyond the limits of everyday discussion and finds parallels in scientific forums frequented by academics and researchers from the world’s most prestigious universities, as demonstrated by the

¹⁵ MONEA, Alexander. *The digital closet: how the internet became straight*. Cambridge: The MIT Press, 2022, p. 60.

¹⁶ 4chan is a website that allows anonymous posting by internet users, also known for hosting radicalized discussion spaces for white supremacists and frequently serving as a platform for discussions that preceded some school shootings in the United States.

¹⁷ Reddit is a social network or social news aggregator, divided into “communities” (subreddits) for anonymous discussions.

¹⁸ MONEA, *The digital closet*, p. 31.

study by Florian Ederer *et al.*,¹⁹ published in October 2023. Encouraged by the idea that they would be sufficiently anonymized, numerous users of the *Economics Job Market Rumors (EJMR)* forum freely share sexist, homophobic, racist and anti-Semitic content in the midst of academic and professional discussions in the field of economics. The authors of the study demonstrated that it was possible to retrieve the IP addresses of the participants and found that “[...] among the top 10 IP addresses of toxic college students, there are several from leading universities in the United States, including the University of Rochester and the University of Chicago”.²⁰ The study lists numerous posts that seek to justify the inequalities that exist in the professional market for economists by using racist and sexist arguments that are resistant to the techniques of automatic exclusion of offensive speech. Phrases such as “the main purpose of women is to be used and make babies”, “America’s greatest enemies are: blacks” or “Vrinda and Hampole have a secret same-sex love-hate relationship?” escape the content moderation tools present in the popular scientific debate space, which receives around 2.5 million visits per month from participants.²¹

To summarize: in a new and disturbing historical turn, social minorities find themselves politically entrenched; they are squeezed between digital language (and its potential to radicalize the masses) and the regulatory-institutional structures that aim to ensure fundamental rights. The disproportionate digital vulnerability of women, black people, and members of the LGBTQIA+ community is documented in countless legal studies and stems from a wide range of cultural factors, widespread in corporate policies and state infrastructures.²²

A new phenomenon called *algorithmic racism*, for example, can be seen in the most diverse social practices that require the mediation of algorithms. A clear example is the so called “redlining”, a term that refers to the demarcation of urban areas according to criteria based on race, since all urban centers are mostly occupied by certain social classes of individuals, depending on their income and profile. These factors have been strongly linked to racist practices.²³ This is what researchers has referred to as *statistical discrimination*, i.e. the situation in which an individual suffers unfair restrictions on access to rights and opportunities as a result of the characteristics of the vulnerable group to which they belong; however, these

¹⁹ ELDERER, Florian; PINKHAM, Paul Goldschmith; JENSEN, Kyle. *Anonymity and identity Online*, 25 out. 2024. Available at: [https://www.insidehighered.com/sites/default/files/2023-07/ejmr_paper_nber\(1\).pdf](https://www.insidehighered.com/sites/default/files/2023-07/ejmr_paper_nber(1).pdf). Accessed on 29 mai 2024.

²⁰ ELDERER; PINKHAM; JENSEN, *Anonymity and identity Online*, p. 40.

²¹ ELDERER; PINKHAM; JENSEN, *Anonymity and identity Online*, p. 1.

²² SKINNER-THOMPSON, Scott. *Privacy at the margins*. Cambridge: Cambridge University Press, 2021, p. 15.

²³ NOBLE, Safiya Umoja. *Algoritmos da opressão: como o google fomenta e lucra com o racismo*. Santo André: Rua do Sabão, 2021, p. 38.

characteristics are *inferred* by other data collected, different from race, but linked to it, such as geographical data. Thus, according to a study published by Bianca Kremer,²⁴ the already widespread practice of consulting credit scores prior to hiring “[...] creates a cycle of poverty, because if the individual can’t get a job because of their credit history, that history tends to get worse, making it even more difficult to get a job”.²⁵

For LGBT+ people, the situation is even more serious. By way of illustration, the *InternetLab* research center²⁶ in a study published in 2020, demonstrated how the *Perspective* tool, developed by the Alphabet group to measure the level of “toxicity”²⁷ of textual productions on Twitter (currently designated X), considered discursive manifestations by famous American drag queens “more toxic” than those published by white supremacists. The practical result of this framework is the invisibility of their ideas and speeches on the network for those who use the tool.²⁸ The same distortion is felt in facial recognition software and body scanners: built on binary logic, these systems usually point out transgender individuals based on a reading of “anomalies”, which results in a substantially higher number of approaches in public spaces that use such technologies²⁹ — such as airports, parks and bus stations. It is therefore not surprising that, according to a study promoted by Coding Rights, with the support of the NGO Privacy International,³⁰ 85.7% of the people interviewed in the survey believe that facial recognition devices can increase their chances of being approached in public places or where people circulate to check their gender identity, while the other 14.3% answered that this “might” happen. These tools are also often used to control access to public toilets, exposing transgender people to embarrassment and contributing to their stigmatization.³¹

²⁴ KREMER, Bianca. Discriminações do sistema de pontuação de crédito: uma perspectiva de gênero e raça. In: OMS, Juliana (org.). *O consumidor na era da pontuação de crédito*. Belo Horizonte: Casa do Direito, 2022, p. 224-245, here p. 232.

²⁵ KREMER, Discriminações do sistema de pontuação de crédito, p. 238.

²⁶ OLIVA, Thiago Dias; ANTONIALLI, Dennys Marcelo; GOMES, Alessandra. Fighting Hate Speech, Silencing Drag Queens? Artificial Intelligence in Content Moderation and Risks to LGBTQ Voices Online. *Sexuality & Culture*, Heidelberg, n. 25, p. 700-732, Springer 2021. Available at: <https://link.springer.com/epdf/10.1007/s12119-020-09790>. Accessed on 10 abr. 2023.

²⁷ The *Perspective* app defines “toxic” as any comment that is considered rude, disrespectful or unreasonable, to the point of inducing the interlocutor to withdraw from the debate.

²⁸ RODRIGUEZ, Daniel Piñeiro; D’ÁVILLA, Caroline B. Linguagem, memes e discriminação algorítmica: deslizamentos da cultura heteronormativa para o plano digital. In: SARLET, Bezerra Sales; FUHRMANN, Italo Roberto (org.). *Tecnologia e discriminação*. Porto Alegre: Fundação Fênix, 2023, v. 1. p. 67-83, here p. 83. Available at: https://www.fundarfenix.com.br/_files/ugd/9b34d5_74feb16715ba44dda10b089bea9c0641.pdf. Accessed on 14 jul. 2023.

²⁹ BEAUCHAMP, Toby. *Going Stealth: transgender politics and U.S. surveillance practices*. Durham: Duke University Press, 2019, p. 74.

³⁰ SILVA, Mariah Rafaela; VARON, Joana. *Reconhecimento facial no setor público e identidades trans: tecnopolíticas de controle e ameaça à diversidade de gênero em suas interseccionalidades de raça, classe e território*. Rio de Janeiro: Coding Rights, 2021, p. 28. Available at: <https://codingrights.org/docs/rec-facial-id-trans.pdf>. Accessed on 10 fev. 2023.

³¹ SILVA; VARON, *Reconhecimento facial no setor público e identidades trans*, p. 32.

The challenge to change this and other realities, however, is difficult to overcome. According to the report *Social Media, Platforms and challenges for Democracy, Rule of Law and Fundamental Rights*, commissioned by the European Parliament and published by the European Parliament's Policy Department for Civil Rights and Constitutional Affairs,³² there are three key issues in the fight against algorithmic bias and hate speech. The first relates to the two main content moderation techniques: hash-matching, which consists of automatically identifying content that is identical to other content that has already been analyzed and removed, and artificial intelligence tools, which "learn" what is or isn't illegal based on large databases containing removed material. The second issue is the high rate of "false positives" and "false negatives" produced by AI, which "disproportionately affect marginalized users"³³ – and, as the report reveals, LGBTQIA+ people and racial minorities even more so. Finally, the third challenge involves the construction of alternatives to content moderation, since, according to estimates by former Meta employees, only 5% of inappropriate content is deleted by such tools".³⁴

This occurs because AI classifiers cannot overcome the "[...] *complexity and social knowledge required to understand the intent and context*" of textual productions with vague, implicit or abstract messages.³⁵ However, when it comes to "multimedia content and especially videos" the difficulties are even greater. This places BigTechs in enormous dependence on "[...] rather simplistic techniques, such as indiscriminately removing content that uses certain keywords".³⁶ The result is the blanket exclusion of content related, e.g., to sexuality, as it is a socially forbidden topic, even when it concerns public health. In contrast, implicit eugenic messages in polished textual productions that conform to the cultured norm can go unnoticed.

It is true that, in its recital 31, the new European Artificial Intelligence Act (AI Act) – which specifies guidelines on algorithmic transparency and the responsibilities of companies that use AI – highlights that systems providing social scoring of natural persons by public or private actors may lead to discriminatory outcomes and the exclusion of certain groups, and

³² BOTERO ARCILA, Beatriz; GRIFFIN, Rachel. Social media platforms and challenges for democracy, rule of law. In: COMISSÃO do Mercado Interno e da Proteção dos Consumidores. *Inteligência artificial: implicações para os direitos humanos e a democracia*. 2023, p. 281-283. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/743400/IPOLE_STU\(2023\)743400_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/743400/IPOLE_STU(2023)743400_EN.pdf). Accessed on 28 fev. 2024.

³³ *Ibid.*, p. 10.

³⁴ SILVERMAN, C; MAC, R. After the US election, Key People are leaving Facebook and torching the Company in Departure Notes. *Buzzfeed News*, 2020. Available at: <https://www.buzzfeednews.com/article/ryanmac/facebook-rules-hate-speech-employees-leaving>. Accessed on 22 fev. 2024.

³⁵ BOTERO; GRIFFIN, Social media platforms and challenges for democracy, rule of law, p. 281.

³⁶ BOTERO; GRIFFIN, Social media platforms and challenges for democracy, rule of law, p. 283.

that “they may violate the right to dignity and non-discrimination and the values of equality and justice”.³⁷ Regarding the use of AI systems based on biometric data that infer data relating to age, ethnicity, race, gender or disability, recital 32 is express in highlighting that they are much more likely to present biased results and therefore have discriminatory effects. The subsequent recital states that “the use of those systems for the purpose of law enforcement should therefore be prohibited, except in exhaustively listed and narrowly defined situations, where the use is strictly necessary to achieve a substantial public interest, the importance of which outweighs the risks”.³⁸ Exceptions are therefore the search for certain victims of crime (missing persons); certain threats to the life or physical safety of natural persons or threats of terrorist attack; locating or identifying offenders or suspects of criminal offenses, when punishable in the Member State concerned by a custodial sentence or detention order of a maximum of not less than four years.³⁹

Currently, however, decisions based on predictive analytics are moving beyond the sales and marketing sectors to financial services, medicine and also criminal justice.⁴⁰ The power dynamics of this society are already a reality in predictive policing, algorithmic risk assessment of recidivism and prediction of judicial decisions. An example of great repercussion was the case of *State of Wisconsin vs. Loomis*, in which Loomis argued that the Compas system was biased in indicating his high risk of recidivism, claiming that there were studies showing that the software was more accurate for black individuals than for white individuals. As Eugênio Facchini Neto and Helen Lentz Ribeiro Bernasiuk⁴¹ note, the Wisconsin Supreme Court ruled that the use of the app was correct, one of its arguments being that the system’s “conclusions were not binding”. By 2022, in Brazil, fifty-three courts were developing various technological solutions using artificial intelligence.

As Burchard argues, the causes for the widespread use of these technologies are diverse, but the predominant argument, especially in the US judicial system, is the promise of objectivity, consistency and neutrality in analysis.⁴² However, the countless evidences of errors and racist biases

³⁷ PARLAMENTO EUROPEU. *The Artificial Intelligence Act*. [S.l.], s.d. Available at: <https://artificialintelligenceact.eu/the-act/>. Accessed on 2 jun. 2024.

³⁸ PARLAMENTO EUROPEU. *The Artificial Intelligence Act*.

³⁹ PARLAMENTO EUROPEU. *The Artificial Intelligence Act*.

⁴⁰ BURCHARD, Von der “Strafrechts”ordnung der “Prädiktionsgesellschaft zur Strafrechts”ordnung” des liberalen Rechtsstaats, p. 555.

⁴¹ FACCHINI NETO, Eugênio; BERNASIUK, Helen Lentz Ribeiro. Inteligência Artificial no judiciário: navegando entre Cila e Caríbdis, in *Revista Jurídica Luso-Brasileira*, [S.l.], a. 9, n. 4, 2023, p. 585-627. Available at: https://www.cidp.pt/revistas/rjlb/2023/4/2023_04_0585_0627.pdf. Accessed on 20 fev. 2024.

⁴² BURCHARD. Von der “Strafrechts”ordnung der “Prädiktionsgesellschaft zur Strafrechts”ordnung” des liberalen Rechtsstaats, p. 559.

show that the main challenge lies in building a use for these digital systems that does not corrupt, with authoritarian and non-liberal tendencies, the Criminal Law characteristic of the Rule of Law.

Bearing this in mind, in a first perspective, it is easy to see the political domination of certain social groups to a normative order that is not factually justified — a normative order that does not treat them as equal subjects of the norm's justification, nor does it allow for an effective and broad counterfactual justification. As seen in the previous section 1, unjust relations of domination don't affect societies spontaneously or anonymously; on the contrary: viewed closely, such relations leave a historical trace and allow us to understand how dominant groups have, over time, limited possible spaces for the presentation of reasons by politically and socially dominated groups. In the words of Forst, such a scenario creates "an order of structural domination", where "domination" means the *establishment of non-reciprocal and unjustifiable relations between the groups involved*. In this relationship, dominance is justified ideologically. Seen from this perspective, the meaning of structural injustice is not comparable to a natural disaster or a contingency; it has a *name*, it is something that people do to each other⁴³ and whose responsibility points to the creators and maintainers of unjust structures.

Seen from another perspective, however, the structural domination present in complex societies does not seem to stem directly from identifiable individuals, nor from dominant groups or classes. As Forst⁴⁴ points out, it is difficult to attribute concrete responsibility to an individual or a collective for the injustice suffered by a single mother with no stable income who has recently immigrated, when she loses her apartment and risks becoming homeless⁴⁵. Neither the landlord who evicted her after she defaulted on her rent payments nor the employer who failed to hire her (because she didn't meet the requirements of the job vacancy on offer) could be held responsible if they didn't act in breach of the law. Both, however, participated in a social arrangement that keeps certain groups of individuals in a perpetual state of structural vulnerability. A "*de-faced*" power,⁴⁶ without an apparent dominant subject, politically and socially subjugates dominated subjects.

⁴³ FORST, *Noumenale Republik*, p. 230.

⁴⁴ FORST, *Noumenale Republik*, p. 230.

⁴⁵ In original: „[...] ist die konkrete Zurechnung von Verantwortlichkeit für Ungerechtigkeit schwer, wenn etwa ein alleinerziehende Mutter, ohne festes Einkommen und vor nicht langer Zeit immigriert, ihre Wohnung verliert und obdachlos zu werden droht“. In free translation: "It is difficult to concretely attribute responsibility for injustice when, for example, a single mother with no fixed income who has recently immigrated loses her home and risks becoming homeless". Ibid., p. 230.

⁴⁶ Forst credits Hayward with the expression.

However, if it is impossible for domination to exist without dominants and the dominated, the question of responsibility for unjust domination needs to be answered by a theory of justice that understands the frequent combination present in unjust social relations, which mix political exclusion, the emptying of power and cultural devaluation. Without this perspective, Forst warns, the pursuit of justice risks asking for help at the wrong doors — including from those who contributed to or benefited from structural injustice.⁴⁷

In any case, when research shows that automatically generated subtitles on *Youtube* videos are less accurate for women's voices (Orwat, 2020); when countless apps appear capable of producing nudity in exclusively female avatars — *deepnudes* — (Silbey and Hartzog, 2019); or when job search platforms favor white men, even when their CVs are identical to those of candidates of the opposite sex, we need to understand the importance of “*extra-algorithmic*” factors — an unjust normative order. The consolidation of this scenario shows that the success of the fight for equal rights in constitutional democracies will largely depend on a constant struggle for justifications.

2. Two images of justice – the one we see and the one that looks at us

In order to find fair alternatives to the structural injustice presented, it is first necessary to define what sense of justice such a proposal will serve. Just as digital images convey different ideologies and therefore condition logical thinking and social coexistence, so too do different images of justice link the response to be given to the questions raised so far. In Rainer Forst's view, there are at least two historically shared images that condition the contemporary view of justice.

Introducing the endless debate surrounding justice, Rainer Forst recalls that, at different moments in history, human beings have formed different images of it: such as the goddess *Dike* or *Justitia*, who always wields a sword and scales, but is not always depicted with a blindfold. The intention to symbolize balance and impartiality varies less throughout history than the representation of its power and strength. These images influence the language used to debate the subject, linking “[...] the way a word is used and thus constituting its ‘grammar’ — its use is therefore conditioned by the image of justice.” As Forst points out, however, perhaps more important to understanding it are the *practical images of injustice*: “images of social situations most often constituted in historical and aesthetic terms that express the issues at stake in a comprehensive and also evaluative

⁴⁷ FORST, *Noumenale Republik*, p. 234.

sense”.⁴⁸ This concept is perfectly applicable to the scenes of algorithmic discrimination analyzed above.

For Forst, “[...] thinking about social or distributive justice is ‘trapped’ in an image that prevents it from getting to the heart of the matter”.⁴⁹ A “false image,” still associated with the old principle of “to each his own” (*suum cuique*), “leads to a comparison of the distribution of goods among people,” leading to a quest to discover, for example, whether the individuals in question already “have enough”.⁵⁰ This image, however, obscures issues that are essential to justice, such as “who decides (and how) on the structures of production and distribution” – including, therefore, their institutions and spaces for deliberation – hiding behind it the question of power.⁵¹

This would be, for Forst, a “false image” that obscures the central political elements of justice. There would be another “more appropriate” image, which addresses intersubjective structures and “not the subjective or supposedly objective states of provision of goods”.⁵² The philosopher points out that a second image can be formed from a radical critique of justice, thus being able to “[...] interfere ‘at the roots’ that structure unjust relations: it is the possibility of justification of social relations” and “the respective distribution of the ‘power of justification’” in a given political context.⁵³

Forst argues that there is a “more original and deeper meaning of justice,” which has arbitrariness as its opposite, that is, “the arbitrary domination of individuals or part of the community” under certain terms of coexistence that reproduce, in an unjustified or unjustifiable manner, asymmetrical power relations. To understand Forst’s image of justice, which is “[...] emancipatory and described with concepts such as equity, reciprocity, symmetry, and balance”,⁵⁴ one must first understand the formation of its foundations, a topic to be explored in the next subtitle. It should be noted, however, that, as the philosopher teaches, the distinction between these two images of justice actually reflects two images—or perspectives—of the subject and their human dignity. The first image, which suggests that “certain goods that are indispensable for a ‘dignified’ or ‘good’ human life” should not be lacking, is the “justice we see”,⁵⁵ that is, a justice perceptible to the senses through the knowledge of its negation (injustice); the second image is that which informs subjects of their freedom and equality “[...] and whose dignity consists in not being subjected to certain norms without an appropriate basis, that is, not being dominated”.⁵⁶

⁴⁸ FORST, *Justificação e crítica*, p. 35.

⁴⁹ FORST, *Justificação e crítica*, p. 38.

⁵⁰ FORST, *Justificação e crítica*, p. 38.

⁵¹ FORST, *Justificação e crítica*, p. 38 (emphasis added).

⁵² FORST, *Justificação e crítica*, p. 38.

⁵³ FORST, *Justificação e crítica*, p. 40.

⁵⁴ FORST, *Justificação e crítica*, p. 40-41.

⁵⁵ FORST, *Justificação e crítica*, p. 67.

⁵⁶ FORST, *Justificação e crítica*, p. 67.

3. Justice as non-algorithmic domination and the fundamental and moral right to justification

Broadly speaking, normativity characterizes principles, rules, standards, and disciplines that guide actions and beliefs with some degree of authoritative force, making them more than mere suggestions, but *norms* (from which the term originates).⁵⁷ Norms stand in contrast to descriptions: while both are representations of actions and beliefs, categorizing something under a description defines its type, whereas categorizing it under a norm establishes its legitimacy, what we should do or believe,⁵⁸ the guiding “ought” that shapes judgments.⁵⁹

⁵⁷ More specific and differentiated definitions of normativity abound across various fields, not only in moral and political thought but in other areas as well. For example, see Glüer, Wikforss, and Ganapini for how the concept of normativity is central in the philosophy of language, or refer to Steinberger for the normativity of logic. GLÜER, Kathryn, et. al. The Normativity of Meaning and Content. In E. N. Zalta & U. Nodelman (Eds.), *The Stanford Encyclopedia of Philosophy*. Metaphysics Research Lab, Stanford University, 2023. Available at: <https://plato.stanford.edu/archives/fall2023/entries/meaning-normativity/>. Access on 29. Set. 2025. Even within metaethics, different subgroups propose various relationships involving normativity: some emphasize a constitutive link between normativity and motivation, others between normativity and intentions to act, or between normativity and agency. COPP, David; MORTON, Justin.. Normativity in Metaethics. In E. N. Zalta & U. Nodelman (Eds.), *The Stanford Encyclopedia of Philosophy*. Metaphysics Research Lab, Stanford University. Available at: <https://plato.stanford.edu/archives/fall2022/entries/normativity-metaethics/>. Accessed on 29 set. 2025. The framework of reference of this book, constructivism, falls into this latter group: we are practical agents, and as practical agents we are continuously engaged in performing actions. But are AI practical agents?

⁵⁸ Discussion of normativity are usually tackled by distinguishing *theoretical reasons* (reasons to believe) and *practical reasons* (reasons to act), in order to also properly distinguishing the types of reasoning faculty we are referring to: theoretical reasoning involves addressing questions of explanation and prediction, while practical reasoning involves addressing questions of action and justification. However, this distinction is far from clear-cut, as theoretical and practical rationality are deeply intertwined: determining the norms of practical rationality seems ultimately a theoretical matter (DREIER, James. Decision Theory and Morality. In A. R. Mele & P. Rawling (Eds.), *The Oxford Handbook of Rationality* (p. 156–179). Oxford University Press. Available at: <https://doi.org/10.1093/0195145399.003.0009>. Accessed on 29 set. 2025) and at the same time beliefs and theoretical reasoning are often influenced by practical considerations (HARMAN, Gilbert. Practical Aspects of Theoretical reasoning. In A. R. Mele & P. Rawling (Eds.), *The Oxford Handbook of Rationality*, p. 45–55. Oxford University Press. Available at: <https://doi.org/10.1093/0195145399.003.0003>. Accessed on 29 set. 2025. Whether deciding *what to believe* or *what to do*, agency manifests in both the epistemic and practical realm with agents navigating norms and taking responsibility for their conclusions and choices. This overlap becomes particularly evident in the context of Artificial Intelligence, as this chapter argues, where the boundaries between reasoning about action and reasoning about belief are often blurred, further complicating the discussion of normativity.

⁵⁹ If we apply Rainer Forst’s distinction between contexts of justice, practical reason refers to the capacity to provide reasons appropriate to specific normative contexts. This entails aligning one’s actions and judgments with moral principles (e.g., “One shall not lie”), ethical rules (e.g., “Greet people when you meet them”), legal standards, (e.g., “Drivers must stop at red lights”), and political practices (e.g., “Citizens should exercise their right to vote”). Practical reason thus functions as a guide for navigating the diverse demands of these distinct yet interconnected normative frameworks. “A theory of justice must not absolutize one of these dimensions and shape the others according to it: justice maintains the boundaries between

When discussing AI or any other scientific approach, the conversation often turns to the normativity the discipline embodies: science is considered to be normative because it provides *explanations*, fosters understanding, and offers systematic knowledge about the world. For instance, one of the major differences between creationism and evolution theory is that the latter is an indispensable tool for explaining and systematizing biological knowledge, while creationism lacks such explanatory and organizational purpose.

This is a common way to differentiate science from pseudoscience; however, technology presents a more complex case. Extensive historical evidence and in-depth philosophical analysis have led to a broad consensus among technology scholars that technology is not, and has never been, solely grounded in science.⁶⁰ Moreover, a more general problem is that technology is strongly connected with agency in a way that science is not.⁶¹ Thus, it seems that in order to determine the normativity that technology employs we don't need just norms for evaluating belief but also norms for evaluating acts. Normative claims gain their force in contexts where agents—whether human or artificial—can understand and respond to them. Norms presuppose a capacity for agency, autonomy, and the ability to act otherwise. These qualities enable agents to reflect on the reasons for their actions and make choices accordingly. This intersection, thus, raises profound questions: How do norms apply to systems that lack agency since they cannot be held morally accountable for their actions?⁶² What responsibilities do human developers, deployers, and regulators bear in making AI systems conform to normative standards? Is it sufficient to

these spheres by giving effect – in accordance with generally justified norms – to ethical identity, equal rights, political membership, and moral respect. [...] The person at the center of a theory of justice is not just an ethical person, a legal person, citizen, or moral person, he or she is all of these simultaneously in a different way: he or she is ethically, legally, politically, morally autonomous" (FORST, Rainer. *Contexts of justice: Political philosophy beyond liberalism and communitarianism*. Los Angeles: University of California Press, 2002, p. 240).

⁶⁰ Advanced technology has existed since long before modern science. Even today, the construction and use of technologies is largely based on more or less systematized practical experiences, such as rules of thumb and tacit knowledge, rather than (or in addition to) science (HANSSON, Sven Ove. With all this pseudoscience, why so little pseudotechnology?, in *Axiomathes*, n. 30, 2020, p. 685-696, here p. 691. Available at: <https://link.springer.com/article/10.1007/s10516-020-09499-3>. Accessed on 4 abr. 2024. On the topic, cf. HOUKES, Wybo. The Nature of Technological Knowledge. In *Philosophy of Technology and Engineering Sciences*, 2009, Elsevier, p. 309–350. Available at: <https://doi.org/10.1016/B978-0-444-51667-1.50016-1/>. Accessed on 30 set. 2025. Also cf. NORSTRÖM, Per. Engineers' non-scientific models in technology education, in *International Journal of Technology and Design Education*, 2013, 23(2), 377–390. Available at: <https://doi.org/10.1007/s10798-011-9184-2>. Accessed on 30 set. 2025.

⁶¹ BIJKER, Wiebe et. al. *The social construction of technological systems: New directions in the sociology and history of technology*. Anniversary ed. Cambridge: MIT Press, 2012. Still on this point, cf. STIEGLER, Bernard. *The future of work*. Cambridge: Polity, 2016; BENJAMIN, Ruha. *Race after technology: Abolitionist tools for the New Jim Code*. Cambridge: Polity, 2019.

⁶² FLORIDI, Luciano. *The ethics of artificial intelligence: Principles, challenges, and opportunities*. Oxford: Oxford University Press, 2023.

demand that AI systems explain their outputs and decisions? Or should we demand *justifications* from their creators?

Technical advancements in transparency are essential. However, they alone cannot fully resolve the challenges posed by AI opacity. To establish a robust framework for accountability in the digital era, it is imperative to ensure that AI systems operate not only transparently but also justifiably, aligning their decisions with broader moral, political, and legal norms. Ensuring that AI algorithms are normatively justifiable and genuinely accountable is not merely a technical challenge but a fundamental endeavor to uphold the integrity of democratic societies in a world increasingly shaped by AI systems. That is why the *cartographic reconstruction* proposed by Rainer Forst, which redraws the “map of justice” using a moral and fundamental right to justification as a compass, can help in building the best ways to promote accountability for the use of AI.

3.1 Forst’s Right to Justification

In his work “Contexts of Justice”, Rainer Forst sought to demonstrate that the dichotomy present in debates between communitarians and liberals, centered on the “primacy of justice over communitarian conceptions of the good”,⁶³ constitutes a false dualism, because neither school of thought takes sufficient account of the perspective of “real participants”. To understand the fallacy of this false dualism, it would first be necessary to understand that a theory of justice can be debated in four different normative contexts—namely, the ethical, the legal, the political, and the moral—but that, although they are codependent (since each retains some “unique residue”), there would be no precedence or hierarchy among them⁶⁴—except when necessary for conflict resolution, a situation in which the normativity of the legal context, as a “protective cover” for particular identities, prevails, limiting them according to the principles of justice. Thus, for the author, the basic structure of a society can be considered fair (or justified) “to the extent that it is ‘fair’ to people in all these dimensions”.⁶⁵ To achieve such success, a theory of justice must be both context-dependent and context-transcendent, that is, it must consider these normative dimensions without making any of them absolute.⁶⁶ It is under this new position that, for Forst, it would be possible to achieve the “[...] compatibility of individual rights

⁶³ WEBER, Thadeu. Hegel e Rawls: um diálogo possível, in *Veritas*. Porto Alegre, v. 67, n. 1, jan./dez. 2022, p. 1-12, here p. 2.

⁶⁴ SILVA, Thyago Rudian Ferreira e. *Justiça e poder na teoria crítica de Rainer Forst*. 2020. Dissertação (Mestrado em Filosofia) – Faculdade de Filosofia, Universidade Federal de Santa Catarina, Florianópolis, 2020, p. 11.

⁶⁵ FORST, *Contextos da justiça*, p. 13.

⁶⁶ FORST, *Contextos da justiça*, p. 14.

with the good of the community, of political universality with ethical difference, of moral universalism with contextualism".⁶⁷

Forst's political philosophy, however, is reflective (or recursive) in nature, in that it is conceived not from the traditional perspective of the Kantian spectator (*Zuschauer*), but rather from that of the participant, which leads to a justification that is anything but abstract. With such a "methodological shift," it becomes possible to formulate concrete justifications "[...] by historical agents who are no longer satisfied with the justification of the normative order to which they are subordinate".⁶⁸ By replacing the position of the observer with that of the participant, it would be possible, according to Forst, to achieve a consistent perspective in the practices of justification.⁶⁹

It is based on the thesis of the four contexts of justice that Forst argues – greatly influenced by his reading of the article *Moral conflicts and political legitimacy*, written in 1987 by Thomas Nagel⁷⁰ – that there is a basic right to justification. This thinking leads Forst to define justice as the "human strength and greatness to oppose arbitrary reactions of domination",⁷¹ that is, domination "without reason" or insufficiently justified by institutionalized means and procedures.⁷² This conception of political justice, whose idea of non-domination has its roots in the basic right to justification, fits perfectly into the "family" of possible liberal political conceptions of justice, as understood by John Rawls, the greatest exponent of political liberalism – even though Rawls did not fail to consider his "justice as fairness"⁷³ the standard example for other political conceptions of justice. At the same time, however, Forst, as Habermas' academic "heir," uses Habermas' reformulation of Kantian proceduralism to build his theoretical enterprise in intersubjective and communicative terms.

This is where Rainer Forst's theory takes a turn. Faced with the realization that there is a constant demand for justification in different contexts, Forst proposes shifting Kant's "monologue"⁷⁴ – which seeks, from a contemplative perspective, to promote deontological moral reflection – to now view it as a "dialogical and intersubjective process"⁷⁵ in constant renewal, "capable

⁶⁷ FORST, *Contextos da justiça*, p. 13.

⁶⁸ FORST, *Justificação e crítica*, p. 14.

⁶⁹ FORST, *Justificação e crítica*, p.17.

⁷⁰ NAGEL, Thomas. *Moral conflict and political legitimacy*. *Philosophy & Public Affairs*, Cambridge, v. 16, n. 3, p. 215-240, Summer 1987. Available at: https://www.jstor.org/stable/pdf/2265265.pdf?refreqid=fastly-default%3A15226922ea92798d7c0c028bfc068277&ab_segment_s=&origin=&initiator=&acceptTC=1. Accessed on 20 out. 2023.

⁷¹ FORST, *Justificação e crítica*, p. 51 (emphasis added).

⁷² FORST, *Justificação e crítica*, p. 51.

⁷³ RAWLS, John. *O liberalismo político*. São Paulo: WMF Martins Fontes, 2011, p. 521.

⁷⁴ SILVA, *Justiça e poder na teoria crítica de Rainer Forst*, p. 27.

⁷⁵ SILVA, *Justiça e poder na teoria crítica de Rainer Forst*, p. 26-27.

of being recursively reconstructed”⁷⁶ based on the ability of “reasonable” people to present ‘good’ reasons for the norms that legitimize actions in specific contexts⁷⁷. The subjective right to justification would, here, correspond to the principle of practical reason “[...] that only those norms that are reciprocally and universally justified can claim universal validity”.⁷⁸ This perspective views every person as a subject of justification who uses and demands reasons to orient themselves in the social space and act within it, with a “basis” for claims of justice⁷⁹ that is, however, averse to cultural relativism. The “participant perspective” is, therefore, a fundamentally normative perspective that values the “objective and intersubjective world.” Thus, given the right not to be subjected, as an equal agent, to norms or institutions that are not satisfactorily justifiable, Forst states that, “[...] in Kantian conceptual terminology, this right to justification—and the respective duty—is a categorical imperative”.⁸⁰

The overarching argument that connects the essays in his book can be summarized as follows:

Premise 1: Humans, as autonomous and rational agents, deserve to be treated with dignity, which entails respecting their capacity to reason and question norms.

Premise 2: Any exercise of power or authority over individuals must be justifiable to those affected, adhering to principles of reciprocity (mutual respect) and generality (universal applicability).

Premise 3: Failure to provide such justification constitutes domination, undermining dignity and justice.

Conclusion: Therefore, the right to justification is a fundamental moral and political right that underpins the legitimacy of all norms, rules, and decisions in a just society.

Thus, Forst argues that a Right to Justification is a fundamental moral right that cannot be reduced to either an interest or an expression of will but instead serves as a precondition for both. This approach seems to offer a clearer account of the source of normativity in rights, avoiding metaphysical assumptions: rather than stemming from an independent objective interest, normativity arises from the justificatory demands of agents themselves. For example, the injustice of some states lacking rights for same-sex marriage does not stem from the failure to recognize an objective interest specific to certain groups. Instead, it arises from the fact that reserving this right

⁷⁶ FORST, *Contextos da justiça*, p. 107 (emphasis added).

⁷⁷ FORST, *Contextos da justiça*, p. 107.

⁷⁸ FORST, *Contextos da justiça*, p. 107.

⁷⁹ FORST, *Justificação e crítica*, p. 140-141 (emphasis in the original).

⁸⁰ FORST, *Justificação e crítica*, p. 142.

for some couples while denying it to others without offering “reciprocally justifiable reasons”, violates the principle of reciprocity.⁸¹

As a result of this interpretation, a right, in its most crucial sense, is not merely a status right protecting individuals from the negative consequences of bad decisions, but is also a demand right requiring that social and political structures be justifiable to all those affected by them. This basic moral right is then to be institutionalized as a political right, ensuring the protection and promotion of each person’s capacity for self-determination.⁸² Yet, even in this political vest, it is important to note that the right to justification is not concerned with securing specific goods or interests (to bring about) but is grounded in the inherent dignity of being a rational agent who is both a “reason-giving and reason-receiving entity and an authority in the space of reasons”.⁸³ According to Forst, thus, autonomy is not simply the capacity to choose; it also entails the ability to critically reflect on one’s choices and to justify them to others. This is a crucial distinction, because it means that autonomy is not just about making decisions but also about being able to provide normative reasons for those decisions that are acceptable to others.⁸⁴

Also, for Forst, the State “[...] is the place and instrument of common coordination of universally justified social coexistence”.⁸⁵ Thus, individuals belonging to a particular ethical community who claim universal validity for their community convictions must offer reciprocal and universal justification, demonstrating the moral foundation of this conception. If this is not possible, there is a strong indication that *moral limits* that need to be imposed on reason have not been overcome, in order to be as ethically neutral as possible. It is this practice that makes the law sensitive to the agendas of feminist and anti-racist social minorities, who unmask false universalities through the public use of reason. An ethical argument can

⁸¹ “So the main argument for the right to same-sex marriage, to take one of Griffin’s examples, would not be that enjoying a particular form of social union and raising children within a marriage is a substantive human aim and generally characteristic of a “worthwhile life,” as Griffin argues, but that a society where the institution of marriage is reserved for some couples and denied to others without reciprocally justifiable reasons violates the demand of reciprocity. The test of reciprocity and generality – which requires a proper institutional form in a political context – would, I believe, show that the reasons proposed for restricting in the first place this right to heterosexual couples only refer to beliefs, either ethical (human nature, the will of God) or empirical (findings about proper conditions for raising children), which cannot withstand scrutiny as a basis for generally binding legal regulations.” (FORST, Rainer. *Justification and critique: Towards a critical theory of politics*. C. Cronin, Trans.; English ed. Cambridge: Polity, 2014, p. 53).

⁸² FORST, Rainer. *The right to justification: Elements of a constructivist theory of justice*. New York: Columbia University Press, 2012, p. 6.

⁸³ FORST, *The Noumenal republic*, p. 199-200.

⁸⁴ FORST, *The right to justification*, p. 50

⁸⁵ FORST, *Contextos da justiça*, p. 58 (emphasis in the original).

be used, provided it is articulated in the grammar of justice, that is, in a procedure of universal-intersubjective justification.

This requires an “intersubjective application” of Rawls’ principle of difference, which seeks to compensate for unjustifiable inequalities “within a framework compatible with economic efficiency”.⁸⁶ Therefore, this command must be interpreted in light of the idea of practical reason in Forst’s theory, that is, based on a “procedural principle of universal justification”.⁸⁷ Thus, social inequalities must be justified to the less fortunate, taking their perspectives into account and equally imposing a universal duty toward those who are worse off.⁸⁸ In addition, it is necessary to guarantee, with the realization of social rights, “substantive points of view and arguments” – for it is these that will prevent the direct migration of economic power to the field of political power, the main cause of social marginalization. Finally, recognition and self-respect must be guaranteed so that citizens “can recognize themselves as full members of society and be recognized as such”.⁸⁹

However, it is not enough for identity minorities to point out the flaws in the justification of majority discourses, since broad political participation requires them to offer, in universal language, their point of view—and thus avoid the “identity trap,” which induces members of stigmatized communities to be content with the public exposure of their “community scars.” Limited to this behavior, they reveal only the effects of serious moral violations—but do not, in themselves, point to alternative responses. As a substantive prerequisite for overcoming the reproduction of the normative power of the factual⁹⁰, it is necessary to grant *access to the reservoirs that concentrate the essential resources of structural power*.

3.2 Noumenal Power – domination between the agent and the structure

The conception of justice as non-domination leads the author to the central point of his theoretical endeavor: *the theory of noumenal power*. From this point, Forst understands power as an essentially cognitive phenomenon (made, therefore, of *thought*, not material)⁹¹ and whose existence is only verified “by the intersubjective cognitive recognition of reasons that explain and justify the action”.⁹² A noumenal conception of power—a Kantian term

⁸⁶ FORST, *Contextos da justiça*, p. 25.

⁸⁷ FORST, *Contextos da justiça*, p. 179.

⁸⁸ FORST, *Contextos da justiça*, p. 180.

⁸⁹ FORST, *Contextos da justiça*, p. 180.

⁹⁰ FORST, *Noumenal Power*, p. 111-127.

⁹¹ SILVA, *Justiça e poder na teoria crítica de Rainer Forst*, p. 12.

⁹² SILVA, *Justiça e poder na teoria crítica de Rainer Forst*, p.12.

used with an important caveat of meaning⁹³ — aims to break away from the problematic quantitative conception of power, which also guides the traditional notion of distributive justice present in Rawls' work.

For Forst, power “must be conceived primarily as a discursive phenomenon” capable of “organizing and influencing, occupying and, if necessary [...], dominating the *space of reasons*.”⁹⁴ As will be seen below, Forst's Habermasian approach strongly dialogues with Rawls' work, insofar as it seeks to restrict itself to the theme of political and social justice. Forst focuses not on the “subjective or supposedly objective states of provision of goods,” but rather on *intersubjective structures and relations*⁹⁵ — that is, the basic structures of the society to which Rawls' political conception of justice is directed.

The general analysis of power as a numinous phenomenon demonstrates, however, its *normative neutrality*: justice or tyranny are symptoms of moral tensions, and not intrinsically qualities of power⁹⁶; its exercise is, in fact, “part of any form of sociability”.⁹⁷ Thus, as political energy capable of generating normative validity,⁹⁸ power takes on “[...] forms of domination [...] when justifications (religious, traditional, metaphysical, economic, political, etc.) stabilize into hierarchical orders of action,” designated as arbitrary dominations.⁹⁹ As a mental phenomenon, its numinous nature stems from the immaterial space in which it develops: a space of intersubjective existence¹⁰⁰ — therefore, neither subjective nor objective — In

⁹³ Forst clarifies in what sense he employs the *numenal* expression in the introduction to his new work *República Numenal (Noumenal Republik)*: “Kant's reflection on human beings as lawgiving beings who enjoy equal status in the *kingdom of ends* and are obliged to offer one another reasons that are uniformly generalizable is, in my view, the appropriate reflection on our situation as justificatory and transcendental beings in this sense. We belong to the factual world of justifications, but we are also members of a realm of critical problematization and mutual respect that binds us here and now and imposes on us the duty to offer justifications in moral or political contexts. The *kingdom of ends*—properly understood—is of this world. We must not succumb to the misconception that we are members of two strictly separate worlds, nor to ontological or metaphysical dualism, but we must recognize that we would not be able to orient ourselves reasonably in this single world if we could not question and transcend the justifications given. Put differently, the counterfactual question about better justifications is part of the facticity of our normative world of justification. The worlds in question, the *numenal* and the empirical, therefore, are not really two separate worlds but two different perspectives on ourselves as subjects of justification. Thus, the counterfactual, transcendental-*numenal* normativity of self-determined legislation appears within the *de facto* normativity of our empirical-noumenal spaces of justification—as a prefiguration of genuine individual and collective autonomy.” (author's free translation, emphasis in the original). FORST, *Noumenale Republik*, p. 13-14.

⁹⁴ FORST, *Justificação e crítica*, p. 168 (emphasis added).

⁹⁵ FORST, *Justificação e crítica*, p. 37-41.

⁹⁶ SILVA, *Justiça e poder na teoria crítica de Rainer Forst*, p. 54.

⁹⁷ SILVA, *Justiça e poder na teoria crítica de Rainer Forst*, p. 54.

⁹⁸ SILVA, *Justiça e poder na teoria crítica de Rainer Forst*, p. 50.

⁹⁹ FORST, *Justificação e crítica*, p. 169.

¹⁰⁰ FORST, Rainer. *Normativity and Power: Analyzing Social Orders of Justification*. Oxford: Oxford University Press, 2017, p. 57. Available at: <https://doi.org/10.1093/oso/9780198798873.001.0001>. Accessed on 2 jun. 2024.

which narratives of justification function as “embodiments of contextual rationality,” condensed into images, biographies, facts, myths – and, why not, memes – capable of energizing certain senses of order.¹⁰¹ It is thanks to the reproduction of justifications repeated daily, “against conscience or intention”,¹⁰² that an apparent “structural power without authorship,” equipped with a “collection of reasons” validated in advance and present in the social structure – but not inherent to it – claims normative authority as a result of its own factuality.¹⁰³ This is what Forst calls *noumenal capital*, an element responsible for shortening relations of justification and mediating the dialectical relationship between agent and structure.¹⁰⁴

Maintaining the current state of algorithmic vulnerability in which social minorities find themselves, resulting from the algorithmic-structural discrimination already analyzed, not only strikes at the heart of individual autonomy, but also at the heart of the ideals of a liberal democracy – that is, it strikes at moral issues. And “once moral issues are affected,” they cannot be “subordinated to other points of view” without requiring equal “elevation to the level of reciprocity of universality”.¹⁰⁵ Thus, as a result of the normative neutrality of power, *the capture of digital language by certain unjustified, supposedly moral or ethical conceptions that elude criticism* – that is, endowed with factual validity or, in Forst’s terminology, noumenal capital – comes up against the “political and moral impulse” originating in human dignity,¹⁰⁶ a moral core of extreme political relevance that not only “leads to substantive fundamental rights, but also aims above all to guarantee participation” in the process of formulating these rights. This political and moral impulse manifests itself as criticism of power (or counterpower) in the face of discursive hegemonies.¹⁰⁷

As Forst teaches, defending a “sliding” of moral norms “[...] into positive law does not mean that they constitute a ‘supra-law’ and that the validity of law is a moral validity”, but rather that the principles of law must be

¹⁰¹ FORST, *Normativity and Power: Analyzing Social Orders of Justification*, p. 57.

¹⁰² SILVA, *Justiça e poder na teoria crítica de Rainer Forst*, p. 64.

¹⁰³ As James Gordon Finlayson teaches in his study on the long-standing debate between Rawls and Habermas, the mere precedence of the term “*Faktizität*” in the title of Habermas’s work (*Faktizität und Geltung*) already conceals a critique of approaches such as Rawls’s and other legal thinkers of the same tradition (like Ronald Dworkin), who, in Habermas’s view, place excessive emphasis and priority on the normative dimension of law, to the detriment of its *facticity* (that is, the social and institutional reality of law). Only in the second part of the title of his work (“*und Geltung*” – “and validity”) is there an indication of the normative component of law, without which positive law would not be possible. FINLAYSON, James Gordon. *The Habermas-Rawls debate*. New York: Columbia University Press, 2019, p. 84-85.

¹⁰⁴ SILVA, *Justiça e poder na teoria crítica de Rainer Forst*, p. 69.

¹⁰⁵ FORST, *Contextos da justiça*, p. 64.

¹⁰⁶ For a detailed analysis on the subject, Cf. SARLET, Ingo Wolfgang. *Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988*. Porto Alegre: Livraria do Advogado, 2001, p. 60.

¹⁰⁷ FORST, *Justificação e crítica*, p. 167-168.

“justified according to the criteria of reciprocity and strict universality”, limited only on the basis of reasons that meet these two criteria. Nor would it be a matter of invoking a “natural law” originating “outside” society, since “[...] it is the people themselves with vulnerable identities who demand reasons for delimiting their ways of life”, which must be justified.¹⁰⁸ Here, drawing on literature—which has always given voice to those who “do not speak the dominant language”¹⁰⁹—Forst argues that a social world that aspires to justice must be capable of allowing individuals to develop their “own self”, which implies, consequently, that a world considered just “[...] would be one that does not coerce anyone into adopting a second artificial and deceptive language that masks what is authentic and ends up rewarding what is false”¹¹⁰ – or, in other words, *normalizing the unjustifiable*.

Regarding specifically the accountability of AI systems, Forst can conclude that the right to justification should not merely be a status right designed to protect individuals from poor decisions by safeguarding their self-advocacy. Rather, it is a demand right that compels AI developers to create algorithms that can be normatively justified and transparent. In order to truly address the problem of opacity in all its dimensions, it is crucial to empower individuals and communities affected by AI-driven decisions, enabling them to demand not only clarity but also normative reasons that they can comprehend and critically assess. In this regard, Forst’s frameworks redefine accountability, elevating it from a mere technical aspiration to a fundamental moral and democratic imperative.

Conclusion

After four deaths and hundreds of injuries, France declared a state of emergency in New Caledonia.¹¹¹ The social unrest erupted after the French National Assembly changed the archipelago’s electoral law, allowing voters who did not participate in the 1998 census to now have the right to vote. Insurgents blocked streets in the city of Nouméa, and French authorities reported fires and looting of businesses and public establishments. The fear of the Kanak independence movement, the original inhabitants of the region, is that the

¹⁰⁸ FORST, *Contextos da justiça*, p. 64 (emphasis added).

¹⁰⁹ FORST, *Justificação e crítica*, p. 250.

¹¹⁰ FORST, *Justificação e crítica*, p. 252 (emphasis added).

¹¹¹ FRANÇA DECRETA ESTADO DE EMERGÊNCIA E PROÍBE O TIKTOK NO TERRITÓRIO DA NOVA CALEDÔNIA APÓS 4 MORTES EM DISTÚRBIOS. *G1*, 15 de maio de 2024. Available at: <https://g1.globo.com/mundo/noticia/2024/05/15/franca-decreta-estado-de-emergencia-e-proibe-o-tiktok-no-territorio-da-nova-caledonia-apos-4-mortes-em-disturbios.ghml>. Accessed on 8 jun. 2024.

constitutional reform—which will grant voting rights to a substantial portion of the residents—will reduce their broad political influence over local institutions. The state of emergency began in May 2024 and gave greater powers to France, which was able to impose traffic bans, make arrests, and conduct house searches. In an unprecedented move in the European Union, and considering the many “messages of hate and incitement to violence” shared in videos and images on social media, one of the measures adopted was to ban the social network TikTok from New Caledonia.¹¹²

The French example shows the power and discursive agility of new digital communication artifacts, whose dissemination makes ideological legacies that were previously almost always hidden in words “visible.” While it is true that such visibility makes it easier for scholars to point out countless examples of these occurrences, it is also true that this new format can make all kinds of ideals virulent—including opposition to the right to vote.¹¹³ As justification complexes capable of simulating a space for reason, ideologies can be used to produce meanings and then exercise power in different normative orders.

The challenge lies in identifying which justification narratives (*Rechtfertigungsnarrative*)¹¹⁴ raise unfair claims when technology is not at the same

¹¹² REYNAUD, Florian; LELOUP, Damien. Why and how TikTok was banned in New Caledonia. *Le Monde*, 16 maio 2024. Available at: https://www.lemonde.fr/en/pixels/article/2024/05/16/why-and-how-tiktok-was-banned-in-new-caledonia_6671655_13.html. Accessed on 8 jun. 2024.

¹¹³ As Pierre-Emmanuel Rodriguez highlights, “[...] the situation is even more surprising for those born locally, who do not all have the right to vote depending on whether their parents arrived in New Caledonia before or after the Nouméa Accord. In total, 20% of French citizens residing in New Caledonia are deprived of the right to vote in local elections, representing more than forty-two thousand voters out of a total population of approximately two hundred and seventy thousand in 2023.” That is why, in Rodriguez’s view, “[...] the deprivation of the right to vote for a significant portion of the archipelago’s population no longer seems justified today. The freezing of the electorate in 1998 was intended to allow the Kanaks to vote for or against independence. However, the most recent referendum in 2021 confirmed the result of the first two, which was to remain part of the French Republic.” Nevertheless, Rodriguez notes that, despite the strong resistance of the Kanak people, the only way out of this crisis—for both the French authorities and New Caledonia—is to resume dialogue. RODRIGUEZ, Pierre-Emmanuel. *The Electoral Reform in New Caledonia as a Blessing in Disguise: Kanak Minority versus the Right to Vote*. *VerfBlog*, 29 maio 2024. Available at: <https://verfassungsblog.de/a-blessing-in-disguise/>. Accessed on 8 jun. 2024.

¹¹⁴ “One of the key concepts, which opens access to the exploration of the simultaneously internal and external contextuality of orders of justification, is that of the “*narrative of justification*.” Orders of justification require substantive, temporal, and social contextualization within the lived worlds of their addressees. Narratives of justification are characterized by the fact that they intertwine justifications from normative orders with the individual and collective spaces of experience and horizons of expectation of the participants, deriving their persuasive power from life stories of generations, historical experiences of injustice, experiences of liberation from relations of domination, or traditional collective self-understandings questioned and confronted by counter-narratives.” Tradução livre. FORST, Rainer; GÜNTHER, Klaus. Normative Ordnungen. Ein Frankfurter Forschungsprogramm. In: _____ (ed.). *Normative Ordnungen*. Erste Auflage. Berlin: Suhrkamp, 2021. p. 9-21. p. 14.

stage of progress as the complexity of discursive manifestations. As pointed out by the European Parliament, in 2023, artificial intelligence classifiers have not yet managed to overcome the social knowledge necessary to understand the new digital language, which is endowed with intertextuality and requires contextual understanding.¹¹⁵ Content moderation tools are equally rudimentary.¹¹⁶

The result of this scenario is both odious preventive censorship—the result of automated inaccuracy that particularly affects sexual and racial minorities—and the preservation of hegemonic discourses, even when criminal, since their identification requires sensitive intertextual understanding. For Binenbojm, in scenarios such as this, the only response “[...] compatible with the 1988 constitutional regime, which banned censorship in Brazil and ensured, in all its fullness, freedom of expression, press, and information,” would be one that values the autonomy and judgment of each individual.¹¹⁷ Thus, it would be appropriate to preserve the free expression of ideas and, in extreme situations, enable those affected and holders of class actions to use the judicial mechanisms available under the legal system.¹¹⁸

But what if extremism becomes the norm—or, at least, more widespread than it can protect the subjective dimension of fundamental rights? What if rates of violence against women and sexual minorities skyrocket; if cases of bullying and attacks in schools and universities increase; if racist demonstrations gradually become more frequent at sporting events, resulting in more conflicts between fans; if political radicalization takes over condominiums and prevents dialogue between neighbors; in short, if a myriad of justifying narratives capable of subjecting fundamental rights and democratic processes to *systemic risks* are already entrenched? And what if, after these symptomatic events, it is possible to identify traces of moral regression in social and institutional relations, captured by extremist leaders willing to radicalize entire hegemonic cultures? In short, what if the constitutional state is at risk of a *dormant anti-democratic culture*?

Only the light of critical thinking can illuminate the open flank of political domination whose legitimacy is based on unjust narratives of justification. However, in the 21st century, the former strength of its antidote, counter-narratives based on more abstract normative reasons, needs to establish itself in an environment that is averse to the dynamics of public reasoning. In the digital world, there is a rush to consume not only products and media, but also insights. Ideologies have the advantage in this arena, as they have found the perfect intergenerational vehicle for conveying feelings

¹¹⁵ BOTERO; GRIFFIN, Social media platforms and challenges for democracy, rule of law, p. 281-283.

¹¹⁶ BOTERO; GRIFFIN, Social media platforms and challenges for democracy, rule of law, p. 281-283.

¹¹⁷ BINENBOJM, Gustavo. *Liberdade igual: o que é e por que importa*. Rio de Janeiro: História Real, 2020, p. 35.

¹¹⁸ BINENBOJM, *Liberdade igual*, p. 36.

that do not require words to be expressed—memes. *For although words are the domain of humans, humans are the domain of images*¹¹⁹ – and images serve as a good home not only for reason, but for all sorts of ideologies.

The guiding idea of this article is that to address effectively the risks of structural domination of AI, it is not sufficient to rely solely on technical solutions or individual transparency. Instead, what is needed is a robust notion of justification that extends beyond mere procedural openness, embracing a normatively institutionalized conception. To be truly accountable, an agent must be able to provide a normative reason—one that is appropriate to the specific matter under discussion and that cannot reasonably be rejected—when called upon to justify its actions.

In this sense, accountability is not simply about making processes visible or decisions traceable; it is about grounding them in reasons that carry normative weight and that others can, in principle, accept. This ensures that justification becomes a practice embedded within institutions and social contexts, rather than an abstract technical requirement.

We have sought to demonstrate that Forst’s theory of justification supports this perspective. His framework emphasizes that justification must always be responsive to the claims of others and must be capable of standing up to reasonable scrutiny. Applying this insight to the governance of AI allows us to reframe the challenge of accountability: not merely as a matter of transparency or oversight, but as a demand for normatively grounded justifications that respect the agency of those affected.

In conclusion, integrating Forst’s perspective into the discourse on AI governance highlights the necessity of a shift from technical fixes to normative practices of justification. This shift is essential if we are to resist structural domination and ensure that AI systems serve not only efficiency or innovation, but also fairness, legitimacy, and the broader values of democratic societies.

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¹¹⁹ BELTING, Hans. *Antropologia da imagem: para uma ciência da imagem*. Lisboa: KKYM, 2014, p. 79.

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