

IN SEARCH OF THE ETHICS OF APROXIMATION IN LAW: THE GAP BETWEEN PRESENT AND FUTURE AND THE DEVELOPMENT OF AN ETHICAL EXPERIENCE IN THE ENVIRONMENTAL CRISIS SCENARIO¹**POR UMA ÉTICA DA APROXIMAÇÃO NO DIREITO : O DISTANCIAMENTO ENTRE PRESENTE E FUTURO E A CONSTRUÇÃO DE UMA EXPERIENCIA ETICA NO CENARIO DA CRISE AMBIENTAL**Clarissa Marques²**Resumo**

O presente artigo parte da crítica quanto ao distanciamento entre presente e futuro para propor uma análise de uma “ética da aproximação no Direito”. Apesar do termo crise ser comumente associado a uma situação problemática passageira, a “crise ambiental” aqui tomada apresenta-se como um “Mal” permanente, consequência das mudanças provocadas pela civilização tecnológica. Os riscos ambientais provocaram a descontinuidade da linearidade do tempo. Em termos de “crise ambiental” presente e futuro coexistem. Tendo em vista o poder de intervenção humana na vida e no futuro da própria humanidade, a ética tradicional não atende ao cenário de medo apontado por Hans Jonas. Surge a necessidade de uma nova ética, a ética *pro* futuro. Em contrapartida, o tempo presente é marcado por um déficit motivacional nos sujeitos morais, por um esvaziamento moral, pela descrença, conforme observado por Simon Critchley. Uma das consequências da tentação niilista que envolve as sociedades contemporâneas é o risco dos princípios éticos e jurídicos transformarem-se em simples mecanismos de justificação, sem que provoquem nos sujeitos uma experiência ética. Assim, uma experiência ética de “aproximação no Direito” é a proposta do trabalho aqui apresentado. Uma espécie de ética de transição entre o presente de medo e o futuro de riscos.

Palavras-chave: Crise Ambiental; Futuro; Riscos; Ética; Direito.

Abstract

This article begins with a criticism of the gap between present and future to propose an analysis of “Ethics of approximation in Law”. Although, the term crisis is commonly associated with a transient problem situation, the “environmental crisis” taken here, presents itself as a permanent “Evil”, resulting in changes brought by technological civilization. Environmental risks caused the disruption of the linearity of time. In terms of “environmental crisis”, present and future coexist. Given the power of human intervention in the life and future of humanity itself, the traditional Ethics do not meet the fear scenario appointed by Hans Jonas. Thus, arose the need for new Ethics, the Ethics for the future. In contrast, the present time is characterized by a motivational deficit in moral subjects, by a moral emptiness, by unbelief, as noted by Simon Critchley. One of the consequences of nihilistic temptation involving contemporary societies, is the risk of ethical and legal ss turning into simple justification mechanisms without causing in the subject an ethical experience. Furthermore, an ethical experience of “aproximation in Law” is the proposal of the work presented here. A kind of transition in Ethics between the present of

¹ Special thanks to Prof. Simon Critchley and Prof. Richard Bernstein for conversations and correspondence on the subjects explored in this essay, to Rogerio Mendes for carefully editing and to Mariam Matar for comments and friendship. This work was supported by CAPES-Brazil.

² Pós-doutorado na The New School of Social Research-NY (Bolsista CAPES). Professora do PPGD da Faculdade Damas. Professora da Faculdade Facipe e da UPE. E-mail: marquesc@newschool.edu

fear and the future of risks.

Keywords: Environmental Crisis; Future; Risks; Ethics; Law.

INTRODUCTION

In the present article the environmental problem, or the “Evil”, departs from the conception of ecological catastrophe³, both, autonomous and spontaneous. It also approaches the realization that the crisis is about civilization, the Western mindset, the modern rationality⁴, the economic model, and the paradigm withdrawal that ended up denying the relationship between subject/object, organism/environment and cause/effect (MOORE, 2015). The environmental “Evil” recognizes that nature was denied and exploited from the conversion of being in *homo economicus* (LEFF, 2006, p. 77). This results in the need to rediscover the place that man must take in nature; to resituate the human being in the world (GUZMAN, 1995, p. 232). These “strange times” require Ethics to be reviewed and encourages reflection on how the legal framework needs to be involved in an ethical experience that allows a connection between present and future on environmental risks. The scenario of “crisis” requires a non-dualistic analysis able to interpret “the two modern compartments”, the human elements and non-human, as one set. The intertwining of nature and society is back to be analyzed (LUKE, 2004, p. 236) and perhaps, this is exactly the point in “crisis”: humanity taken to rethink the non-human elements beyond the categorization of objects available. Furthermore, there is a need to rethink the temporal dimension as the effects go beyond the present time and make the future a current problem.

Contemporaneity, identified by some as post-modernity, is characterized by fluid concepts⁵ and complex social relationships, to name a few. It underlines the modern rupture between subject and object; a strong break which makes us face ethical challenges. Simon Critchley warns about the need for us to resist nihilistic and pessimistic temptations and face

³ Although the idea of catastrophe has not been included in the present work, its doctrinal reception is quite common. “Il est impossible d’éviter une catastrophe climatique sans rompre radicalement avec les méthodes et la logique économique qui y mènent depuis cent cinquante ans”. GORZ, André. *Écologica*. Paris: Galilée, 2008, p. 29.

⁴ “A modernidade pesada era uma época que pretendia impor a razão à realidade por decreto, remanejar as estruturas de modo a estimular o comportamento racional e a elevar os custos de todo comportamento contrário à razão tão alto que os impedisse”. BAUMAN, Zygmunt. *Modernidade líquida*. Rio de Janeiro: Jorge ZAHAR, 2001, p. 58.

⁵ The idea of fluidity of concepts in the contemporaneity is proposed by Zigmunt Bauman.

the harsh reality of the world that points towards unfair violence all around, a growth in social and economical inequality and reactionary behaviour towards what is understood as identity. This is a reality that questions the “health” of liberal democracy and presents a massive political disappointment (CRITCHLEY, 2012, p. 07). Despite Critchley not referencing environmental degradation as one of the aspects of this contemporary reality, it certainly should not be excluded. In the wake of concern raised by Critchley about a motivational deficit that seems to involve ethical experience nowadays, one can question if, as a result, there would also be the emptying of moral reflection about an ethical *pro* future in environmental terms, and if the question of this motivational emptiness reaches towards the Law.

This is the primary challenge of this article: to discuss an ethical experience which re-considers the gap between present and future in terms of what is conventionally called the “environmental crisis”. Raising the possibility of “Ethics of approximation”, in other words, ethical support able to approach the future, even if on the drift of what appears to be the present time, given that, in terms of “environmental crisis”, present and future coexist. The aim is to provoke an ethical debate that may assist the Law in the construction of rules that are not only a means of justification, but rather principles that contribute to the motivating force of proper moral relations. The way chosen as basis for analysis of the present difficulty of building an ethical *pro* future, or “Ethics of approximation” in Law, in times of “environmental crisis”, is the fear presented by Hans Jonas, as “heuristics of fear”. Critchley’s theoretical contribution of “ethical experience” (CRITCHLEY, 2012) compliments the rationale for the proposed analysis. In this sense, this paper first analyzes the recognition that human intervention can cause fear in humanity itself, by the long-term effects of their actions, as proposed by Jonas. In a second moment, it confronts the analysis of the challenges of an ethical experience in Law in times of “environmental crisis”, as well as, of ethical-moral disbelief in contemporary societies, using as theoretical reference, the proposal of Simon Critchley⁶.

⁶ The author begins with the crisis of legitimacy of the political institutions created by the democracies of the Western countries to indicate the necessity of an Ethics that enables us to face the current political situation. Or rather, the starting point will be given from the theoretical challenge, assumed by Critchley, of an ethical experience and subjectivity that leads to an ethical demand for commitment to the disbelief characteristic of today’s societies. The challenge is to form an ethical experience, even in the midst of disbelief which will be approached by the present research regarding the challenge of forming an ethical experience of approximation in Law in the name of a future time, even in the face of disbelief in the present.

STRANGE TIMES OR “ENVIRONMENTAL CRISIS”?

Isabelle Stengers states, “these are strange times” (STENGERS, 2015, p. 07), as if we were living two different stories enacted in a world that has become “global”. One of them is known by everyone, and is characterized by a spirit of competitiveness and the idea of development, but at the same time of fear of its consequences: ever-growing social differences, pollution, pesticides poisoning, depletion of water supplies and the evident climate changes, to name a few. The second story can be clearly identified with regards to the facts, but is obscure when it comes to answers on what has been happening (STENGERS, 2015, p. 08) - the so-called present and future risks, this well-known uncertainty. This global scenario, in which the two stories are staged (the “time of catastrophes”), is highlighted by the need to question what is clearly known as development, and make it responsible for its consequences. It is the realization of how unsustainable that growth is in the manner that has been submitted, or it is simply the famous “environmental crisis”. On these “strange times” the challenge is to think of “a future that is not barbaric” (STENGERS, 2015); a life after economic growth.

In fact, “strange times” may well represent the risk scenario arising from the changes in nature made by modern technology (JONAS, 2006), since the word “crisis” indicates a delicate situation, but it is aware that this is something temporary. Far from being just a chapter, or a passing oddity, environmental risks arise as consequences caused by “technological civilization” (JONAS, 2006)⁷ and suggests that it will be permanent and not temporary, as one can imagine. Therefore, it is necessary to clarify the approach used here. This is distinct from positions that address the risks to the environment as natural and spontaneous disasters, or as transient problems for the proposed analysis. In terms of “environmental crisis”, present and future coexist. That is, the term “crisis” will be used in order to be aligned with the rhetoric commonly used in everyday social relations, but unlike the meaning of temporary difficulty, the “environmental crisis” investigated in this article is part of the present time and future time, composing a new era. The intention is to approach the idea not as something temporary limited, momentary. In doing so, relating it to the consequences brought about by human interventions that have resulted in “fear” about the future, as properly analyzed by Hans Jonas.

This new time points to a nature that needs to be protected against damage, caused by men, and at the same time makes men uncomfortable, once the knowledge and ways of life

⁷ The expression “technological civilization” is used by Hans Jonas to treat the context of societies after the introduction of technology in modernity. V. O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio.

(STENGERS, 2015, p. 11) are confronted. As an example, one must mention an article published by the New York Times in April 19th last year. "Ten ways to be a greener traveler, even if you love to fly"⁸, suggests the use of reusable bottles while traveling, as opposed to purchasing disposable plastic bottles throughout the day. According to the Pacific Institute, millions of barrels of oil are needed to produce plastic bottles for water, consumed just by Americans. In 2007, the Institute stated that the amount of oil used in the manufacture of plastic bottles was enough to power more than one million cars. The article also suggests that travelers should take their own mugs for coffee or tea in order to avoid the use of "to-go cups" and save paper. If applied, take the recommendation for New Yorkers to drink coffee in a mug and not in the famous "to-go cups", a conflict between lifestyle and environmental awareness would easily be established. It is part of the routine of New York residents to stop to buy coffee wherever they are heading to, be it a place of work, study or even leisure. A shift in which people would start to carry mugs in their backpacks would be perceived as a "break of style". Here there is the tension created by the distance between present and future in environmental terms: what will be the next and immediate effect on the lives of coffee consumers using "to-go cups"? That is, what environmental impact can they identify in their lives at the present time, due to the style adopted in everyday life? The distance between this action (the use of "to-go cups" as a lifestyle) and, the time of the consequences is so wide (the depletion of natural resources, increased production of waste, pollution etc) that most likely the option of an ethical stance for the future would remain impaired. The reflection here is to consider the timing of things. Clearly, there is a gap between the time of the actions and the time of the demonstration of the consequences, which become part of the scenario of future risks, the famous environmental uncertainty.

The doubt about which form those consequences will take, the intensity and the time of these events, transform the future of the crisis into the present. As contradictory as it may seem, the question about the future of the environment becomes a certainty, upon the realization that the present time is taken by a future crisis, given the urgency to act, including therein the urgency to discuss the relationship between Ethics and Law.

More than regulation through legal standards, this new era - formed by a present time in which the future belongs - suggests that normative production should be accompanied by an ethical debate. If not, it runs the risk of becoming one more mechanism of justification.

⁸ http://www.nytimes.com/2016/04/24/travel/ecotourism-green-travel-tips.html?_r=0

Therefore, these standards will not be able to motivate the subject, contributing to the motivational deficit, which is one of the hallmarks of contemporary societies, and will remain taken by the feeling of “fear” of the time to come. If taken once again the example of the use of “to-go cups”, one can imagine the risks of a rule that does not articulate with the ethical debate. It is hard to imagine that the city of New York could, one day, propose and impose establishments to only sell coffee, tea, water or juice to consumers utilizing reusable containers. This law would remove the use of “to-go cups” by merchants and, at the same time, put an end to what for some could mean a lifestyle. The hypothesis here refers to a scenario in which a norm would be passed out without being accompanied by an ethical discussion; without concern to clarify to the subjects that their moral obligations have now been extended and include their duty towards the future. It is indeed possible that this norm could control the consumption of paper cups. However, the absence of an ethical discussion would potentially, not morally, motivate subjects to the risks of “environmental crisis”. One of the consequences resulting from this gap between Ethics and Law would be new lifestyles and habits, which easily arise and are disjointed from an ethical and environmental stance; human behavior motivated to risk containment in these “strange times” can not occur only through coercive measures, but requires an ethical commitment by individuals who lack an ethical experience able to face the gap between present and future, or an “Ethics of approximation”.

In this sense, the “environmental crisis” is not envisaged as a bad phase to be overcome, but rather as an “evil” that seems permanent, not merely to overcome a current difficulty. Moreover, it does not refer only to major environmental disasters, but also to the damage caused to the environment due to small behaviors that are already part of the routine of social groups, such as the use of “to-go cups”. Thus, the “environmental crisis” leads to reflection on the gap between present and future.

THE FEAR IN JONAS AND THE PRESENT TIME OF THE FUTURE ENVIRONMENTAL CRISIS

Crisis, risk and an open future are, in few words, a possible representation of the theoretical problem faced by Hans Jonas: the construction of responsibility as a imperative which confronts future risks to humanity. The crisis, to Jonas, is born out of the difficulty found in using traditional Ethics to assess good and evil with regards to the changes brought about by modern technology. The risk lies in the uncertainty of the consequences caused by human intervention via technology, including in nature. One of the added risks to the crisis, which is of

Jonas' concern, is the future which is open and taken by serious risks, but whose scars of uncertainty do not justify the lack of commitment by the subjects. According to Jonas, we live in an apocalyptic situation, under the threat of a catastrophe. In case we fail, things take the course which had been given at the present time; and more: the danger comes from the excessive dimension assumed by the so-called scientific-technological-industrial civilization (JONAS, DEMING, 2009, p. 12). Therefore, crisis, risk and an open future pervade the development of a new dimension of ethical responsibility, based on the responsibility as a imperative (GORDON, 2014, p. 23) ⁹ that faces this new scenario which, according to him, is named "technological civilization" (GORDON, 2014, p. 09)¹⁰.

In this sense, with regards to the power of human intervention in nature raised by Hans Jonas, the "environmental crisis" departs from the ecological catastrophe mode and approaches the realization that nature was denied and highly exploited. Another aspect of this conception of environmental issues as crises, is the need for the discussion of risks, primarily future risks. In other words, considering the possible risks of degradation and environmental damage caused by the civilization model assumed after modernity. Thus, the "environmental crisis" presents a "risk regime" as it becomes integrated into the routine of this "new" society and imposes a new order; one that is no longer national but global, given the spatial extension and temporal consequences of human actions. The need to discuss a new ethical paradigm (BECK, 2009, pp. 03-05), including time (OST, 1997), means considering this crisis scenario as one in which one can find risks and an open future. As such, the analysis presented becomes the proposal of *pro* future Ethics.

Early in his work "The imperative of responsibility", Jonas declares his belief in the need for changes in Ethics, in view of, the transformations undergone by the human capacity. The modified nature of human action, according to the author, comes as a logical consequence of ethical changes. The new faculties, understood by him as a consequence of modern technology, present a new dimension of ethical behavior, hitherto not designed by traditional Ethics (JONAS, 2006, p. 29). This results in two observations: the first one being that, all traditional Ethics are

⁹ According to Walter Weiskopf, the central question in Hans Jonas's theory is: "what kind of changes have to take place in our ethos in order to create an atmosphere of responsibility for the future of humankind?". V. Moral responsibility for the preservation of humankind. In: GORDON, John-Stewart, BURCKHART, Holger. Global ethics and moral responsibility. Hans Jonas and his critics. Surrey: ASHGATE, 2014, p. 23.

¹⁰ The expression used by Jonas is "technical civilization". V. Responsibility today: the ethics of an endangered future. In: GORDON, John-Stewart, BURCKHART, Holger. Global ethics and moral responsibility. Hans Jonas and his critics. Surrey: ASHGATE, 2014, p. 09.

anthropocentric (JONAS, 2006, p. 35). In other words, the ethical significance of these positions is focused on a direct relationship between men, including man's relationship with himself. The second one refers to the concern of the action, which has always proved to be targeted for action. That is, the position of traditional Ethics about good and evil is lacking in long term considerations, as well as, often turn to the immediate and near reflexes of human acts in the lives of men instead. Ethics, taken by the author as traditional, do not consider the effects of actions taken by moral subjects before the non-human elements, given its anthropocentric character and concern for proximity.

Traditional Ethics, for Jonas, suffer a kind of confinement, in other words, limited to the field of immediacy of action, where time is common. The behavior of moral analysis turns to the present. A direct consequence of this isolation is a moral environment focused on those who live presently, or as he states "The moral universe consists on the contemporary, and its future horizon is limited to the predictable length of time of their lives" (JONAS, 2006, p. 36)¹¹. The analysis of human action, from the idea of the good or the evil occurs from short-term consequences. However, according to Jonas, the scenario has now changed. Modern technology has brought new forces and, with them, new consequences, resulting in the inadequacy of traditional ethical references. But this is not to say that the "Ethics of the closer ones" are no longer valid; which remain valid for the sphere of intimacy and routine of human relations. However, the changes brought about by the technical lead actors, their actions and effects for a sphere beyond the proximity, provoke the need in Ethics for a new dimension of responsibility. This results, since man is now called to account also for long-term consequences. According to the author, care for the future of humanity is a collective duty in the era in which technological civilization is omnipotent, if not in its production, in its destructive potential (BURCKHART, 2014, p. 09)¹²; the risks are gaining ground and require care at the present time. If taking care of the future of humanity is, to Jonas, a collective duty that already exists, it means that the "imperative of responsibility" recognizes the gap between present and future. However, it proposes to work, through the Ethics of responsibility, the bridging of these two spheres of time.

One of the changes caused by technical intervention of the subject is, according to Jonas, the vulnerability of nature, which to him is one of the indications that there is a need to discuss

¹¹ JONAS, Hans. O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006, p. 36.

¹² V. Responsibility today: the ethics of an endangered future. In: John-Stewart, BURCKHART, Holger. Global ethics and moral responsibility. Hans Jonas and his critics. Surrey: ASHGATE, 2014, p. 09.

new Ethics, once traditional Ethics no longer meet the challenges created by technological civilization. This is because “nature as a human responsibility is surely one *novum* on which a new ethical theory must be considered” (JONAS, 2006, p. 39)¹³. Until then, no Ethics were forced to think of human life as a global condition, nor the distant future. However, since both, human life and future time, became part of the “game” of modern technology, a new conception of rights and duties became necessary. It is no longer possible to think of rights and duties from a defined logic criteria, as proximity and simultaneity, once these were transformed by the spatial growth and temporal extension of the consequences of human action. Technical praxis changed the cause and effect relationship. By giving moral equation a cumulative character it brought a new ethical problem, “the gap between the power to foresee and the power to act”. The ethical challenge is to act in the present, in the face of predictions of the future of the consequences and act before the risk scenario, even while being characterized by uncertainty and doubt. Traditional Ethics had never even considered this gap between the forecast for the future and the present action of the time, so do not sufficiently contribute to the idea proposed in the present article; that the “environmental crisis” is a future which the present time is already a part of, despite the gap between present and future. One must not only think about how to act in the face of environmental catastrophes, it must actually rethink ethical models and consider that a new dimension of responsibility towards nature emerges in the scenario created by modern technology.

Analyzing the temporal element of ethical responsibility, and assigning this responsibility to Ethics and Law under the “environmental crisis”, is what is proposed by Hans Jonas and also operates as the foundation of this article. With regards to the temporal dimension of the actions, responsibility often acts in response to events in the past. On the other hand, it has prospective responsibility (CANE, 2002, p. 31)¹⁴, taken here in ethical terms, which acts to establish obligations and duties, not because of past acts, but in face of a future time. Thus, adding an ethical conception guided by a transtemporal¹⁵ notion is, to Law, a possible path that has, as theoretical alternative, the redemption of the discussion about the Ethics of

¹³ JONAS, Hans. O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006, p. 39.

¹⁴ CANE, Peter. Responsibility in law and morality. Oxford: Hart Publishing, 2002, p. 31.

¹⁵ Transtemporality represents a challenge to Ethics itself, which has always been concentrated in the present, since the temporal expansion of the consequences of human action has always been associated with random chances. However, the order of global environmental risks requires the right to perceive that the moral universe surpasses the behavior of contemporaries, and presents the need for the Law to operate through a transtemporal ethical framework in the ambit of the environment.

responsibility. The responsibility, in turn, takes on Jonas the status of a principle (JONAS, 2006, p. 189)¹⁶, based on the need to act today without losing the relationship with the past, as well as, with tomorrow even when the latter is an uncertain future. Responsibility, in this case, takes the role of an ethical principle of command of *pro future*¹⁷ Ethics, which for this article involves adding to Law an ethical experience able to act in the present with the anticipation of expected consequences for a future time of environmental risks.

The motivation for humanity to act in advance is, for the author, the fear about the future consequences of behavior assumed after modernity. Due to the rising human modification of the technical power, Jonas pointed out the fear that humanity made in itself, that is, the fear of humanity as its own destructiveness. He stressed that “to investigate what we really give value to, moral philosophy has to consult our fear before our desire” (JONAS, 2006, p. 71)¹⁸ which he called *heuristics of fear*. Fear, to Jonas, motivates the Ethics of the future.

However, these new Ethics are faced with a fear that turns something on that has not been tried and that may not count with similar situations in the past, as well as, in the present (GORDON, 2014, p. 16)¹⁹. In this sense, Jonas proposes that the *malum*, so far only imagined (a future *malum*), should take the form of an experienced *malum*, known as, past or present. “Thus, getting a projection of that future becomes a first duty, as it were introductory, to the Ethics that we seek” (JONAS, 2006, p. 72)²⁰. However, the imagined *malum* is not experienced by the subject and therefore does not produce fear which usually happens when the subject is threatened. The second introductory duty authorizes the imagined destination of future men, or even the planet, and exerts influence on what motivates our actions and mind. That is, “the willingness to be affected by salvation or misery (even if only imagined) of the future generations, is the second duty of desired ethics” (JONAS, 2006, p. 72)²¹. This is because,

¹⁶ Jonas analyzes what he calls Theory of Responsibility and highlights the importance of the future horizon. O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006, p. 189.

¹⁷ “Obter uma projeção desse futuro torna-se um primeiro dever, por assim dizer introdutório, daquela ética que buscamos”. O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006, p. 72.

¹⁸ O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006, p. 71.

¹⁹ JONAS, Hans. Responsibility today: the ethics of an endangered future. In: GORDON, John-Stewart, BURCKHART, Holger. Global ethics and moral responsibility. Hans Jonas and his critics. Surrey: ASHGATE, 2014, p. 16.

²⁰ O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006, p. 72.

²¹ O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006, p. 72.

according to Jonas, to the new sphere of action - brought about by technological planning - fantasies are not paralyzed. Projection of the future is part of the duties of that sphere (JONAS, 2006, p. 72)²² and its uncertainties are worth exploring.

The caveat of the author, with regards to the difficulty of Ethics dealing with an unknown *malum* by human experience, therefore, would not, at first glance, have the ability to motivate moral behavior in the name of a distant future. This leads to another peculiarity in future Ethics, which is their non-reciprocity. The duty to the future has no corresponding right, which is another challenge of these new Ethics proposed by Jonas. There is no reciprocity in the sphere of the imperative of responsibility, once the desired ethical subject dealt with does not yet exist. This unknown and non-existent future, for obvious reasons, can not correspond, present a counter match, or establish a list of rights and duties as do traditional Ethics. In Jonas's words, "in the absence of time travel, reciprocal interaction with distant generations is impossible" (MULGAN, 2006, p. 342)²³. Thus, it is not possible to ask what the future has for me or for us, then, to define the corresponding ethical behavior (JONAS, 2006, p. 89)²⁴.

Furthermore, the Ethics of the future emerge as a new alternative in the face of the inability of traditional Ethics to operate in the scenario caused by technology, including the vulnerability of nature. The changes brought about technological civilization, according to the author, cause fear about the future. This motivates the discussion of Ethics about what is to come, whose performance is through the imperative of the responsibility. In this regard, two observations come about: first, its non-reciprocity, in other words, a liability for which there is no corresponding match, once it has an obligation towards a non-existent something, in other words, the future. The second observation relates to the fact that, unlike the commonly used sense of responsibility, which would be a calculation of what should be done *ex post facto*, the imperative of responsibility emphasizes the determination of what has to be done.

In this sense, the notion of responsibility found in the imperative presented by Jonas has relevant place, due to the object that claims one's act, and not, due to one's conduct and its consequences (JONAS, 2006, p. 167)²⁵. However, it is emphasized that this justifying object of

²² O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006, p. 72.

²³ MULGAN, Tim. Future people. A moderate consequentialist account of our obligations to future generations. New York: University Press, Oxford, 2006, p. 342.

²⁴ O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006, p. 89.

²⁵ O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006, p. 167.

moral action, the changed nature of human action, has been motivated by fear, and it is this fear about the uncertain future that justifies the Ethics of the future to Jonas. Announcing the “ethical vacuum” we’ve experienced, awash in nihilism, the author points to fear as a noun of true wisdom when we are facing immanent threats. However, he points out that fear can not act in the same proportion as it used to from a long-range perspective. The reason lies in the fact that the small magnitude of things, which occur because of the distance in time between action and consequences, makes them seem innocent (JONAS, 2006, p. 65)²⁶. In other words, what is far from the eyes does not generate the same fear as what is present. What is not real, something non-existent, does not seem to cause fear and leads to an “ethical vacuum”. As an example, the future of nature, in light of the vulnerability caused by the technique. However, this article aims to analyze not only how fear would be a reason for Ethics that stand on behalf of the unborn, but also, to an approach of ethical experience in Law that would be built in the midst of a motivational deficit, including ethical, which seems to represent the landscape of contemporary societies (CRITCHLEY, 2012)²⁷.

The reference to Ethics of transition arise from the gap pointed out by Hans Jonas, “the gap between the power to foresee foresight and the power to act”. The characteristics of this time between predicted consequences and the actions themselves, which seem to be present time, is disbelief or disappointment; the nihilism described by Simon Critchley, which requires a reaction through a theory of ethical experience and subjectivity. This is the challenge proposed here: to analyze the implications of motivational and ethical deficit for the Ethics of the future. Put simply, to discuss the need for Ethics of responsibility, which emerge from an atmosphere of fear, according to Jonas, but face a disappointment that seems to take into account contemporary societies, according to Critchley. The question that permeates the problem presented here is about the possibility of an ethical experience in Law to act before the reported time lag; “the Ethics of approximation in Law” in these strange times or “environmental crisis”.

THE MOTIVATIONAL DEFICIT IN THE PRESENT AND THE ETHICAL EXPERIENCE OF THE FUTURE

This article investigates the possibility of “the Ethics of approximation in Law”. It starts with

²⁶ O princípio responsabilidade. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006, p. 65.

²⁷ CRITCHLEY, Simon. *Ininitely demanding. Ethics of Commitment, politics of resistance*. Brooklyn: Verso Books, 2012.

the consideration of the need for Ethics of responsibility in advance, in environmental terms, in spite of the difficulty of operating in the present with the future time in mind, the uncertain time. The Western democratic model poses difficulties accentuated by the backdrop of uncertainties in a global environmental risk context, as well as, a trend for evidence and immediacy, an "order of fear", a fragmented urban life and a legitimacy crisis which is going into the political institutions formed by the Western democratic model²⁸. It is in fact, an ethical experience in Law that conceives a new relationship between time, Ethics and environmental responsibility; a new ethical commitment to be assumed by the global risk society²⁹ or, in Jonas's words, new Ethics for the technological civilization. This contributes to the understanding that *pro* future Ethics prove to be necessary to the order of risks, even when this points to a motivational and ethical deficit, clouding the subject of contemporary societies. Furthermore, this leads to the understanding that an ethical experience, in which the commitment of individuals to resist favored nihilistic temptation today, is the condition of possibility for confronting the environmental future time. A kind of Ethics of transition: an ethical experience in Law that can mediate the communication between the present fear scenario and the script of a future risk, thereby, approaching these two times (present and future) in these "strange times".

This binary scenario presents disappointment and a future of risks. It is the starting point for an ethical experience in Law. The idea is that when considering the scars of the present, this "Ethics of approximation" will be able to contribute to the reduction of the gap between the present time of action and the future time of environmental risks, both respectively fundamental to adopt an ethical stance towards environmental prospective (CANE, 2002, p. 31)³⁰ responsibility.

Understanding the gap between present and future in the environmental risk order becomes a necessary condition to propose an "Ethics of approximation in law", therefore, the theoretical proposal of Simon Critchley seems a good alternative to investigate the possibility of an ethical experience and subjectivity of the current dissatisfaction scenario. In his "Infinitely

²⁸ In this sense: BAUDRILLARD, Jean. A sociedade de consumo. Lisboa: Edições 70, 2008. BAUMAN, Zygmunt. Medo líquido. Rio de Janeiro: Jorge Zahar, 2008. CRITCHLEY, Simon. Infinitely demanding. Ethics of Commitment, politics of resistance. Brooklyn: Verso Books, 2012. In this sense:

²⁹ In this sense: V. BECK, Ulrich. Políticas ecológicas en la edad del riesgo. Antídotos. La irresponsabilidad organizada. Barcelona: El Roure, 1998. BECK, Ulrich. La sociedad del riesgo global. Madri: Siglo XXI, 2009. LEFF, Enrique. Racionalidade ambiental – a reapropriação social da natureza. Rio de Janeiro: Civilização Brasileira, 2006.

³⁰ Peter Cane analyzes the prospective responsibility turning to the temporal element of responsibility. Responsibility in law and morality. Oxford: Hart Publishing, 2002, p. 31.

Demanding - Ethics of Commitment, Politics of Resistance”, Critchley begins his analysis pointing to what he calls the “motivational deficit”. He explains that this deficit directly affects the liberal democracy model, once the citizens live with the rules issued by the State, which coordinate life in contemporary society, but as a kind of external link that is not internally convincing; these standards are simply not part of our thoughts, our subjectivity, according to Critchley. Thus, liberal democracy does not motivate subjects enough, and, what is now needed is an ethical conception which accepts the motivational deficit found in democratic institutions, without however, embracing nihilism or disbelief. Although the author does not cite the Law as one of these democratic institutions in which the subjects suffer a motivational deficit, it is possible to interpret his viewpoint as such. One can also identify this deficit or disbelief as one of the points of difficulty of the Ethics for the future in Law. If the contemporary setting is overtaken by nihilism, how can one enforce the legal provisions aimed at protecting the environmental future and the quality of life of future generations? How can one motivate the subjects morally with what still appears to be? One possible solution would be to persuade the modern subjects that the future time of the environment is already part of the present. Therefore, the dialogue between Ethics and Law needs to be established, hence the need of an “Ethics of approximation in Law”, able to assist the analysis of the gap between present and future in the “environmental crisis”.

What is lacking at the present time of massive political disappointment is a motivating, empowering conception of ethics that can face and face down the drift of the present, an ethics that is able to resist the political situation in which we find ourselves. (CRITCHLEY, 2012, p. 38)

If the Law is part of democratic institutions, it should be asked to what extent the rules, which govern the protection of the environment, sufficiently motivate people, specifically rules which deal with the present obligation to the future. That is, in view of the dissatisfaction reported by Simon Critchley, can the present generations overcome the motivational deficit, especially with regard to legal rules, and accept that the so-called “environmental crisis” has turned the future part of the present time and part of its obligations? Or, are the Ethics that allow the transition between the present time of disbelief, currently lived, the future of risks and environmental consequences, still needed?

In presenting his argument, Critchley identifies what he calls the fundamental question of Ethics, “how the self is linked to what determines your values?”. According to him, the answer involves the explanation of the subjective commitment to ethical action. All normative justifications, be them theories of justice, rights, duties, obligations or any other reference,

should be regarded as “ethical experience”. This should be taken into consideration as the structural core of subjective morality. Thus, the “ethical experience” makes up the motivating force for moral action and, should it not possess a motivating force with plausible signs, the moral reflection becomes a mere manipulation of justification presets. In this sense, the question presented by the author can be adapted and applied to the problem analyzed here: how can the present *self* be linked to the future time of environmental crisis? Is it possible that the *self* feel linked to the future protection of the environment, even though it does not participate in that temporal frame? Subjectively, if *pro* future Ethics do not count with a motivating force that show proof of plausability, which represent the moral reflection of the future risks for humanity, even if springing from the “fear” suggested by Jonas, this would not go beyond an ethical and normative justification manipulated emptily. In other words, it is worth highlighting the position of Peter Cane on the relationship between Law and morality. According to the author, it is easy to think of situations in which legal rules have been changed due to changes in the “popular morality”. Environmental Law would be an example. However, he encourages to fully investigate the relationship between Law and morality, which is the issue here, the development of Ethics and normative principles without the occurrence of a moral experience on the subjects, that is, when the principles are developed without the motivating force required. For Cane, Law influences how people think about responsibility in the moral domain. However, given the motivational deficit highlighted by Critchley and the risk of democratic institutions, such as the Law not morally motivating contemporary subjects, the legal regulation of environmental future time will probably not influence the moral responsibility nor the Ethics for the future. Yet, with regards to “ethical experience”, this starts from a demand on which the subject gives its approval. Thus, there are two key elements in this experience: demand and approval. No sense about the “good”, the values, occurs without approval or affirmation; the structure formed by the demand and approval is what forms the “ethical experience”. Critchley writes, “the essential feature of ethical experience is that the subject of the demand - the moral *self* - affirms the demand, assents to finding it good, binds itself to that good and shapes its subjectivity in relation to that good”. Again, it is appropriate to reflect on the possibility of responsibility for the environmental future to become a demand for the *self*; here, reflection should be made, once more, as to what extent a future scenario of environmental risks is able to mobilize a demand for the self and receive the approval, thus, becoming a moral bond. This doubt about the moral relationship with the future reinforces the argument presented here, the need to build an ethical experience “of approximation”. In other

words, the need for Ethics of transition that can act, even with the gap between present and future. Therefore, one of the premises is the understanding that the future environmental crisis is, in fact, already part of the present. Thus, the moral bond ceases to be something that does not yet exist and becomes a link to an existing crisis. This is the challenge of that transition: to make the subjects realize that the “environmental crisis” has broken the linearity of time. When examining environmental risks, the fear of the future discussed by Jonas, the time yet to come, integrates the responsibility of the present time; the timeline made up of past, present and future undergoes a transformation; the impact of past actions are still manifested in the present and the future becomes part of today. This implicates the subject and makes it morally responsible for a time that is yet to come.

In this sense, according to Critchley, without the experience of a demand with which subjects are prepared to bind and commit themselves, morality remains impaired whether by not managing to be started, or being transformed into manipulation of empty formulas. This is the risk of Ethics that are not able to awaken in the self commitment to the future of the environment, resulting in one more ritual of manipulation of ethical principles, nonetheless, an empty ritual in its meaning and effect. This is also the risk of a normative construction elaborated, despite an ethical debate able to contribute to the motivational force of the subjects. In other words, moral attachment to the environmental future awakened by fear, according to Jonas, becomes possible to the extent that ethical responsibility for the future becomes a demand to the *self*, thus causing an ethical experience. However, given the difficulty of something that is not yet apparent provokes a demand to the point of building an ethical experience. The gap between present and future deserves to be analyzed by “Ethics of approximation”. This in turn would act in Law, involving normativity, for an ethical experience which could contribute to the dialogue between the present of fear and the future risks, given that both, Law and moral behavior, are part of the complex entanglement which is the responsibility.

A statistic cited by David Harvey in one of his talks serves as an example for the analysis of the Ethics proposed here. Harvey maintains that in three years China consumed the same amount of cement that the United States took a century to consume. A necessary first question is: is this a present or future environmental problem? Given that much of the environmental impacts, brought by excessive construction in China, will occur in the future, the consequences of consuming such profuse amounts of cement becomes an environmental risk. “Fear” to the generated interventions turns to the future, that is the mark of the present on this case.

However, despite the inability to see the effect of that conduct, the share of time with regard to responsibility for anticipation is the present time; preventive measures need to be taken. Thus, the future “environmental crisis” is already part of the present. The second question that arises asks: can the risk scenario that characterizes the environmental future of China generate a demand in the *self* of the present individuals? In other words, can future risks about cement consumption be able to morally bind the subjects of the present and provoke an ethical experience? If the future impact of these risks can not be transformed into a moral-obligatory link to the current subject, the development of principles and norms -ethical and legal - will be a case of manipulation of empty formulas. Here, Critchley’s concern about the disappointment of modern societies, with regards to democratic institutions, is crucial. If the times are marked, according to the author, by disbelief and a motivational deficit, awakening a demand on moral subjects towards the future of risks becomes an enormous challenge. Thus, because of the nihilism that characterizes present time, mobilizing the *self* to an ethical experience, with regards to future and uncertain cement overconsumption consequences for China, is a herculean task. The proposal suggested here is that the approach of Ethics could be associated with the Law, so that the legal rules governing the use and exploitation of natural resources do not become another empty formula or another justification system. Taking into account Critchley’s position on the motivational deficit suffered by contemporary societies, an ethical proposal to consider the disbelief that marks the present day could help the Law in regulating the environment. If not, a strong risk is posed by the maintenance of normative production that fails to incite ethical demand in the subject.

CONCLUSIONS

Nature as human responsibility, as cited by Hans Jonas, is a *novum* and needs to be analyzed from a new ethical proposal. It requires the Ethics of the future to consider the extension of time, which see the future yet to come as an existing moral obligation. With regards to these new Ethics, “environmental crisis” is a sphere that is to be analyzed as a future that is already part of the present moral responsibility which, overcomes the distance of time and makes human acts punishable by a new dimension of responsibility. It is a collective duty for the future of humanity, which in this study, is considered as recognition of the distance between present and future, as well as, the approach of these two times through an ethical experience in Law. In this sense, to investigate the need for an ethical and environmental stance in the Law requires the consideration of a conception of ethical responsibility for the future

which recognizes the flapper connection between Law, Ethics and future time.

The “new order”, brought by the “regime of risks”, strengthens the discussion about the long-term effects caused by human intervention in Nature. While recognizing that environmental risks bring doubt and uncertainty, this “new order” makes necessary precautionary action on the present time: ethical responsibility towards future generations or an ethical approach which is able to work with the gap between present and future. This proposed ethical experience of approximation in Law is accompanied by many challenges. One of them is to overcome the misconception that the “crisis” is temporary, since the commonly indicated environmental risks give evidence of it being a permanent “evil”. Another challenge is to review the concept of time itself, considering that the “evil”, regarded by many as yet to come, is part of the present time, however contradictory it may seem. An ethical experience of approximation in Law strengthens the role of moral actions in the risk scenario, as well as, “environmental crisis” by allowing the schism between present and future; it provides an ethical alternative that considers the responsibility to come, without ignoring the challenges of the moral vacuum in which it appears to be the present time.

On one hand, Jonas defends the need for Ethics of the future, motivated by the “fear” of the consequences to come. On the other hand, Simon Critchley speaks of Ethics in response to disappointment that affect contemporary societies. The proposal launched here is that the “Ethics of approximation” in Law, a kind of ethical construction associated with the Law, is capable of assisting the transition between the present of fear and the future of risks. In other words, an ethical experience that collaborates in the approach of these two times and that takes into account the disbelief that surrounds the present day. These are Ethics that are able to act before the hiatus of these “strange times”, the time of the motivational deficit, located between the “fear” and the risks. Far from offering answers or solutions, the aim is to raise the possibility of an ethical support, able to approach the future in the face of the drift which seems to confront the present time, given that in terms of “environmental crisis” present and future coexist.

REFERENCES

BAUDRILLARD, Jean. **A sociedade de consumo**. Lisboa: Edições 70, 2008.

BAUMAN, Zygmunt. **Modernidade líquida**. Rio de Janeiro: Jorge ZAHAR, 2001.

_____. **Identidade**. Rio de Janeiro: Jorge ZAHAR, 2005.

_____. **Medo líquido**. Rio de Janeiro: Jorge Zahar, 2008.

BECK, Ulrich. **Políticas ecológicas en la edad del riesgo**. Antídotos. La irresponsabilidad organizada. Barcelona: El Roure, 1998.

_____. **La sociedad del riesgo global**. Madri: Siglo XXI, 2009.

CANE, Peter. **Responsibility in law and morality**. Oxford: Hart Publishing, 2002.

CRITCHLEY, Simon. **Infinitely demanding**. Ethics of commitment, politics of resistance. Brooklyn: Verso, 2012.

FERRY, Luc. **Le nouvel ordre écologique**. L'arbre, l'animal et l'homme. Paris: Grasset, 2009.

_____. **Développement durable, monde de la technique et société du risque**. In: BOITEUX, Marcel. **L'homme et sa planète**. Paris: PUF, 2003.

GABRIEL, Markus. **Why the world does not exist**. Cambridge: Polity, 2015.

GORZ, André. **Écológica**. Paris: Galilée, 2008.

GUZMÁN, José López. Justicia y ecología. In: BALLESTEROS, Jesús, RUIZ-GÁLVEZ, Maria Encarnación Fernández, MARTÍNEZ-PUJALTE, Antonio-Luis (coords). **Justicia, solidaridad, paz. Estudios en homenaje al Professor José María Rojo Sanz**. Vol.I. Valencia: Departamento de Filosofía del Derecho, Moral y Política de la Universitat de València, 1995.

JONAS, Hans. **Pour une éthique du future**. Paris: Payot & Rivage, 1998.

_____. **O princípio responsabilidade**. Ensaio de uma ética para civilização tecnológica. Rio de Janeiro: PUC Rio, 2006.

_____. **DEMING, Alison Hawthorne**. The edges of the civilized world. In: LOPEZ, Barry. **The future of nature**. New York: Milkweed, 2007.

_____. **Responsability today: the ethics of an endangered future**. In: GORDON, John-Stewart, BURCKHART, Holger. **Global ethics and moral responsibility**. Hans Jonas and his critics. Surrey: ASHGATE, 2014.

LEFF, Enrique. **Racionalidade ambiental – a reapropriação social da natureza**. Rio de Janeiro: Civilização Brasileira, 2006.

LUKE, Tim. Marcuse's ecological critique and the American environmental movement. In: ABROMEIT, John, COBB, W. Mark (orgs.). **Herbert Marcuse. A critical reader**. New York: Routledge, 2004.

MOORE, Jason W. **Capitalism in the web of life**. Ecology and accumulation of Capital. New York: Verso, 2015.

_____. **De objeto a Oikeios: la construcción del ambiente en la ecología-mundo capitalista**. Disponível em: http://www.jasonwmoore.com/uploads/Moore__DE_OBJETO_A_OIKEIOS__2015.pdf

MULGAN, Tim. **Future people**. A moderate consequentialist account of our obligations to future generations. New York: University Press, Oxford, 2006.

OST, François. **A natureza à margem da lei. A ecologia à prova do direito**. Lisboa: Instituto Piaget, 1997.

_____. **Le temps du droit**. Paris: Odile Jacob, 1999.

STENGERS, Isabelle. **No tempo das catástrofes** – resistir à barbárie que se aproxima. São Paulo: Cosac Naify, 2015.

STENGERS, Isabelle. **No tempo das catástrofes** – resistir à barbárie que se aproxima. São Paulo: Cosac Naify, 2015.

WEISSKOPF, Walter. Moral responsibility for the preservation of humankind. In: GORDON, John-Stewart, BURCKHART, Holger. **Global ethics and moral responsibility**. Hans Jonas and his critics. Surrey: ASHGATE, 2014 pp. 23-40.

Trabalho enviado em 12 de julho de 2017.

Aceito em 09 de setembro de 2017.