

The Risk Assumption in Law: A Semiotics Approach

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Abstract

In this article, the notion of accident for Greimasian Semiotics is discussed as proposed by Eric Landowski in his *Interactions risquées* (2005). The object of investigation includes civil and criminal proceedings and jurisprudence, using accidents that occurred in society as starting points. Semiotics conceptualization of accident includes the unpredictability, chance and risk lexemes. Thus, the main objective of this work is to verify how these elements are understood and assumed by the Judicial Area, as in jurisprudence, in civil and criminal proceedings. In other words, the objective of this paper is to investigate whether (or how) unpredictability, chance and risk constitute an integral part of the fiduciary contract between the sender and the addressee. In regards to this issue, there is in Law, two opposing principles: *pacta sunt servanda* and *rebus sic stantibus*. In the former, the judge rules that unpredictability be assumed by the party to contract and determines that the unpredictability burden must be assumed by the party to contract. In this case, unpredictability is part of the fiduciary contract between the sender and the addressee. In the latter, the judge rules that unpredictability should not be assumed by the parties to hire: it does not belong to the fiduciary contract. For Semiotics it is important to know how the accident and its unpredictability are understood and assumed differently by the Judiciary. Therefore, the objective here is to explain how the judicial area conceptualizes and understands risk, the random element and the accident. This is fundamental for a deep understanding and the development of reflections on the accident regime proposed by Eric Landowski.

1. ACCIDENT IN SEMIOTICS

The objective of this article is to introduce the accident regime as a form of interaction, as proposed by Eric Landowski (CNRS/Paris) in his *Les interactions risquées* (2005).^[1] An attempt to approximate this landowskinian approach to the Unpredictability Theory applied to Contract Rights is made, to discuss two basic principles: *pacta sunt servanda* and *rebus sic stantibus*. The objective is to identify converging and diverging points between two methodological proposals: on one side the accident in Semiotics and on the other side the Unpredictability Theory in Law.

By proposing the accident regime as a form of interaction, Landowski opens up a new route, a new development for Semiotics discursive and narrative syntax. In this book, Landowski analyzes possible relationships among random events and their implications for interactions among subjects. Based on this premise, he discusses how «unpredictability» can determine meanings and interactions.

However, it is necessary to conceptualize the term accident before introducing this new interaction regime. The *Aurélio* dictionary defines it as «a casual, fortuitous (act of God), unpredictable event». The *Houaiss* dictionary adds the lexeme «unexpected» to the *Aurélio* definition, describing accident as «any unpleasant and sad event, involving damages, losses, injuries, suffering or death». Actually, the term accident is used only to define a broad category from which a large number of other «subcategories» result, such as environmental, domestic, work-related, traffic accidents and others.

According to Landowski, the basic principle behind the accident regime is the «random element», manifested by the presence of the fact that happens by chance, as a consequence of the risk. Its presence is not regular, or, at least, this regularity is unknown. For Landowski, the random element does not have a defining competence within the theory of Semiotics yet, neither of modal or aesthetics order. From a modal standpoint, the random element is not motivated, i.e., it acts with no reason. If intention exists, it is unknown. From an aesthetics point of view, the random element is undetermined, it has no body: it is not, therefore, of a sensible order.

Notwithstanding, the random element determines performance; more precisely, it determines accidents. Consequently, it is licit to suppose that, it somewhat contributes to the development of the narrative course. As an accident does not follow neither a pre-established order nor a systematic and programmed, predictable route, the nature of the role performed by the random element is not thematic, but catastrophic.

Unpredictability may characterize different types of accident. The challenge of the discourse analyst is to try to establish some standards; an order in the apparent chaos. This is what a court judge does (or should do) to determine the subjects involved and the type of participation each one had in the accident, to either verify responsibilities or to arrive to the conclusion that no one was responsible for the accident.

[1] This paper is the translation of an article first published in the annals of ABRALIN – Associação Brasileira de Linguística (Brazilian Linguistics Association) in 2009. The event was held in João Pessoa (Paraíba/Brazil) from 4th to 7th of March. ISBN 978-85-7539-446-5.

The other interaction regimes (programming, manipulation, and adjustment^[2]), whose principles define regularity, intention and sensibility, also pose risks or, better yet, *degrees of risk*, since the relationship established among the subjects, even though remotely possible, can bring unexpected results. In an accident regime, risks are more intense than in other regimes. In programming, for instance, risks are almost nonexistent; they are related to the field of safety. In manipulation, risks are limited, thus greater than in programming. However, adjustment is characterized by the lack of safety in the relationship. Finally, an accident, which is characterized by the total lack of security, is pure risk. Landowski adds that programming and manipulation characterize *prudence* in interactions, while adjustment and accident are deemed as *adventure*.

According to Landowski (2005, p. 70), there are two forms of risk: the result of «math probability» and the result of «mythic probability». The former sees the fortuitous element as an «inherent and without meaning» phenomenon. Thus risk is perceived as a calculated math probability, based on supposed manifestations, such as «winning the lottery», for instance. In the latter, risk is connected to *fatality*, which is a «transcendent and impenetrable» phenomenon, such as a natural disaster/catastrophe.

As for the nature of the roles developed by interaction regimes, Landowski explains that, in programming, the roles are thematic; in manipulation, of modal competence; in adjustment, of aesthetic competence, and in the accident, catastrophic.

Successful interaction regimes lead others to action. Manipulation leads to a *make-want* (*faire vouloir*), adjustment to a *make-feel* (*faire sentir*), programming to a *make-happen* (*faire advenir*) and the accident to a *make-supervene* (*faire survenir*). In the two first cases (manipulation and adjustment), interaction leads to *make-make*. However, in the last two cases (programming and accident); it results in a *make-be*.

However, due to the possible fragility of the interaction involving the subjects, there are «assumed risks» in each one of the regimes. These assumed risks go from one extreme of the continuum to the other. In programming, for instance, risk is almost inexistent; it is the field of safety. In manipulation, risks are limited, therefore greater than those in programming. Adjustment, on the other hand, is characterized by insecurity in the relationship. And, finally, accident, which is characterized by total lack of safety, is pure risk. Landowski also explains that programming and manipulation characterize *prudence* in interactions, while adjustment and accident are marked by *adventure*.

As evidenced by the concept of accident, some lexemes such as «unpredictability», «the random element» and «risk» appear. It is necessary, however, to verify how these elements are meant and assumed by the legal area, as in jurisprudence, civil or criminal procedures, contracts, etc. In other words, it is important to understand how Law assigns responsibility to unpredictability, the random element and accident. One possible way of doing it is by analyzing two Contracts Theory basic principles, *pacta sunt servanda* and *rebus sic stantibus*. As discussed later in this article, in the Unpredictability Theory, contract revisions by «force majeure» or

[2] For a deeper understanding about these interaction regimes, cf. especially *Passions sans nom* (2004), de Eric Landowski.

«acts of God» (random element) are mentioned. These extra contractual elements may cause changes or even contract termination. The fact is that, in the core of «acts of God» and «force majeure», an accident may appear. Obviously, not all acts of God and force majeure situations will be deemed as accidents, as conceived by Landowski. However, all accidents are the result of an act of God or force majeure, thus justifying the *pacta sunt servanda* and *rebus sic stantibus* principle approach discussed in this work.

2. *PACTA SUNT SERVANDA VERSUS REBUS SIC STANTIBUS*

Law is pure language! It was created by men for men, thus, impossible not to be controversial. As personal world concepts change with time, Law adjusts itself to the new social reality, the new juridical spirit. Consequently, Law is always relative, dynamic and questionable: what was not, now is. This is particularly evident in the Law of Obligations, especially in Contract Law, since it is possible to create, change and even eliminate rights and legal obligations.

So, before dealing with the Law of Contractual Obligations, the concept of contract should be defined. To do so, Maria Helena Diniz's *Tratado Teórico e Prático dos Contratos* (*Theoretical and Practical Contracts Treaty*) should be consulted. According to her (1996, p.11), a contract can be defined as «an agreement between two or more wills, in compliance with the legal order, to regulate the interests between the parties, with the intent to acquire, change or terminate legal relations of patrimonial nature».

Among other things, the General Theory of Contracts is controversial, due to two leading principles which, at first, seem contradictory. On one hand, there are the defenders of the *pacta sunt servanda* («*formal pacts should be kept*») principle and, on the other hand, there are those who identify themselves with the *rebus sic stantibus* («*considering the way things are*») principle.

The basic principle in *pacta sunt servanda* is the idea that contracts exist in society to be maintained, regardless future extra contractual terms and conditions. This principle includes one binding/compulsory jurisdiction established by the parties in a contract, which turns its articles into laws. Orlando Gomes, in his *Contratos* (Contracts) (1998, p.36) says that contracts must be maintained «with the observance of all assumptions and requirements needed to validate them, and must be executed by the parties as if their clauses were imperative legal rules». Maria Helena Diniz in her *Tratado Teórico e Prático dos Contratos* (Theoretical and Practical Contracts Treaty) corroborates with this concept, stating that contracts, «once concluded freely, are incorporated into the legal order, constituting a true legal norm.»

If, on one hand, the *pacta sunt servanda* principle mandates that the parties involved must honor the established contract, despite future adverse situations, some general Law principles must be considered (such as Good Faith, Legality, Equality, among others), whose objectives are to create a stable and harmonious social order. Thus, despite the juridical spirit in *pacta sunt servanda*, the obligation to comply with contractual clauses may not be absolute. Thus, another principle was created: *rebus sic stantibus*.

The Latin expression *rebus sic stantibus* is connected with the unpredictability principle which shows that the basis of a contract can be revised and reformulated due to an unpre-

table and unexpected event occurred after the contract was signed by the parties, which may have resulted in an unfair and excessive onus to one of the parties. According to Maria Helena Diniz (2003, p. 336):

The excessive onus resulting from an extraordinary and unpredictable event, which makes the performance of one of the parties difficult, has, now, become a legal motive for contractual resolution, for being deemed as a *rebus sic standibus* clause, corresponding to a formula where relational (successive performance) and fixed-term contracts have their mandatory binding always subject to the event in effect at the time of their stipulation.

Actually, the *rebus sic standibus* established the relativization of the *pacta sunt servanda* clause, which is excessively radical and inflexible. The *rebus sic standibus* principles are evoked when «fortuitous element» and «force majeure» appear after a contract has been signed by the parties.

In his article «A Teoria da imprevisão no Direito do Trabalho — Cláusula ínsita *rebus sic standibus*» (The Unpredictability Theory in Labor Law — the *rebus sic standibus* principle), published in the Legal Page of the Universidade Veiga de Almeida, Rio de Janeiro^[3], Arnaldo Goldemberg explains that force majeure originates from human acts and acts of God from natural phenomena. He emphasizes that Cunha Gonçalves, Valentin Carrion and Mozart Victor Russomano do not make this distinction. For them, both acts of God and force majeure can originate from human acts, private or not.

Goldemberg also points out that acts of God and force majeure are linked to the idea of accident and, it is unpredictability, accident's own characteristic, that releases the affected party from the contractual responsibility:

In acts of God and force majeure, there is always an accident responsible for the damage. In force majeure, the cause of gave origin to the event is known, since it is a natural fact, such as lightning causing fires, for instance; floods damaging products; frosts ruining crops; implying an idea of relativity, since the power of event is greater than the supposed, where previous consideration of the state of the subject and the space-temporal circumstances should be made, for civil liability release be efficiently characterized.

Maria Helena Diniz (1996b, p. 80), in her *Curso de Direito Civil Brasileiro* (Course in Brazilian Civil Law), corroborates with the same idea mentioned above, i.e., she connects acts of God and force majeure to accidents, releasing one of the parties from the excessive onus of the contract due to the unpredictability of the fact:

[3] In the article published on the University site, there is no reference to the year in which the article was written or disseminated on the *Web*. Also, pages are not marked in the article. However, it can be recovered in its entirety in the following electronic address: http://www.uva.br/icj/artigos_de_professores/Teor_%20Impr_%20Dire_%20Trab.htm

In acts of God (RT, 431:74, 346:336, 356:522, 399:370, 453:92), the accident that causes damages originates from: (1) unknown causes such as an aerial electrical cable that breaks down and falls on phone cables, causing fire; the explosion of power plant boilers, or a machine malfunction provoking death; or (2) events such as mutiny, change of government, product discontinuation, which cause serious accidents or damages due to the impossibility of complying with some obligations. Absolute, for being totally unpredictable or unrecognizable with some diligence, in a way that subject liability could not be thought, obligations incurred, unless it was agreed to pay or whether the Law imposes this obligation, as in the cases of objective liability.

In this article, Goldemberg, lists factors from which the theory of unpredictability may be evoked:

The application of the theory of unpredictability depends on the co-existence of (a) a supervining fact; (b) unpredictability; (c) irresistibility; (d) inexistence of direct or indirect contest in the event and (e) the economical - financial imbalance of one of the parties.

The author also mentions that the Consumer Protection Code, created by Law number 8.078/90, makes clear the supremacy of the public authority over abusive contracts.

He also lists articles (51, 52, e 53) that, whenever violated, can call for contract termination. Thus the role played by the public authority in controlling and preventing abuses becomes clear, «keeping the hypo-sufficient safe from the abuses of power, looking for social balance».

Article 6° of the Consumer Protection Code makes evident the *rebus sic stantibus* principle:

Art. 6° Basic consumer rights are: [...]

V – Alteration of contractual clauses that establishes unproportional installments or their revision due to supervining facts that make them extremely onerous.

In the Brazilian Civil Code, the same principle appears to maintain social order, preventing abuses of power in society:

On the Excessive Onus Resolution: Art. 478. In contracts of continuous or deferred execution, if the installment becomes too onerous to one of the parties, with an extreme advantage to the other party, due to extraordinary and unpredictable events, the debtor may demand contract termination. The effects of the sentence will be retroactive to the contract's notification date. Art. 479. The resolution may be prevented if the defendant decides to make contract terms equal. Art. 480. If in the contract, obligations bind only one of the parties, an installment reduction or a change in execution mode may be demanded to avoid excessive onus.

It is important to emphasize that the excessive onus of the contract, necessary to call for the principle of *rebus sic stantibus*, must be in fact excessive to cause a financial imbalance in the contract for both parties. As Goldember says:

We are not dealing with any type of excessive onus. It must be the one that originates from an extraordinary and unpredictable event. The contractual imbalance that causes excessive onus must be thus considered in relation to the adjustment terms during the contract celebration. The installment from one of the parties cannot «become» excessively onerous. However, if the original contract included this condition, the unpredictability theory will not apply.

3. ACCIDENT IN SEMIOTICS AND THE UNPREDICTABILITY THEORY

The argument behind the *pacta sunt servanda* principle is that risks are present when contracts are signed. However, the presence of risk is something immaterial. It can be imagined but it does not have a corporeal, tangible form. Risk is simply the potentialization of an accident which may not even occur. Therefore, risks cannot be perceived or conceived by the actors, specially by those who are characterized by the *not knowing* and that, at the discursive level, are realized in the hypo-sufficient individual dealt with by the Law. However, risks can have catastrophic consequences (*performance*), materialized in an accident motivated by either acts of God or force majeure, according to jurists, or either by a mythical or mathematical probability, as Landowski would say.

The argumentative basis supporting the *rebus sic stantibus* principle is that of good faith and citizen equal rights. Thus, it can be inferred that, if the actor had been modalized by *knowledge*, i.e., if he had known that the assumed risks would lead him to the non-compliance of his fiduciary contract, he would have acted differently, in order to preserve his image in society, honoring the assumed commitment and realizing his *performance*. Thus, he cannot be held responsible for something he did not know. Neither can he be sanctioned for his failure to perform, since he is characterized as a virtual subject. In addition, he cannot be punished for an event (*performance*) that took place in a non-motivated or, as Landowski would say, «meaningless» way.

From an epistemological standpoint, accidents, acts of God and risks have modal functions, participate in the narrative route and characterize actors. According to the assumption of the random element manifested by the figure of chance and, consequently, of risk, actors can be prudent, imprudent, ignorant, wise, experts or non-experts, negligent, etc. Notwithstanding this diversity in actors characterization, the underlying principle in *rebus sic stantibus* is that they must be considered as equals (constitutional principle) by justice.

At the heart of all this is the principle of society moralization, manifested by the principles of justice, Law's greatest goal. This principle is found in both *pacta sunt servanda* and *rebus sic stantibus*. While the first is extremely radical, inflexible, the second appears to relativize the first, to be its exception. It is in this search for social balance that the process of society moralization lies.

This notion of moralization or just, equal and coherent social order is found in several moments during contract revision discussions, as mentioned by César Fiúza (n/d p. 5):

A contract bind can be explained much more by the social relevance of the situation objectively established by the parties than by its own and exclusive will, either found in its objective or subjective reality. [...] Several new principles were taken on by modern doctrine, trying to meet the demands of the new times. Thus contractual principles develop radically, focusing on the preceptive theory, principles of self-responsibility and trust, giving rise to the principles of good faith and contractual justice.

This same assumption can be found in Arnaldo Godemberg's article mentioned above: «the supremacy of the public interest in banning adjustments against Ethics, public order and good behavior adjustments. The celebration of a contract must respect the rules of the social order, collective safety, patrimonial balance and the well being of all».

4. FINAL CONSIDERATIONS

The existence of the *pacta sunt servanda* and *rebus sic stantibus* principles implies the need to look beyond the contract. It is important to analyze the socio-economic conditions prevalent during the signature of the contract and those prevalent during the moment of disagreement. In this sense, the so-called literal interpretation of the law does not apply anymore. Being an interpreter of the law is, first and foremost, being an interpreter of the social conditions under which the contract was firmed.

As mentioned before, initially, the two principles (*pacta sunt servanda* e *rebus sic stantibus*) seem antagonistic, but they are not. Both have the same basic principle: the moralization of society. In the first case, the immanence of the text points out to the need to create mechanisms to preserve the will and the freedom of the actors. Therefore, it is important for legal institutions to believe in societies. Without this, there will be no just and coherent social order. With the same interest in establishing and maintaining a just and coherent social order, the second principle emphasizes the need to foresee, or at least consider, unpredictability, which can create an imbalance in the already established social order.

Both, the principles of *pacta sunt servanda* and *rebus sic stantibus* try to create legal mechanisms to preserve the social order, guaranteed by the constitutional social equality principle. On the other hand, the fragility cannot succumb to the power, and freedom override oppression. Private interests or those of a few cannot override collective interests. These are the bases of social regulation or, as it is always said, of social moralization. However, it is important to remember that contractual obligations are the rule and that unpredictability is the exception.

Thus, the association of these two areas of knowledge, Semiotics and Law, is very proficuous and promising. The accident regime developed by Landowski brought the two areas close together, since the area of Law, by its nature, work with accidents. It is believed that the Semiotics analytical potential can bring fundamental contributions to Law and vice-versa.

There is lots of research to be done on the model presented by Landowski, especially in relation to the accident regime. In Brazil, for instance, there is too little research on accident from a theoretical semiotics standpoint. The only theoretical material on the subject is the book *Les interactions risquées* by Landowski himself, which needs to be imported to Brazil.

Accident is better understood and dealt with by other areas of knowledge such as Law, for instance. The approximation of these two areas is healthy for both and, certainly will contribute to the theoretical development of the accident regime in Semiotics.

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