




# Regulatory Law and Logic in Decision-Making: An Investigation into Limited Rationality in *A Causa Secreta* of Machado de Assis

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**How to cite this paper:** Cardoso, H. R., Costa, I. G., Machado Júnior, A. de A., & Souza, A. F. S. (2024). Regulatory Law and Logic in Decision-Making: An Investigation into Limited Rationality in *A Causa Secreta* of Machado de Assis. *Beijing Law Review*, 15, 1305-1327.

<https://doi.org/10.4236/blr.2024.153078>

**Received:** June 17, 2024

**Accepted:** September 20, 2024

**Published:** September 23, 2024

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## Abstract

This article addresses the intersection between Regulatory Law, Economics and Literature, revealing the complexity of regulatory decisions. Regulatory Law, with its norms and principles, seeks to balance public and private interests, allowing public agents to adjust norms to specific cases, although this may introduce extralegal biases. Behavioral economics, highlighted by scholars such as Daniel Kahneman and Cass Sunstein, criticizes limited rationality in decisions, influenced by cognitive and emotional distortions. Sunstein's choice architecture demonstrates how structuring options can significantly shape your decisions. At the same time, literature, represented by Machado de Assis in *A Causa Secreta*, explores the human psyche and the hidden motivations of behavior. Assis's work illustrates how perceptions and decisions can be manipulated, offering a rich metaphor for the analysis of bounded rationality. Fortunato, the central character, exemplifies human duplicity and irrationality, reflecting the challenges faced by social regulators. In this interdisciplinary context, there is a need for robust mechanisms to mitigate biases and extralegal influences in regulatory decisions. Literature, therefore, is a crucial tool for understanding the nuances of human rationality, supplementing economic and legal approaches. Assis's work, especially, illuminates

the recesses of the human mind, promoting a legal hermeneutics that is more aware of the complexities of human nature. Thus, a multidisciplinary analysis contributes to the development of fair and efficient regulatory mechanisms, recognizing the limitations inherent to human reason.

## Keywords

Regulatory Law, Jusliterature, Behavioral Economics, Bounded Rationality

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## 1. Introduction

In the fascinating intertwining of the disciplines of Regulatory Law, Economics and Literature, a multifaceted texture emerges that reveals the complexity of regulatory decisions. This interdisciplinary exegesis not only enriches the understanding of normative processes, but also uncovers the underlying forces that shape the behavior of regulatory agents, offering an accurate examination of social and economic dynamics.

Regulatory Law, this *sui generis* legal body, integrates a set of norms and principles designed to regulate and guide economic and social activities, seeking a delicate balance between public and private interests, preventing marketing practices from harming the community. Here, discretion, an intrinsic characteristic of regulatory law, gives public agents the ability to adjust norms to the particularities of each specific case, without, however, discovering the potential for decisions influenced by extralegal factors, challenging objectivity and impartiality.

Behavioral economics, largely through the seminal paradigmatic contributions of Daniel Kahneman and Cass Sunstein projects an incisive critique of limited rationality in decision-making. This theory proposes that agents, including regulators, do not operate under full rationality, but are often driven by cognitive, emotional and heuristic distortions, which can obstruct judgment and lead to suboptimal choices. In this way, Sunstein's choice architecture exemplifies how the arrangement of options significantly influences decisions, illustrating that policy structuring and direct regulation tend to follow the same logical path.

At the same time, literature, through iconic figures such as Machado de Assis, explores the depth of the human psyche and the motivations that underlie behavior. In *A Causa Secreta*<sup>1</sup>, Assis dissects the hidden motivations of his characters, exposing the duplicity and irrationality of human nature, encapsulated in the figure of Fortunato, whose persona illustrates the manipulation of other people's perceptions for hidden interests. This literary framework offers a rich metaphor for the analysis of limited rationality, highlighting that, just as Fortu-

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<sup>1</sup>Translated as *The Secret Cause*. With bilingual version: **The Secret Cause**, Machado de Assis; *A Causa Secreta*, Machado de Assis; Bilingual edition: English, Portuguese. Tapa blanda—27 Julio 2022. Available in <https://www.amazon.com/Secret-Cause-Machado-Assis-Secreta/dp/8560864040>.

nato orchestrates the perception of others, having no control over his own unhealthy passions, regulators can, consciously or unconsciously, influence the decision-making environment to favor this.

In this interdisciplinary set, the imperative need for robust mechanisms that mitigate biases and extralegal influences in regulatory decisions is outlined. Literature, therefore, emerges as an essential heuristic tool to illustrate the nuances of human rationality, which merely economic and legal approaches can neglect (Livingston, 1991). In this palimpsest, human reason, once exalted by jusnaturalism and later revisited by the batons of behaviorism and cognitive psychology, assumes a significant role. Modernity sees instrumental reason emerge as a calculator, a strategic tool that defines the most advantageous choices, echoing the utilitarianism that presides over capitalist operations. However, contemporary criticisms of pure rationality, such as those of Herbert Simon, who introduce the notion of limited rationality, are fundamental to understanding the complex decision-making processes, exemplified.

Cultural background significantly influences human choice by shaping the values, norms, and expectations that guide individual behavior (Lindenberg, 1989: pp. 175-200). Culture provides a framework through which individuals understand the world and make decisions, impacting preferences from what we eat and how we dress to more complex decisions like career paths and ethical viewpoints.

One of the most manifest ways cultures affects choice is through value systems, which are deeply ingrained through cultural teachings and socialization from an early age. These values can dictate priorities in life, such as the importance of individual achievement versus community welfare, or attitudes toward authority and power structures. For example, in individualistic cultures, such as the United States, self-reliance and personal success are often emphasized, leading individuals to make choices that reflect personal benefit and autonomy. Conversely, in collectivist cultures like Japan or Colombia, community and family cohesion often take precedence, influencing decisions that promote group harmony over individual gains.

Moreover, cultural norms dictate acceptable behaviors and influence choices by setting boundaries on what is considered appropriate. These norms can affect everyday decisions like how to greet someone, what and when to eat, or how to express emotions. Cultural norms also extend to larger life decisions including educational pursuits, marriage, and child-rearing practices (Burns & Roszkowska, 2016: pp. 195-207). The choice to conform or deviate from these norms can affect social acceptance and personal identity within a culture.

In this way, this background also affects the perception and decision-making process itself. For instance, cultures that emphasize holistic thinking patterns (Rozin, 1996: pp. 83-104), such as East Asian cultures, might encourage individuals to consider context and relationships in their decisions. In contrast, Western cultures, which often promote analytical thinking, might focus more on the

attributes of individual objects or specific outcomes without considering the broader context.

Language, an essential part of culture, also plays a critical role in shaping choices. The structure and vocabulary of a language can influence how people think about time, spatial relationships, and even agency. For example, speakers of languages that use a future tense for future events (like English) may think about the future differently from those whose languages do not distinctly separate the future from the present (like Mandarin Chinese).

Also, cultural background influences risk perception and decision-making under uncertainty. Cultures vary in their tolerance for uncertainty and ambiguity, impacting everything from individual career choices to national economic policies. This variability in risk tolerance can lead to differing health decisions, financial choices, and responses to global crises like pandemics. Thus, when considering the imaginative texture offered by Machado de Assis in *A Causa Secreta*, the analysis of limited rationality in this scenario forges a crucial multi-disciplinary perspective to develop regulatory mechanisms that are not only efficient, but also fair and aware of the complexities inherent to human nature.

## 2. *A Causa Secreta* from a Justice Perspective

*A Causa Secreta*, one of Machado de Assis's most enigmatic short stories, offers fertile ground for legal exploration, interconnecting the universe of literature with the theoretical framework of law. The narrative, with its psychological and moral complexity, allows for a deep interpretative analysis of human motivations and the legal implications that arise from them (Tavares et al., 2018), revealing the intricate layers of bounded rationality that govern the characters' actions.

Machado de Assis, by creating characters like Fortunato and Garcia, builds a microcosm that mirrors the tensions and contradictions present in human interactions and, by extension, in social and legal structures. Fortunato, with his facade of benevolence and his hidden cruelty, represents the moral duplicity that can be present in authority figures. Its rationality, apparently logical and beneficent, hides an intrinsic perversity, revealing the limitation and fallibility of human reason.

The jusliterary perspective (Nogueira & Ribeiro, 2021), in addition to the interpretative fields of Law (Silva, 2008), in this scenario, allows us to analyze how Machado de Assis narrative highlights the erratic nature of human decisions, which are often made based on incomplete information, intense emotions and latent prejudices. This approach aligns with contemporary theories on bounded rationality, especially those developed by Cass Sunstein, who highlight how decisions are often shaped by heuristics and cognitive biases.

In the context of regulatory law, *A Causa Secreta* can be interpreted as an allegory of the systemic failures and challenges inherent in the application of justice. Fortunato's behavior, from this lens, is seen as a metaphor for the devia-

tions and abuses of power that can occur within legal and administrative structures. History questions the system's ability to identify and correct such deviations, exposing the need for more robust control and supervision mechanisms.

Furthermore, Machado's narrative explores a propaedeutic notion of choice architecture, a central concept in Sunstein's theory (Thaler & Sunstein, 2008) that will be better addressed later. Fortunato, by manipulating the perceptions of Garcia and the other characters, creates a biased structure of choices, directing actions and reactions according to his hidden interests. This manipulation reflects how the choice architecture can be used for both the common good and nefarious purposes, depending on the intentions of whoever controls it.

From a jurisliterary perspective, the work of Machado de Assis, a well-known critic of the legal educational system (Calabresi, 2008), serves as a reprimand to legal institutions (Lopes, 2018) as it questions the excessive confidence in the rationality and apparent morality of authority figures. The tale suggests that legal institutions must be aware of the limitations inherent to human rationality and the possibility of manipulation and abuse. This implies the need for a legal hermeneutics that recognizes and mitigates biases and cognitive limitations, ensuring a fairer and more equitable application of the law.

In this vein, the story provides a rich and multifaceted analysis of the intersections between literature and law. Through a jurisliterary perspective, Machado's narrative not only exposes the complexities of human rationality, but also offers valuable *insights* for the improvement of legal and regulatory practices. This approach highlights the importance of considering psychological and ethical aspects in legal decisions, promoting a more holistic and critical understanding of justice.

### **Limited Rationality and Human Nature in *A Causa Secreta*: Implications for Regulatory Law**

*A Causa Secreta*, as previously stated, by Machado de Assis, is a short story that, by dissecting the hidden motivations of its characters, reveals the complexity of human nature and offers a rich basis for the analysis of limited rationality in the legal and regulatory. Through a subtle, psychological narrative (Horta, 2019: pp. 83-122), Machado exposes how human decisions are often influenced by irrational and unconscious factors, challenging the assumption that rationality is always the basis of action.

The tale revolves around Fortunato, a character who appears to be a good man, dedicated to helping others. However, throughout the narrative, the author reveals his true nature—a sadistic personality who finds pleasure in the suffering of others. This development serves as a powerful allegory of bounded rationality, where Fortunato's actions are shaped by impulses and desires that are beyond apparent logic.

In the context of the theory of bounded rationality, further explored below, as discussed by Cass Sunstein's (Sunstein, Reisch, & Rauber, 2017), *A Causa Secreta*

exemplifies how choices and decisions can be distorted by cognitive biases and subconscious motivations. Fortunato manipulates the perception of other characters, especially Garcia, thus creating an architecture of choices that favors his own perverse desires. He projects an image of altruism that masks his true intent, manipulating the decision-making environment to obtain the outcome he desires—the suffering of others as a spectacle for his pleasure.

This manipulation can be seen as a parallel to situations in which regulatory agents, with discretionary power, can bias decisions to serve private interests or inappropriately influence public policies (Aguilar, 2022). Like Fortunato, these agents can create decision structures that appear fair and rational on the surface, but which in fact hide hidden and irrational motives.

Machado's analysis of limited rationality in the tale offers important insights for regulatory law. The tale underscores the need for robust mechanisms to mitigate the influence of biases and hidden motivations in regulatory decisions<sup>2</sup>. In a system where discretion is a reality, it is crucial to recognize that decision-makers are not completely rational and that their actions can be shaped by extralegal and irrational factors.

Machado de Assis reminds us that human nature is complex and often contradictory. In *A Causa Secreta*, he illustrates how rationality can be limited by subconscious desires and hidden motivations. This understanding should inform the construction of regulatory and legal policies that are more aware of these limitations, implementing safeguards to ensure that decisions are fair and equitable.

In this literary context, the author offers a narrative that unmasks the illusory texture of pure rationality, exposing the depths of the human psyche and its implications for behavior. By applying a legal analysis to the story, we can better understand how the concepts of limited rationality and choice architecture manifest themselves in real life and in the legal field. Fortunato, with his duplicity, serves as a reminder that human decisions are often more complex and less rational than they seem, underlining the importance of a critical and reflective approach in the application of law and the construction of public policies.

### 3. Regulatory Law and Decision-Making: An Intersection between Law, Economics and Literature

The intersection between regulatory law, economics and literature offers a rich multidisciplinary approach to understanding the complexity involved in decision-making. This integration provides valuable insights into how norms are

<sup>2</sup>The relevance of this point is accentuated in the context of regulatory law, in which agents' discretion can be a double-edged sword. On the one hand, it allows flexibility and adaptation to the particularities of each case; on the other hand, it leaves room for biased decisions, based on personal interests or irrational impulses. Thus, Machado's narrative not only enriches the understanding of bounded rationality, but also serves as a warning for the implementation of effective safeguards. Literature, therefore, transcends its traditional role, offering valuable criticism and guidance for legal practice and the formulation of public policies, reinforcing the need for a conscious and reflective approach to regulatory decision-making.

formulated and applied, as well as revealing the underlying influences that shape the behavior of regulatory agents.

Regulatory law covers a set of norms and principles that aim to control and guide economic and social activities (Mota Filho, 2023). It seeks to balance public and private interests, ensuring that market practices do not harm the community. Discretionality is an intrinsic characteristic of regulatory law, allowing public agents to adapt norms to the specificities of each case. However, this flexibility can be a challenge, as it leaves room for decisions that are potentially biased or influenced by extralegal factors (Gonçalves, 2017).

Behavioral economics, especially through the works of authors such as Daniel Kahneman (Sbicca, 2014) and Cass Sunstein, provides a critical perspective on bounded rationality in decision-making. The theory of bounded rationality suggests that individuals, including regulatory agents, are not completely rational (Kahneman, 2012). Your decisions are often influenced by cognitive biases, emotions, and heuristics, which can distort judgment and lead to suboptimal choices (Kahneman, Slovic, & Tversky, 1988).

For example, the choice architecture proposed by Sunstein, further discussed later, will highlight how the way options presented can significantly influence individuals' decisions (Thaler & Sunstein, 2019). In the regulatory context, this means that the way policies and regulations are structured—or framed—can direct the actions of regulatory agents and those regulated, often unconsciously.

Literature, especially through classic authors such as Machado de Assis, offers a deep exploration of human nature and the motivations underlying behavior. In *A Causa Secreta*, Machado de Assis dissects the characters' hidden motivations, revealing the complexity of the human psyche. The character Fortunato, for example, personifies duplicity and irrationality, hiding his true intentions under a facade of altruism.

This literary narrative provides a powerful metaphor for the study of bounded rationality. Just as Fortunato manipulates the perception of other characters, regulatory agents can, consciously or unconsciously, manipulate the decision-making environment to favor certain interests (Andrade & Muramatsu, 2023). Literature, therefore, serves as a critical tool for understanding and illustrating the nuances of human rationality that purely economic and legal approaches may not fully capture.

The integration of regulatory law with perspectives from behavioral economics and literature enriches the analysis and application of standards (Santos, 2017). Recognizing the limited rationality of regulatory agents leads to the need to create mechanisms and safeguards that mitigate extralegal biases and influences. This may include implementing review processes, transparency in decisions, and promoting an organizational culture that values ethics and responsibility.

Furthermore, literature contributes to a deeper understanding of human motivations by offering a narrative context that can illuminate complex behavioral



aspects. This multidisciplinary approach not only broadens theoretical understanding, but also promotes fairer and more effective regulatory practices.

The intersection of regulatory law, economics and literature offers a comprehensive and critical perspective on decision-making. While behavioral economics exposes the limits of human rationality, the literature reveals the deep and often irrational motivations that shape behavior. This multidisciplinary approach is essential to developing regulatory mechanisms that are not only efficient, but also fair and aware of the complexities inherent in human nature.

### 3.1. Human Reason under New Lenses: From Jusnaturalism to Cognitive Psychology

The modern theory of natural law began to be established in the 17th century, being inexorably influenced by a myriad of crucial events in the history of humanity (Goyard-Fabre, 2002: p. 63): 1) the development of the capitalism, which considerably amplifies social complexity, with repercussions on all the quadrants of social life; 2) the discovery of new lands and cultures, which brings to light the *Jus Conquestus*, the *Jus Possessionis*, the principle of otherness and the natural freedom of indigenous people; 3) the construction of the national State, which highlights the dilemmas of sovereignty, freedom and equality of citizens; 4) the Protestant Reformation, which emphasizes the issues of differences and tolerance, the separation between State and religion, and political or religious dissent. These events had a decisive impact on scientific and philosophical thought, and on political and legal theory.

The new political and legal theory focuses not only on natural law, but also on sovereignty, subjective freedom, and the formal equality of citizens. This theory of natural law will be called “rational” to distinguish it from the theory of natural law based on nature (developed by Greek philosophers) and the theory of revealed natural law (developed by medieval philosophers). This denomination does not imply that Greco-Roman or medieval philosophy did not consider the concept of reason. The concept of reason elaborated by modern rationalism has characteristics that distinguish it from the concept of reason elaborated by Greek philosophers and reused by Roman and medieval philosophers.

In modern rationalism, human reason emerges as the legislator of the Universe, making obsolete the conception of man who acts in accordance with nature and valuing the conception of man as the master and possessor of nature. This new rationalism gives human reason characteristics of instrumental reason, a calculating *ratio* that, by measuring utilities and results, defines the choice of alternatives or the most useful and advantageous forms of exercising power. Instrumental reason, in this sense, is a strategic *ratio*, following the dictates of utilitarianism, the current at the time, capable of organizing the course of action to achieve determined ends. This reason will be of fundamental importance for presiding over capitalist (business) operations, given that these are carried out with a utilitarian aim in mind: the acquisition of greater profits and the neutral-



ization of risks in the exploration of economic activity, it is in this context that what will emerge Critics of John Stuart Mill's method came to call it *homo economicus* (Costa, 2009).

Modern rationalism breaks with the past, seeing in it only errors to be avoided. This rupture causes the isolation (individualism) of man in relation to others and in relation to the social organization. This isolation strengthens the idea of freedom as something inherent to the human being but obscures the notion that freedom is a political and rational achievement. Subjective freedom gains autonomy in relation to social organization, so that only in the will, as subjective, can freedom be effective. This notion of subjective freedom (autonomy of will) constitutes the core of the theorization of Law and the State as contractual forms. It is worth saying, in modernity, political and legal theories substantiate and legitimize the modern State in relation to the social contract.

In the 17th and 18th centuries, the idea of natural law resurfaced with renewed vigor and acquired a preponderant role, especially in its practical consequences. This renewal is accompanied, on the one hand, by the rationalism that characterizes the advent of modern philosophy and, on the other, by a movement of political and religious emancipation that manifested itself as a theoretical expression.

In dubio, natural law stands as an instrument of combat against the medieval and pre-capitalist organization. The bourgeois revolution, whether French or American, invokes natural law as a blunt weapon against the legal-political edifice of the Ancien Régime. Jurists and philosophers of natural law assume an ideological role of utmost relevance in the revolutionary process, justifying the overthrow of the medieval tradition rooted in political institutions and private business regulation (Lopes, 2000: p. 182).

Theories of sovereignty, especially contractualists, by introducing the conception of the state of nature, contributed decisively to the establishment of the idea of a natural law whose basic attributes would be the universality and immutability of certain principles that transcend geography and escape history. Such principles are given and not imposed by convention, accessible to men through reason. Thus, natural law would have pre-eminence over positive law, characterized by the particularism of its location in time and space (Lopes, 2000: p. 189).

The essential notion of rational natural law is centered on the following postulate: law is an idea that precedes and transcends experience (Salgado, 1995: p. 71); it is a principle of reason; the product of a logical construction through which the human mind, starting from certain general premises about the principle of justice, deduces all particular legal truths. Rational natural law therefore represents an archetype that, on the one hand, provides the criterion for evaluating institutions and, on the other, constitutes a model according to which current positive law must conform (Lopes, 2000: p. 191).

Modern natural law, marked by great names such as Samuel Pufendorf (1632-1694) (Ferraz Jr., 1995: pp. 67-68) and Christian Thomasius (1655-1728),

is intrinsically linked to the progressive development of rationalism. In the medieval period, Roman prudence prevailed, combined with religious dogmatism, which placed the criterion of truth in *auctoritas*. Against tradition and authority, rationalism opposes *ratio*, which provides the criterion of truth: true is what is logically necessary. For rationalism, reason is not only the instrument for knowing the truth (Ferraz Jr., 1996: pp. 25-26), but it is the very source from which it derives. In this way, for rationalism, reality itself is deduced from thought. Historians consider Hugo Grócio (1583-1645) as the first representative of the School of Rational Natural Law, conditioning reason, in short, to the sociability (Goyard-Fabre, 2002: p. 58) of man in an environment permeated and ordered by Positive Law, as a reflection and fruit of human rationality.

This overestimated notion of human reason, materialized in the theory of expected utility (Becker, 1988), began to suffer its most significant criticism in the 19th century, when the American economist Herbert Simon (Simon, Egidi, Viale, & Marris, 1992: pp. 174-193) stated the existence of a myriad of motivational aspects that condition the making of a decision, forming a range that encompasses and transcends pure rationality.

Simon's criticism, strengthened by the paradox presented by the French economist Maurice Allais (1952), culminates in the so-called "Behavioral Economics", whose greatest exponents, Daniel Kahneman and Amos Tversky, starting from such premises, analyze, in summary, phenomenologically, the process of decision-making, decisions (Kahneman & Tversky, 1979). Within the scenario of a need for choices whose results are uncertain, the probabilistic mathematical calculations, once defended, lose their strength in the face of the notion of gains and losses, based, in turn, on the way in which the problem presents itself, denying the idea of may humanity be rational *in total*.

Therefore, as we will see below, using as a scenario the imaginative texture offered to us by the pen of Machado de Assis, decision-making, constituting the guide of social conduct, varies according to the choices presented, configuring, therefore, a question of narrative, after all "[...] one may discover that the relative attractiveness of options varies when the same decision problem is presented in different ways" (Kahneman & Tversky, 1984: p. 342).

### 3.2. Limited Rationality in *A Causa Secreta*: Machadian Analysis

First of all, still with this narrative focus, we have, in the short story *A Causa Secreta*, that Machado's shrewd look leads us, in some moments of the narrative, to see the scenario through the lenses of Fortunato, himself being a narrator-character from your own universe. The author provides an insightful exploration of the depths of human psychology and its underlying motivations. The narrative, centered on the figure of Fortunato, reveals how human actions are often guided by limited rationalities and influenced by unconscious impulses, providing a fertile field for legal and regulatory analysis.

In the short story, Fortunato initially appears as an altruistic doctor, appar-

ently dedicated to the well-being of others, as noted:

[...] a dedicação ao ferido da rua D. Manuel não era um caso fortuito, mas assentava na própria natureza deste homem. Via-o servir como nenhum dos fâmulos. Não recuava diante de nada, não conhecia moléstia aflitiva ou repelente, e estava sempre pronto para tudo, a qualquer hora do dia ou da noite. Toda a gente pasmava e aplaudia. Fortunato estudava, acompanhava as operações, e nenhum outro curava os cáusticos (Assis, 1896: p. 70)<sup>3</sup>.

However, as the narrative progresses, his true sadistic nature is revealed:

[...] Fortunato metera-se a estudar anatomia e fisiologia, e ocupava-se nas horas vagas em rasgar e envenenar gatos e cães. Como os guinchos dos animais atordoavam os doentes, mudou o laboratório para casa, e a mulher, compleição nervosa, teve de os sofrer [...] E com um sorriso único, reflexo de alma satisfeita, alguma coisa que traduzia a delícia íntima das sensações supremas, Fortunato cortou a terceira pata ao rato, e fez pela terceira vez o mesmo movimento até a chama. O miserável estorcia-se, guinchando, ensanguentado, chamuscado, e não acabava de morrer. Garcia desviou os olhos, depois voltou-os novamente, e estendeu a mão para impedir que o suplício continuasse, mas não chegou a fazê-lo, porque o diabo do homem impunha medo, com toda aquela serenidade radiosa [...] (Assis, 1896: pp. 71-72)<sup>4</sup>.

This unmasking not only reveals the complexities of Fortunato's personality, but also illustrates how human rationality can be deeply limited and distorted by hidden motivations. His wickedness disguised under a facade of benevolence exemplifies how decisions that appear rational can, in fact, be deeply rooted in irrational desires.

In many parts of the narrative, Machado subtly makes us understand that the decision-making process that guides Fortunato's conduct is not guided by his reason, but rather by hidden pleasures and primitive instincts, as he, guided by his pleasures, being a renowned doctor, is reduced by his anger to a primitive animal whose action is limited to his atrocious desire. Machado reveals, in Fortunato's moments of lucidity, that intoxicated by such pleasures, he deviates

<sup>3</sup>Translated as "[...] the dedication to the injured man on D. Manuel Street was not a fortuitous case but was based on the very nature of this man. I saw him serve like none of the servants. He did not back down from anything, he knew no afflictive or repellent disease, and he was always ready for anything, at any time of the day or night. Everyone was amazed and applauded. Fortunato studied, followed the operations, and no one else cured the caustics".

<sup>4</sup>Translated as "[...] Fortunato had begun studying anatomy and physiology and occupied himself in his spare time with tearing up and poisoning cats and dogs. As the animals' screams stunned the patients, he moved the laboratory home, and the woman, with a nervous complexion, had to suffer them [...] And with a unique smile, a reflection of a satisfied soul, something that reflected the intimate delight of the supreme sensations, Fortunato cut off the mouse's third leg, and made the same movement for the third time towards the flame. The wretch was writhing, screeching, bloody, scorched, and he never finished dying. Garcia looked away, then looked back again, and stretched out his hand to stop the torture from continuing, but he didn't do it, because the devil in man-imposed fear, with all that radiant serenity [...]"

from his psyche, and uses dissimulation as a meeting point between such worlds, allowing the co-existence of his contradictory ways of acting, as he sees fit:

[Fortunato] ao levantar-se, deu com o médico e teve um sobressalto. Então, mostrou-se enraivecido contra o animal, que lhe comera o papel, mas a cólera evidentemente era fingida. [...] Era a mesma troca de teclas da sensibilidade, um diletantismo *sui generis*, uma redução de Calígula (Assis, 1896: p. 73)<sup>5</sup>.

Limited rationality, a concept widely discussed by theorists such as Cass Sunstein, suggests that human choices and decisions are often shaped by cognitive biases and information constraints (Kakinohana, 2022). In *A Causa Secreta*, Fortunato manipulates the perception of others, especially Garcia, imposing on him an architecture of choices biased by his cruelty and social status that favors his own perverse desires. He uses his apparent altruism as a tool to manipulate the environment and obtain the result he desires—the suffering of others as a spectacle for his personal pleasure.

The death of his wife constitutes the climax of the narrative, as Fortunato is confronted with the feeling of loss and pain that he imposed so much on those he considered inferior to him, in the words of Machado “[Fortunato] truly loved his wife, in his own way, he was used to her, it was difficult for him to lose her” (Assis, 1896: p. 75)<sup>6</sup>.

At this moment, the author masterfully points out the contradiction of the human mind regarding Fortunato’s unconscious desires when faced with the loss of his wife. The character’s internal conflict is evidenced in moments in which he, saddened by the loss, still rejoices in the suffering of loved ones due to the death of his wife, as observed:

[...] Garcia inclinou-se para beijar outra vez o cadáver, então não pôde mais. O beijo rebentou em soluços, e os olhos não puderam conter as lágrimas, que vieram em borbotões, lágrimas de amor calado, e irremediável desespero. Fortunato, à porta, onde ficara, saboreou tranquilo essa explosão de dor moral que foi longa, muito longa, deliciosamente longa (Assis, 1896: p. 75)<sup>7</sup>.

Machado de Assis, with his penetrating analysis of human nature, highlights the need for robust mechanisms to mitigate the influence of biases and hidden motivations in regulatory decisions. The narrative of *A Causa Secreta* suggests that, in a system where discretion is a reality, it is crucial to recognize that deci-

<sup>5</sup>Translated as “[...] when he [Fortunato] got up, he saw the doctor and was startled. He then became enraged at the animal, which had eaten his paper, but his anger was evidently feigned. [...] It was the same exchange of sensitivity keys, a *sui generis diletantism*, a reduction of Caligula”.

<sup>6</sup>Translated as “[Fortunato] truly loved his wife, in his own way, he was used to her, it was difficult for him to lose her”.

<sup>7</sup>Translated as “[...] Garcia leaned over to kiss the corpse again, then he couldn’t do it anymore. The kiss broke out into sobs, and the eyes couldn’t contain the tears, which came in bursts, tears of silent love and irremediable despair. Fortunato, at the door, where he had remained, calmly savored this explosion of moral pain that was long, very long, deliciously long”.

sion-makers are not completely rational and that their actions can be shaped by extralegal and irrational factors.

Bounded rationality therefore requires that regulatory and legal policies must be structured in ways that recognize these human limitations. In the short story analyzed, Machado de Assis offers a powerful reminder that human nature is complex and often contradictory. Its characters demonstrate that rationality can be compromised by subconscious desires and hidden motivations, highlighting the importance of a critical and reflective approach in the application of law and the construction of public policies.

In this vein, Machado's analysis of limited rationality in *A Causa Secreta* provides valuable insights for contemporary regulatory law. By exposing the fallacies of pure rationality, Machado de Assis invites readers and jurists to consider the depth of the human psyche and its implications for behavior and decision-making. This perspective is crucial to creating a legal system that is fair, equitable and aware of the complexities of human nature.

#### **4. Between Functionality and Discursivity: Reflections on the Role of Law**

Law, in its essence, plays a multifaceted and complex role in the organization and regulation of social relations. This multifunctionality manifests itself in two primary dimensions: functionality and discursivity (Pêpe, 2016). Understanding the balance between these dimensions is fundamental for a deep and comprehensive analysis of the role of law in contemporary society.

The functionality of law refers to its ability to receive information from the environment in which it is inserted and, in autopoietic operational closure, process it according to its own binary code, organizing, regulating and stabilizing social and economic interactions (Kurkowski, 2021). This functional aspect is fundamental to ensuring order, predictability and legal security. Law, in this sense, acts as a system of norms and rules that guides the behavior of individuals and institutions, promoting social cohesion and conflict resolution.

Furthermore, this is evident in its practical application: legislation, regulations and judicial decisions are instruments that aim to solve specific problems, protect rights and promote justice. For example, the regulation of commercial contracts ensures that transactions are conducted in a fair and predictable manner, while criminal laws seek to prevent and punish behavior that is harmful to society. In this context, law is seen as a pragmatic and instrumental mechanism, essential for the efficient and harmonious functioning of society.

On the other hand, the discursivity of law highlights its role as a space for argumentation, debate and construction of meanings (Trindade, 2016). Law is not just a set of fixed norms, but also a dynamic field where different interpretations, values and interests are discussed and negotiated. The discursiveness of law is evident in legislative processes, judicial interpretations and academic and social debates on legal issues.

The discursive nature of law implies that it is not only a reflection of established norms, but also a continuous process of construction and reconstruction of meanings. Jurisprudence, for example, is the result of judicial interpretations that adapt and contextualize legal norms to the specific realities of specific cases (Costa & Santos, 2023). This discursive aspect is crucial to ensuring that law evolves with society (Trindade & Bernsts, 2017), incorporating new values, demands and challenges.

The central challenge of contemporary law lies in finding a balance between its functionality and discursivity. While functionality ensures the stability and effectiveness of norms, discursivity ensures that the Law remains flexible, adaptable and responsive to social changes. This balance is fundamental to the legitimacy and justice of the legal system.

For example, in economic regulation, functionality requires clear and predictable rules that guarantee the efficiency and security of transactions. However, discursiveness is necessary to adapt these standards to new economic and technological realities, such as the emergence of the digital economy and the challenges of environmental sustainability. Likewise, in the field of human rights, functionality ensures the protection and promotion of fundamental rights, while discursivity allows the inclusion of new rights and the adaptation of legal interpretations to cultural and social changes.

The role of law in society is, therefore, marked by a productive tension between functionality and discursivity. This tension should not be seen as a conflict, but as an essential characteristic that allows the law to fulfill its functions effectively and fairly. By recognizing and valuing both functionality and discursivity, law can act as a true instrument of justice (Schwartz & Macedo, 2006), capable of promoting order and stability, while responding to the dynamic demands of a society in constant transformation<sup>8</sup>.

Furthermore, law, by balancing its functionality with its literary discursive nature, reaffirms its fundamental existential role (Streck & Karam, 2018) in the construction of a fair, equitable and progressive society. This balance allows law to be simultaneously a tool of social control and an arena for the expression and negotiation of values, interests, and identities, reflecting the complexity and diversity of human experience (Costa, 2022).

#### 4.1. Behavioral Designer: The Law in Practice

The concept of behavioral designer applies to law with the purpose of shaping behaviors and decisions through the structuring of the normative and institutional environment. This focus goes beyond the mere application of legal rules (Malvasio, 2017), placing itself in a context in which knowledge from behavioral

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<sup>8</sup>The tension between these two aspects is described as productive because, by recognizing and valuing both functionality and discursivity, the law becomes more robust and adaptable. This tension ensures that law does not become merely technical and insensitive to human complexities (functionality without discursivity), nor is it lost in endless debates without producing concrete results (discursivity without functionality). By balancing these elements, the law can act as a true instrument of justice.

sciences is used to create norms and public policies that encourage desirable behaviors and dissuade unwanted practices.

Law, in exercising this function, is based on the understanding that human beings are not perfectly rational. This perspective, influenced by research in cognitive psychology and behavioral economics, recognizes that decisions are often affected by cognitive biases, heuristics, and information processing limitations (Cardoso et al., 2018a). This view challenges the traditional backward model of *homo economicus*, which assumes that individuals always make rational decisions based on complete and accurate information.

The architecture of choices, choice architecture, refers to the way in which options are presented to individuals, influencing their decisions. In the legal context, this can be seen in policies that use nudge theory to guide citizens' choices without restricting their freedom of choice (Oliveira & Stancioni, 2021). For example, automatic enrollment in private pension plans, with the option to opt out, significantly increases worker participation, promoting financial security without imposing a direct obligation.

Laws and regulations can be designed to harness behavioral sparks to improve compliance and social outcomes. Public health campaigns that use psychological messages to encourage healthy behaviors or environmental regulations that harness social pressure to promote sustainable practices are examples of how law can benefit from a behavioral approach.

Considering such an approach, complex standards and regulations can make compliance difficult. By simplifying legal language and making regulatory processes more accessible, the law can improve policy adherence and effectiveness. The simplification of tax declarations and the standardization of contracts are measures that can facilitate the understanding and execution of legal obligations. In this sense, the implementation of financial or punitive incentives that consider the limited rationality of individuals can guide behaviors more effectively. Subsidies for renewable energy or penalties for non-compliance with environmental standards are examples of how behavioral incentives can be incorporated into law to achieve political and social objectives.

The use of behavioral (Aguiar, 2020) design in law raises significant ethical questions, especially about paternalism and manipulation. While *nudges* are designed to improve individual and collective well-being, it is crucial to ensure that such interventions respect the autonomy of individuals and are transparent in their intentions and methods, promoting, in Sunstein's view, a balance between two seemingly antagonistic trends, namely: libertarianism and paternalism<sup>9</sup>.

<sup>9</sup>The theory of nudges, developed by Cass Sunstein and Richard Thaler, propose a form of "libertarian paternalism" where interventions are designed to enhance healthier or more rational choices without restricting freedom of choice. However, this approach raises debates about the extent to which it is ethical to influence behavior without the explicit consent of individuals, especially in contexts where subtle manipulation may be perceived as a violation of personal autonomy. Transparency and proportionality of interventions are, therefore, fundamental to legitimize the use of behavioral designers in law, as discussed in the aforementioned **Nudge: Improving Decisions About Health, Wealth, and Happiness** (2008).



To achieve this purpose, it is crucial that behavioral designer-based policies are transparent, allowing individuals to understand how and why their choices are being shaped. Lack of transparency can undermine public trust and the legitimacy of legal institutions. Likewise, interventions must balance behavioral effectiveness with respect for individual autonomy. Citizens must have the ability to opt out of certain choice structures, ensuring that their freedoms are not unduly restricted.

It is essential that the behavioral designer in law does not exacerbate existing inequalities or discriminate against certain groups. Policies must be designed to benefit society as a whole, promoting justice and equity (Costa, 2017). This trend offers an innovative approach to the application of law, leveraging *insights* from behavioral sciences to create more effective and human-centered norms and policies. By recognizing and incorporating the bounded rationality of individuals, law can not only improve policy compliance and effectiveness, but also promote social well-being in a more holistic and pragmatic way.

However, the application of public policies guided in this sense must be conducted with care, ethics and transparency. Only in this way can law balance its functional objectives with the need to preserve the autonomy and dignity of individuals, fulfilling its role of ordering and harmonizing social relations in an increasingly complex and interconnected world.

#### **4.2. Legal Functionalism as Promoter of Public Policies**

Legal functionalism emerges as a theoretical approach that sees Law not only as a system of norms, but as an active instrument in promoting public policies and achieving social objectives. This perspective considers law in its functionality, that is, in its pragmatic role in solving social and political problems, as well as guiding the conduct of individuals and institutions.

This current is based on the premise that legal norms must be evaluated by their effectiveness and their ability to achieve the desired social ends. Unlike approaches that focus exclusively on the internal logic and coherence of the legal system, functionalism emphasizes the relationship between law and its practical effects on society. In this context, the legal norm is seen as a tool that must be shaped and applied according to the specific objectives of public policies.

Niklas Luhmann's theoretical contributions (Luhmann, 1991: p. 1419) re-frame the understanding of law, shifting from a tool for social control to a self-sustaining system within the broader societal framework. This approach asserts that law is not merely an apparatus for resolving disputes or enforcing norms, but an autonomous system characterized by its unique logic and operational closure (Zumbansen, 2008).

Central to Luhmann's concept is the idea of autopoiesis, whereby the legal system self-reproduces through its own operations. It generates and maintains its norms, functioning independently from other social systems. This independence underscores the legal system's closed nature while highlighting its special-

ized functionality.

Legal Functionalism postulates that modern societies are characterized by functional differentiation, where various subsystems, such as law, politics, and economy, operate under their unique logics and functions. Law is not a direct instrument of any single subsystem, like politics or morality, but serves its own function of stabilizing social expectations and managing legal conflicts.

The primary role of law is to stabilize normative expectations within society. This stabilization allows individuals and institutions to plan and act with a degree of certainty about the legal outcomes of their actions. Such predictability is crucial in complex, functionally differentiated societies, as it enables smooth social interactions and reduces uncertainty.

While the legal system is operationally closed, meaning it operates based on its own distinctions (e.g., legal/illegal), it is cognitively open (Luhmann, 1991: p. 1422). This openness allows it to observe and react to changes in its environment, adjusting its structures via processes known as structural coupling or inter-systemic communications. In Legal Functionalism, the law does not merely solve conflicts but also constructs them by defining and framing what constitutes a legal dispute. This aspect highlights how legal norms not only resolve but also generate certain social realities.

The functionalist nature of law allows it to be used strategically in the conception, design, and implementation of public policies. For instance, when addressing issues like social inequality, legislators can create norms that not only regulate behavior but also promote social and economic inclusion. Affirmative action policies and income transfer programs exemplify how law can be employed to correct structural inequalities present in various legal areas (Cardoso, 2006).

By leveraging the functionalist aspect of law, policymakers can develop targeted interventions that go beyond mere behavioral regulation. They can create legal frameworks that actively promote social and economic inclusion, thereby addressing deep-rooted inequalities. This strategic use of law enables societies to tackle complex challenges and work towards a more equitable and inclusive future.

Following this example, in the field of economic regulation, legal functionalism guides the creation of standards that promote sustainable development and fair competitiveness. Antitrust laws, regulation of the financial markets, and policies to encourage technological innovation are designed to balance private interests and public well-being, ensuring that the market functions efficiently and equitably.

Furthermore, in the scenario of environmental issues, we are faced with a field in which legal functionalism appears to be particularly relevant (Costa & Rosa, 2019). Environmental standards are designed to protect ecosystems, reduce pollution, and promote the sustainable use of natural resources. The effectiveness of these standards depends on their ability to influence the behaviors (Cardoso, Vila-Nova, & Knoerr, 2019) of both individuals and corporations, often using

economic incentives, penalties and enforcement mechanisms.

The relationship between legislation and market operations is both intricate and essential, serving as the backbone for how markets function and evolve (Osman, 2015). Legislation provides the regulatory frameworks that define the rules within which markets operate. These laws encompass a wide array of areas including trade regulations, company law, consumer protection, labor laws, and environmental safeguards. Such legal frameworks are crucial as they help ensure fairness, reduce uncertainty, and establish a stable environment conducive to economic transactions.

Laws are pivotal in ensuring market efficiency and fairness. Through the enforcement of antitrust laws and regulations against monopolistic practices, legislation promotes competition and prevents the concentration of market power that could otherwise stifle innovation and exploit consumers. These regulations maintain transparency and fairness, which are essential for consumer trust and the effective functioning of markets.

Moreover, legislation plays a critical role in protecting rights and property, key components that underpin market operations. Property laws ensure that ownership rights are recognized and enforced, which is fundamental for market transactions. Intellectual property laws, in particular, protect creators and inventors, providing them with the incentive to innovate by ensuring they can reap the benefits of their inventions without the fear of undue appropriation.

At times, markets fail due to various reasons such as externalities, public goods, or information asymmetry. Legislation steps in to correct these market failures through measures like taxation, subsidies, and in some cases, direct government intervention in specific sectors. Environmental regulations serve as a prime example of legislation addressing the external costs of pollution that market mechanisms fail to account for.

However, the relationship between legislation and market operations is not unidirectional. Market forces often influence legislative processes as well. Economic stakeholders frequently lobby for laws that protect their interests, which can result in legislation that favors certain industries or companies, potentially at the expense of broader public interests.

In the context of globalization, the interplay between domestic legislation and international laws becomes increasingly significant. Global markets are influenced by international regulatory standards and treaties which, in turn, necessitate adjustments in domestic legislation to ensure compliance and competitiveness in a global setting.

Also, legislation not only supports market operations by providing a stable and fair environment, protecting rights, and correcting market failures but also adapts to economic forces within a dynamic interplay (Sun, 2023). This relationship highlights the delicate balance required to enable free market activities while ensuring that such freedom does not lead to adverse consequences for society and the environment.

From a materially different perspective, around public health, functionalist law is crucial for the implementation of policies that protect citizens' health. Regulations on vaccines, control of infectious diseases, and regulations on food safety are examples of how law can be used to promote public health. Responding to health crises, such as pandemics, requires close coordination between law and public policy to ensure an effective and rapid response.

Although legal functionalism offers a pragmatic and results-oriented approach, it faces significant challenges (Cardoso, Costa, & Sousa Jr., 2018b). The search for effectiveness in public policies can sometimes conflict with principles of justice and equity. The law must be applied in a way that balances the diverse (Fragoso, 2021) and often conflicting interests of different social groups. Furthermore, creating effective standards that actually achieve public policy objectives can be complex. Implementing these standards requires a deep understanding of social, economic and cultural dynamics, as well as an efficient monitoring and evaluation system (Souza, Ramos, & Perdigão, 2018).

Legal norms need to be flexible enough to adapt to changing social, economic and technological conditions. Rigidity can lead to ineffective public policies, while excessive flexibility can generate legal uncertainty<sup>10</sup>.

Therefore, legal functionalism, by focusing on the practical effectiveness of norms and the achievement of social objectives, positions law as a vital instrument in promoting public policies. This approach allows the law to respond in a dynamic and pragmatic way to social needs, using principles from behavioral, economic and social sciences to design and implement norms that promote collective well-being.

However, the application of legal functionality must be balanced with considerations of justice and equity, ensuring that public policies benefit everyone in a fair and inclusive way. Thus, Law, when acting in a functional way, not only regulates, but also transforms society, promoting sustainable development, social justice and public well-being.

## 5. Conclusion

The expository work presented here, under the jurisliterary aegis, undertakes an intricate incursion into the intellectual realm where Literature and Law converge in a complex conceptual dance. Under the erudite guidance of Machado de Assis, this paper serves as a fertile ground for contemplating the human condition from the perspective of natural law and the intricacies of psychology. Through-

<sup>10</sup>The ability of legal standards to adapt to constantly changing contexts is crucial to the effectiveness and relevance of public policies. However, this delicate balance between flexibility and rigidity is fundamental to ensuring legal security, as highlighted by Zygmunt Bauman in his analysis of liquid modernity (*Modernity and Ambivalence*, 1991). Excessive rigidity of standards can result in them being outdated and ineffective, unable to respond to new social, economic and technological realities. On the other hand, excessive flexibility can undermine predictability and trust in the legal system, creating an environment of uncertainty and instability. Therefore, the search for a dynamic balance is essential to ensure that the law continues to serve as a pillar of order and justice in society.

out the analysis, a captivating narrative of Fortunato is unveiled, an archetype of moral dichotomy, whose persona oscillates between apparent benevolence and unspeakable cruelty. The author navigates the depths of the human soul, exposing the webs of bounded rationality that govern their actions.

Within the theoretical framework of Regulatory Law, Machado's narrative emerges as a crucible of reflection, where the gaps in the human psyche and the imperfections of reason intertwine to form a tapestry of legal nuances. Fortunato, with his veiled mastery and concealed cruelty, serves as a microcosm of the systemic failures and challenges inherent to the implementation of public policies on Brazilian soil.

Through the lens of jusnaturalism, a profound analysis of bounded rationality unfolds, revealing how human choices are shaped by impulses and motivations that transcend the realm of pure logic. Machado's narrative, meanwhile, stands as a critical beacon, illuminating the dark recesses of the human mind and prompting further legal hermeneutics. Thus, faced with the conceptual kaleidoscope that unfurls on each page of the work, readers are invited on a journey of reflection, where literature and law intertwine in a sinuous dance, unveiling the mysteries and contradictions that permeate human nature.

Ultimately, by reflecting on the functional role of Law as a societal organizer, its significance in facilitating the harmonious coexistence of a rationally bounded humanity, guided by its regulations, becomes evident. Literature, under the social narrative aspect, serves as a constructor of biopsychosocial textures, a beacon that enables flexibility and adaptation to new contexts.

## Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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