ANDRE LUIS OKUMURA

**A Crise de 2008 sob o prisma da
análise econômico-comportamental do direito**

Tese de Doutorado

Orientadora: Professora Titular Dra. Paula Andrea Forgioni

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Tese apresentada à Banca Examinadora do Programa de Pós-Graduação em Direito, da Faculdade de Direito da Universidade de São Paulo, como exigência parcial para obtenção do título de Doutor em Direito, na área de concentração de Direito Comercial, sob a orientação da Professora Titular Dra. Paula Andrea Forgioni.

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Though this be madness, yet there is method in't.
Shakespeare, Hamlet – Act 2, scene 2, 205-206.

RESUMO

OKUMURA, Andre Luis. **A Crise de 2008 sob o prisma da análise econômico-comportamental do direito.** 2017. 441 f. Tese (Doutorado) – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2017.

Quase 10 anos após a eclosão da Crise de 2008, seguimos insistindo em velhas soluções para problemas econômicos recorrentes, e os remédios regulatórios que têm emergido em resposta à crise continuam fundamentalmente baseados no tradicional paradigma econômico neoclássico que pressupõe que o ser humano é um agente econômico infalivelmente racional, conforme o modelo do *Homo economicus*, desconsiderando-se as evidências empíricas em sentido contrário que nos trazem as ciências cognitivas em geral, e a economia comportamental em particular. Pois, lançando mão dessas descobertas, nossa tese é a de que a análise econômico-comportamental do direito deve ser usada como instrumento para prescrever políticas públicas capazes de aprimorar a regulamentação do mercado financeiro. Para tanto, dividimos nosso trabalho em três grandes capítulos. No primeiro capítulo, tecemos uma narrativa da Crise de 2008, com ênfase nas circunstâncias em que foi engendrada, e discorremos sobre como a economia neoclássica explica suas causas. No segundo capítulo, explicamos a economia comportamental e a análise econômico-comportamental do direito, contrapondo-as à economia neoclássica e à análise econômica do direito. No terceiro capítulo, defendemos que a explicação neoclássica da crise é incorreta, e tecemos uma narrativa alternativa da Crise de 2008 com base na economia comportamental. Finalmente, criticamos as principais respostas regulatórias que têm sido dadas à Crise de 2008, demonstrando que continuam se baseando quase que exclusivamente na economia neoclássica, e fazemos propostas alternativas de regulamentação inspiradas na análise econômico-comportamental do direito, a fim de provar nossa tese de que esta disciplina realmente deve ser usada para prescrever políticas públicas a fim de aprimorar a regulamentação do mercado financeiro.

Palavras-chave: Análise econômico-comportamental do direito. Direito e economia comportamental. Economia comportamental. Crise de 2008. Mercado financeiro.

ABSTRACT

OKUMURA, Andre Luis. **The 2008 Financial Crisis under the perspective of behavioral law and economics**. 2017. 441 f. Thesis (Doctorate) – School of Law, University of São Paulo, São Paulo, 2017.

Almost 10 years after the outbreak of the 2008 Financial Crisis, we continue to insist on old solutions to recurring economic issues, and the regulatory remedies that have emerged in response to the crisis continue to be fundamentally based on the traditional neoclassical economic paradigm which assumes that the human being is an infallibly rational economic agent, according to the model of *Homo economicus*, thus disregarding the empirical evidence to the contrary that has been uncovered by cognitive sciences in general, and behavioral economics in particular. Grounded on these very findings, our thesis is that behavioral law and economics should be used as a tool to design public policies to improve the regulation of financial markets. We divide this paper into three major chapters. In the first chapter, we develop a narrative of the 2008 Financial Crisis, with focus on the circumstances in which it happened, and discuss how neoclassical economics explains the causes of the crisis. In the second chapter, we expound behavioral economics and behavioral law and economics, contrasting them with neoclassical economics and law and economics. In the third chapter, we argue that the neoclassical explanation of the crisis is incorrect, and we develop an alternative narrative of the 2008 Financial Crisis based on behavioral economics. Finally, we criticize the main regulatory responses that have been given to the 2008 Financial Crisis, demonstrating that they continue to rely almost exclusively on neoclassical economics, and we suggest alternative regulatory proposals inspired by behavioral law and economics to demonstrate that this approach should be used to design public policies to improve the regulation of financial markets.

Keywords: Behavioral analysis of law. Behavioral law and economics. Behavioral economics. 2008 Financial Crisis. Financial market.

RÉSUMÉ

OKUMURA, Andre Luis. **La crise financière mondiale de 2008 dans le cadre de l'analyse économique-comportementale du droit**. 2017. 441 f. Thèse (Doctorat) – École de Droit, Université de São Paulo, São Paulo, 2017.

Alors que dix ans environ se sont écoulés depuis le déclenchement de la crise financière mondiale de 2008, nous continuons à insister sur les mêmes solutions à des problèmes économiques récurrents, et les réponses réglementaires qui ont émergé face à la crise continuent fondamentalement d'être basées sur le paradigme économique néoclassique traditionnel qui suppose que l'être humain est un agent économique infailliblement rationnel, selon le modèle d'*Homo œconomicus*, ignorant ainsi les preuves empiriques contraires qui ont été découvertes par les sciences cognitives en général, et par l'économie comportementale en particulier. Sur la base de ces constats, notre thèse affirme que l'analyse économique-comportementale du droit devrait être utilisée comme outil pour concevoir des politiques publiques visant à améliorer la réglementation des marchés financiers. Nous avons divisé ce travail en trois grands chapitres. Dans le premier, nous développons un récit de la crise financière mondiale de 2008, en mettant l'accent sur les circonstances dans lesquelles elle s'est produit, et discutons comment l'économie néoclassique explique les causes de la crise. Dans le deuxième chapitre, nous exposons l'économie comportementale et l'analyse économique-comportementale du droit, les opposant à l'économie néoclassique et à l'analyse économique du droit. Dans le troisième chapitre, nous soutenons que l'explication néoclassique de la crise est incorrecte et nous développons un récit alternatif de la crise financière mondiale de 2008 basé sur l'économie comportementale. Enfin, nous critiquons les principales réponses réglementaires qui ont été accordées à la crise financière mondiale de 2008, démontrant qu'elles continuent à compter presque exclusivement sur l'économie néoclassique, et nous proposons d'autres propositions réglementaires inspirées par l'analyse économique-comportementale du droit pour démontrer que cette approche devrait être utilisée pour concevoir des politiques publiques améliorant la réglementation des marchés financiers.

Mots-clefs: Analyse économique-comportementale du droit. Droit et économie comportementale. Économie comportementale. Crise Financière Mondiale de 2008. Marché financier.

RIASSUNTO

OKUMURA, Andre Luis. **La crisi finanziaria del 2008 secondo l'analisi economica e comportamentale del diritto**. 2017. 441 f. Tesi (Dottorato) – Facoltà di Giurisprudenza, Università di São Paulo, São Paulo, 2017.

Quasi dieci anni dopo lo scoppio della crisi finanziaria del 2008, continuiamo a insistere su vecchie soluzioni a problemi economici ricorrenti. I requisiti normativi che sono emersi quale risposta alla crisi finanziaria continuano fondamentalmente ad essere basati sul tradizionale paradigma economico neoclassico, tale paradigma presuppone che l'essere umano è un agente economico infallibilmente razionale secondo il modello dell'*Homo oeconomicus*, trascurando così le prove empiriche contrarie che sono state scoperte dalle scienze cognitive in generale e in particolare dall'economia comportamentale. Sulla base di questi risultati, la nostra tesi è che l'analisi economica e comportamentale del diritto dovrebbe essere utilizzata come strumento per progettare politiche pubbliche atte a migliorare il regolamento dei mercati finanziari. Abbiamo diviso questo lavoro in tre capitoli principali. Nel primo capitolo, facciamo una narrazione della crisi finanziaria del 2008 concentrandoci sulle circostanze nelle quale si è sviluppata e discutendo in che modo l'economia neoclassica ne spiega le cause. Nel secondo capitolo, spieghiamo l'economia comportamentale e l'analisi economica e comportamentale del diritto, opponendoli all'economia neoclassica ed all'analisi economica del diritto. Nel terzo capitolo, sosteniamo che la spiegazione neoclassica della crisi è sbagliata e sviluppiamo una narrazione alternativa della crisi finanziaria del 2008 basata sull'economia comportamentale. Infine, criticiamo le principali risposte normative che sono state date alla crisi finanziaria del 2008, dimostrando che le medesime continuano ad essere basate quasi esclusivamente sull'economia neoclassica e suggeriamo pertanto proposte regolamentari alternative ispirate dall'analisi economica e comportamentale del diritto onde dimostrare che questo approccio dovrebbe essere utilizzato per progettare politiche pubbliche per migliorare il regolamento dei mercati finanziari.

Parole chiave: Analisi economica e comportamentale del diritto. Diritto ed economia comportamentale. Economia comportamentale. Crisi Finanziaria del 2008. Mercato finanziario.

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INTRODUÇÃO

The world is facing the greatest financial crisis since the Great Depression. (...) It is reasonable to ask whether an understanding of human behavior can help to explain what happened – and whether nudging [i.e., implementing liberty-preserving policies based on cognitive behavioral science research findings] might prevent future occurrences of the same sort of mess. The answer to such questions would deserve a book of its own.
Thaler & Sunstein, Nudge.

Quase uma década se foi desde a eclosão da Crise de 2008. Não faltam trabalhos sobre o assunto, tampouco versões sobre o que houve, narrativas, digressões e, nem mesmo, confissões. O que nos propomos a fazer, no entanto, é diferente do que se tem feito – se não o fosse, melhor seria silenciarmo-nos do que agregar mais um repetitivo eco aos ditirambos que se têm cantado em verso e prosa ao longo do último decênio.

A enorme diversidade de textos e explicações sobre o tema, associada às respostas normativas que lhe têm sido dadas – de um modo geral, semelhantes, senão, praticamente unissonantes –, são *per se* eloquentes, e muito nos dizem sobre onde estamos com relação ao que houve – enfatize-se, quase uma década depois do ocorrido: As causas da crise, o que de fato se passou, onde erramos, seguem sendo objeto de discussões e hipóteses; enquanto que, contraditoriamente, as respostas legislativas e regulatórias a essa riquíssima fauna de possíveis pecados e culpas tendem a ser aproximadamente as mesmas. Ou seja, os mais amplos ingredientes da crise vão sendo amalgamados em explicações que, estranhamente, afunilam-se em uma abordagem quase unívoca sobre como impedir que o antanho volte a encarnar-se no porvir. E, desse modo, em vista da incerteza quanto ao diagnóstico da doença, tomamos todos os mesmos velhos elixires para combatê-la, e continuamos seguindo a manada, obedientemente observando todos a mesma profilaxia prescrita pela economia neoclássica ao homem racional, uma nova versão vitaminada das mesmas drogas que não impediram a patologia de se manifestar com seu repertório completo de sintomas, virulência e morbidez em 2008.

A nossa diagnose vai no sentido de que temos nos fiado em presunções equivocadas: O ser humano é, *inter alia*, excessivamente otimista quanto a sua capacidade de compreender problemas e imaginar soluções, acredita que o futuro invariavelmente repetirá o passado, e tem limitações cognitivas e éticas seriíssimas, sempre demasiadamente humanas, e completamente alheias ao *Homo economicus*. Este trabalho visa a dar uma pequena dissonante contribuição ao barulhento coro da malograda odisseia financeira de nossa geração, fundamentalmente, a fim de fomentar o debate construtivo sobre o tema.

Por um lado, nossos esforços inspiraram-se na observação de que o arcabouço intelectual em que as condições para a crise floresceram continua substancialmente intocado, imaculado e estéril a novas propostas que poderiam ser capazes de realmente reparar um sistema que clama desesperadamente por reformas. Identificamos o âmago desse arcabouço no postulado da racionalidade dos agentes econômicos, que jaz na raiz da ortodoxia dominante, tanto do pensamento econômico, quanto do pensamento jurídico que orientou a feitura da regulamentação que, frise-se, falhou em prevenir a Crise de 2008, mas segue sendo o inabalável alicerce sobre o que as respostas à calamidade têm sido erguidas. Insurgimo-nos portanto contra o postulado da racionalidade, pressuposição compartilhada que, imperturbável e incontestado, tem impellido bem-intencionados reformadores a buscar um improvável novo engenho em vetustas esperanças.

Por outro lado, iluminam nosso trabalho as surpreendentes descobertas científicas sobre os mais diversos e inesperados aspectos da cognição humana, descobertas estas que solapam a confiança em um modelo econômico que de algum modo sobreviveu a si mesmo durante a crise, em prol de um novo paradigma, quase tão humano quanto o próprio *Homo sapiens* nós mesmos.

Assim, exploraremos uma ideia que, surpreendentemente, tem sido muito ventilada, mas pouco levada a sério: A de que o pressuposto da racionalidade está comprovadamente errado e as recentes descobertas psicológicas e cognitivas a respeito do ser humano precisam ser levadas em conta para se atualizar e reformar a regulamentação aplicável ao mercado financeiro, notadamente, conforme prescrito pelas germanas economia comportamental e análise econômico-comportamental do direito. Desse modo, em outras palavras, a tese que almejamos defender é a de que *a análise econômico-comportamental do direito deve ser*

usada como instrumento para prescrever políticas públicas capazes de aprimorar a regulamentação do mercado financeiro.

Para tanto, dividimos nosso trabalho em três grandes partes, ou três grandes capítulos.

Enfocaremos o primeiro capítulo de nosso trabalho na Crise de 2008. Em um primeiro momento, vamos circunstanciar o ambiente que nutriu as condições para que a crise fosse engendrada. Aproveitaremos a oportunidade para definir alguns conceitos importantes e explicar institutos e instrumentos financeiros de particular relevância ao tema. Discorreremos sobre o que foi a Crise de 2008 e como pôde ocorrer. Uma vez contextualizada a crise, explicados seus mais importantes elementos, e apontados seus principais atores, apoiados em Richard A. Posner, um dos pais da análise econômica do direito, passaremos a demonstrar como a economia neoclássica explica suas causas. A narrativa posneriana da crise nos será particularmente útil por ser antitética à nossa tese: Posner, em duas volumosas obras sobre o assunto, se propõe a explicar a Crise de 2008 estritamente com base na economia neoclássica, e explicitamente defende que a economia comportamental não é necessária para compor a explicação.

O segundo grande capítulo de nosso trabalho visará a explicar a economia comportamental e a análise econômico-comportamental do direito contrapondo-as à economia neoclássica e à análise econômica do direito. Optamos por construir o capítulo desse modo na medida em que o contraste entre as disciplinas enriquece a discussão e certamente deixa mais claras as discrepâncias entre elas do que poderiam fazer meras descrições estanques. Assim, se o primeiro grande capítulo do trabalho é um mapa dos mares que vamos navegar, o segundo é a caixa de ferramentas que utilizaremos para nos localizarmos e procurarmos o proverbial caminho para as Índias.

Cumpra aqui notar uma limitação importante de nosso trabalho: Nossas análises, conclusões e recomendações serão construídas com base em experimentos comportamentais realizados e publicados por terceiros. Apesar do caráter eminentemente prático e até mesmo laboratorial das ciências cognitivas atuais – inclusive da economia comportamental – não realizaremos pesquisas experimentais primárias no escopo de nosso trabalho. Aproveitaremos os experimentos já realizados, publicados e criticados por terceiros, com ênfase em jornais e revistas acadêmicas sujeitas à revisão de pares, conforme a melhor prática.

Posteriormente, no terceiro grande capítulo de nosso trabalho, retomando a argumentação de Posner como paradigmática da análise da Crise de 2008 através do modelo econômico padrão, rebateremos seus argumentos a fim de demonstrar sua incorreção. Desmontada a argumentação neoclássico-posneriana a respeito da crise, com base em George A. Akerlof e Robert J. Shiller, teceremos uma nova narrativa para a Crise de 2008, desta vez, fundamentada em economia comportamental, visando a explicitar o quão convincentes e sólidas são as explicações que a nova disciplina nos confere. Finalmente, tendo assim descartado o velho paradigma econômico neoclássico em favor do novo modelo econômico comportamental, passaremos então a elencar as principais respostas regulatórias que têm sido dadas à Crise de 2008, demonstraremos que continuam se baseando na economia neoclássica, e faremos propostas de regulamentação alternativas inspiradas na análise econômico-comportamental do direito, comparando-as com regulamentações favorecidas no arcabouço econômico neoclássico para demonstrar a insuficiência deste paradigma, a fim de, assim, provar nossa tese de que a análise econômico-comportamental do direito realmente deve ser usada para prescrever políticas públicas para aprimorar a regulamentação do mercado financeiro.

CONCLUSÃO

Capitalist societies, as correctly seen by the old economics, can be tremendously creative. Government should interfere as little as possible with that creativity. On the other hand, left to their own devices, capitalist economies will pursue excess, as current times bear witness. There will be manias. The manias will be followed by panics. (...) The proper role of government (...) is to set the stage. The stage should give full rein to the creativity of capitalism. But it should also countervail the excesses that occur because of our animal spirits.

Akerlof & Shiller, *Animal Spirits*

Diz-se que o tempo é senhor da razão. Porém, quase uma década depois da grande catástrofe econômica dos últimos 80 anos, o paradigma econômico neoclássico que serviu de arcabouço para nutrir as condições que desembocaram na crise continua reinando de forma quase que absoluta nas mentes e corações de nossos políticos, empresários, acadêmicos, e reguladores do mercado financeiro, de modo que as respostas normativas que têm sido conferidas aos problemas que levaram à Crise de 2008 seguem sendo fundamentalmente desenhadas para regular o comportamento do *Homo economicus*, e não o de seu genitor encarnado, e que efetivamente precisa ser regulado – o *Homo sapiens*.

O modelo econômico neoclássico, sem dúvida alguma, tem muitos méritos e muita utilidade. Não se contesta isso. No entanto, o avanço das ciências cognitivas tem apontado com muita clareza o quanto empiricamente nos desviamos desse modelo, e quais as consequências desses desvios. E, mais do que isso, as ciências cognitivas têm também demonstrado que, ainda que nem sempre o ser humano se comporte do modo peculiarmente racional que pressupõe a economia neoclássica, nem por isso seu comportamento é absolutamente errático – ao contrário, o ser humano se comporta de modo “previsivelmente irracional”, na expressão de Ariely. Podemos, portanto, construir-lhe um modelo mais realístico, com maior aderência à realidade e maior poder de previsibilidade. É justamente o que se propõe a fazer a economia comportamental na arena econômica, e a análise econômico-

comportamental do direito na arena jurídica voltada ao comportamento econômico da sociedade.

Em nosso trabalho, apoiados justamente nestas descobertas cognitivo-comportamentais, procuramos demonstrar que a análise econômico-comportamental do direito deve ser usada para otimizar a regulamentação do mercado financeiro. Para tanto, dividimos nosso trabalho em três grandes partes. Resumindo, na primeira, discorremos sobre a Crise de 2008. Na segunda, expusemos a economia comportamental e a análise econômico-comportamental do direito. Finalmente, na terceira, demonstramos que o diagnóstico neoclássico para os problemas que levaram à crise é insuficiente e equivocado; que a economia comportamental nos dá melhores explicações para o que houve; que a regulamentação que tem emergido em resposta à crise é primordialmente fundamentada no modelo econômico neoclássico e, portanto, falha; e que a análise econômico-comportamental do direito nos proporciona respostas melhores aos desafios teóricos que nos foram impostos pela crise, devendo, portanto, efetivamente ser utilizada para prescrever políticas públicas a fim de aprimorar a regulamentação do mercado financeiro, provando, assim, a nossa tese.

Mais especificamente, na primeira parte de nosso trabalho tecemos uma narrativa da Crise de 2008. Primeiro, narramos as circunstâncias em que a crise foi engendrada e estabelecemos alguns conceitos e definições de particular relevância ao trabalho. A seguir, discorremos sobre a eclosão da crise, procurando demonstrar como o arcabouço exposto anteriormente levou o sistema financeiro norte-americano ao colapso. Finalmente, na parte final deste primeiro capítulo do trabalho, baseados com Richard A. Posner, demonstramos como a economia neoclássica explica a crise e suas causas como frutos de comportamentos sempre racionais dos agentes econômicos.

No segundo grande capítulo de nosso trabalho, expusemos a economia comportamental e seu híbrido jurídico, a análise econômico-comportamental do direito, contrapondo-as à economia neoclássica e à análise econômica do direito, a fim de ressaltar suas diferenças. Aproveitamos para fazer uma reflexão a respeito do estado da arte da análise econômico-comportamental do direito, a partir da que chegamos a mais algumas conclusões importantes a nosso trabalho.

Em primeiro lugar, concluímos que a análise econômico-comportamental do direito não é uma filosofia grandiloquente, nem tampouco uma teoria da justiça ou sequer uma teoria

do direito. Muito mais modestamente, a análise econômico-comportamental do direito tem função precipuamente instrumental, e não visa, assim, a criar valores ou a determinar quais valores devem ser perseguidos pelo ser humano, mas, simplesmente, a auxiliar-nos a avaliar as possíveis consequências econômicas da adoção de determinadas normas ou políticas públicas e, dessa maneira, a realizar os valores previamente abraçados pelo sistema jurídico em que a sociedade está mergulhada.

Outra conclusão importante desta segunda parte do trabalho é a de que a análise econômico-comportamental do direito não é, tampouco, uma disciplina perfeitamente coerente, completa e integrada; e a de que os resultados que emergem de uma análise econômico-comportamental do direito nem sempre são totalmente contrários ao que também concluiria uma análise econômica neoclássica. Ao contrário, especialmente de um ponto de vista microeconômico, a análise econômico-comportamental do direito, assim como a economia comportamental, frequentemente apenas complementam ou ajustam a análise econômica do direito e a economia neoclássica, respectivamente. As diferenças decorrentes das abordagens, entretanto, ficam mais evidentes em análises macroeconômicas. Se, de um ponto de vista microeconômico, comumente, a análise econômico-comportamental do direito e a economia comportamental *atualizam* os modelos neoclássicos; de um ponto de vista macroeconômico, a análise econômico-comportamental do direito e a economia comportamental muitas vezes implicam uma verdadeira *substituição* dos modelos construídos sobre o paradigma da racionalidade neoclássica, trazendo às análises não só uma quantidade maior de variáveis, mas também, novos elementos, muitas vezes, inquantificáveis; substituindo modelos matemáticos por estudos de caso. Aqui, a análise econômico-comportamental do direito e a economia comportamental se tornam potencialmente tão distantes da análise econômica do direito e da economia neoclássica quanto a antropologia da física.

Finalmente, mais uma conclusão relevante que emergiu de nossa reflexão sobre a análise econômico-comportamental do direito é a de que nem sempre é fácil diferenciar-se uma análise econômico-comportamental do direito de uma análise simplesmente econômico-comportamental; assim como as fronteiras entre as diversas disciplinas cognitivo-comportamentais nem sempre são claras. Desse modo, até mesmo em vista da interdisciplinaridade atávica à análise econômico-comportamental do direito, optamos por abordá-la de modo razoavelmente amplo, ainda que rigoroso.

No terceiro grande capítulo de nosso trabalho, finalmente, rebatemos a argumentação neoclássica a respeito da crise, substituindo-a por uma narrativa econômico-comportamental, para demonstrar e concluir que esta é mais completa e satisfatória do que aquela. A seguir, elencamos as principais medidas normativas que têm sido propostas e implementadas ao redor do mundo em decorrência da Crise de 2008, demonstrando e concluindo que quase a totalidade delas continua alicerçada sobre os pressupostos da economia neoclássica; notadamente, em uma suposta perfeita racionalidade econômica do ser humano. Finalmente, baseados em uma análise econômico-comportamental do direito, tecemos algumas sugestões normativas, demonstrando sua superioridade teórica em relação ao que se tem sido proposto com base no vetusto modelo do *Homo economicus*, e comprovando, dessa maneira, nossa tese.

Uma última conclusão importante que emerge deste trabalho e que convém comentar é a de que, como mencionamos, praticamente tudo o que se tem proposto e implementado normativamente em resposta à Crise de 2008 segue fundamentado na economia neoclássica – ou seja, no mesmo paradigma que fracassou em prevenir a crise, e que, inegavelmente, carrega *ab ovo* o mais libertário viés ideológico econômico, o mesmo viés que levou à desregulamentação dos mercados, ao dismantelamento do Glass-Steagall, à própria Crise de 2008, e que, atualmente, inspira, e de modo particularmente virulento, a mais nova proposta de lei para regular o mercado financeiro dos Estados Unidos, o CHOICE Act.

A economia neoclássica, sem dúvida alguma, muito contribuiu para o progresso da humanidade, e ainda tem muito o que contribuir. Ademais, o governo, que carrega o terrível Leviatã em seu DNA, precisa, de fato, ser observado com saudável suspeita e distanciamento; convencidos que estamos de que, quanto maior seu poder e influência, tanto mais perigoso se torna. No entanto, particularmente em relação ao mercado financeiro, o que a Crise de 2008 nos mostrou com a mais completa transparência, e o que também a Crise de 29 já o havia feito antes dela, é que esta é uma área em que os agentes econômicos efetivamente precisam ser regulados, para o bem da sociedade. A regulamentação, claro, não deve ser excessiva; e um dos maiores desafios que temos é, justamente, regular o mercado de modo a controlar abusos, manias e pânico, sem tolher a liberdade e a criatividade dos agentes econômicos, que impulsionam a economia e, em última instância, a humanidade. Este é o grande desafio dos anos vindouros, especialmente, em um momento em que, aparentemente, a memória do grande desastre econômico de nosso brevíssimo milênio já começa a evanescer.

Como bem disse Greenspan, o mais perigoso legado da Crise de 2008 foi o “alquebrado sistema político” que dela emergiu. Um sistema financeiro saudável é essencial ao crescimento econômico, mas a população nunca o odiou tanto quanto hoje. A meritocracia é essencial ao capitalismo, mas nunca esteve sob tão grande suspeita quanto atualmente. O capitalismo e o livre comércio tiraram bilhões da miséria, mas, devido à Crise de 2008, os inimigos da liberdade puderam levantar a cabeça e, com eles, pululam ao redor de todo o globo demagogos e anarco-narcisistas, protecionismos e tiranias, falsos profetas e oportunistas, todos vestindo as tradicionais máscaras da virtude e da justiça, ainda capazes de enganar os incautos, os ressentidos e os desesperançados, e cuja maior bandeira é – simplesmente – ser contra o *establishment*.

Neste contexto, vemos com particular preocupação a manutenção do paradigma neoclássico na normatização dos mercados financeiros globais; e novas – velhas – iniciativas, como a do CHOICE Act, nos deixam verdadeiramente consternados. O sistema sobreviveu uma vez a si mesmo, mas terá fôlego para superar um novo cataclisma? Tememos que não, e a hora de agir é agora – *agora*, a hora de moldar as leis que nos moldarão o futuro. E aplicar-se a análise econômico-comportamental do direito aos mercados financeiros, resgatando nossa própria humanidade de volta à teoria econômica e jurídica, seria um importante primeiro passo na direção correta.

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