Confronting the insupportable

Resources of the law of responsibility[1]

Alain Supiot

"Everyone fights for what he lacks" Surcouf[2] is said to have replied to an English captain who was boasting about fighting for honour and not for money. The indiscriminate invocation of republican or democratic values is a sign of their weakness; there should be no need for such proclamations if these principles were part of everyday experience. The same goes for 'social responsibility', so often bandied about by big business or political leaders. Its omnipresence in political and economic circles is a symptom of the juridical crisis that responsibility is going through. It expresses a general feeling that the breaking down of trade borders and the weakening of the pursuit of the public good are leading to widespread irresponsibility.

Over a century ago, the welfare state was born of a crisis of this sort. The proliferation of industrial accidents for which nobody accepted responsibility sparked a major legal revolution. Under civil law, responsibility was essentially individual and derived from the concept of fault. The responsible person appeared as the one who, adult and of sound mind, had to repair the harmful consequences of their guilty actions, negligence or carelessness. It was only by exception that an individual's responsibility could be directly invoked without fault on their part because of certain things 'placed in their care' (their ruined buildings or their animals) or because of people they were in charge of (children, pupils or representatives). These were a finite list of exceptions to the rule of irresponsibility that applied to both things and other people.

To be able to repair harm for which no-one was judged to be responsible – notably a reduced or lost capacity to earn a living – people had to rely largely on their own resources, i.e. their prudential arrangements, or failing that on the older of younger generations of their own family or on charity. This was notably the type of charity that was known as 'paternalism'. It is making a come-back today in the guise of 'corporate social responsibility' (CSR). As is implied by the notion of *patronat*,[3] which has since been rejected by business leaders, some employers motivated by faith or morality felt that they had responsibilities towards their workers comparable to those of a father towards his children. They thus looked after their workers like children, watching over their conduct and providing them help and assistance as needed. This social responsibility was voluntary, and God was its only guarantor.

These limits to civil responsibility did not survive the shock of the Industrial Revolution and the large increase in harm caused by machines. The shock brought about the broadening of responsibility for things that one has under one's care. The starting point for this broadening in all industrialised countries was the introduction at the end of the nineteenth and the beginning of the twentieth centuries of a specific regime of reparation for workplace accidents. This legal turning point led not only to a broadening of responsibility for things, but also to a corresponding expansion of risk insurance mechanisms. Initially voluntary, the responsibility for things became obligatory for the most serious risks to which the working class were exposed: accidents but also illness, old age and unemployment. The combination of broader responsibility and compulsory insurance was the mortar of the first pillar of the welfare state, i.e. a state guarantor of solidarity in the face of risks. This legal revolution brought about the decline of paternalism: so long as they acquitted themselves of their insurance obligations by paying the relevant dues, businesses no longer had to be concerned about misfortunes affecting their employees. Family solidarity

Confronting the insupportable underwent a similar evolution. The rise of pension schemes freed those active in the workforce from having to provide financially for the needs of their ageing parents. Thus an impersonal duty of solidarity requiring the payment of taxes and levies took over in large measure from the personal duties of help and assistance which ensured the cohesion of traditional societies. The expansion of capitalism was thus facilitated by the transfer of responsibility for risks affecting employees to social insurance mechanisms. Employers were able, legitimately, to no longer concern themselves with the lives of their employees – their education, health, financial security, education, health and family costs – and thus to treat work as an economic resource available on a market determined solely by the calculation of utility. More generally this transfer of responsibilities has nurtured in the population as a whole the illusion of neither being responsible nor needing to rely on anyone else, in other words the illusion of a subject capable of independently determining their life.

The whole of this institutional edifice is being shaken today in the context of what is called globalisation, which is the establishment of a total market on a planetary scale. Free circulation of capital and goods thrusts all states into a global competition where each one must, according to the liberal doctrine of David Ricardo, pursue its 'comparative advantage'. This comparative advantage may lie in natural or 'human' resources which states are thereby encouraged to over-exploit to maintain their global competitiveness. They all find themselves engaged, willy-nilly, in what the British prime minister recently called a 'global race', that's to say a mortal race whose guiding principle is reduction of labour costs, which has become the be-all and end-all of the economic policies followed by all governing parties in Europe. By resorting to outsourcing, international sub-contracting or expatriate staff, a company can operate in a market while largely escaping taxes and social levies. The establishment of this total market

Error! No text of specified style in document. Confronting the insupportable brings with it an increase in systemic risks. These risks includes financial risk, with the abandonment in 1971 of fixed exchange rates in favour of floating currencies, considered as commodities like others and whose value no longer has any internationally recognised guarantee; as well as ecological risk, of which climate change is but one of its multiple aspects with the over-exploitation of natural resources, which continue to be treated as commodities whereas they are a vital means for the survival of our societies. These new risks add to the resurgence of social risks that the welfare state had succeeded in curbing. The lesson from the two world wars according to which "universal and lasting peace can be established only if it is based on social justice"[4] is forgotten and the abandonment of any social justice objective at the international level is accompanied unsurprisingly by a huge rise in inequality, unemployment and economic migrants, and a return of religious, nationalist, and identity extremism and more broadly of violence.

The rise of these dangers is accompanied by the weakening of the capacity of states to remain the guarantors of the principle of responsibility, i.e. of their capacity to make those who hold economic power answerable for the consequences of their decisions. This dissociation of the place of power from the place where responsibility lies imposes risks on those least able to protect themselves. From a legal point of view, the question is thus how to reconnect power and responsibility so as to avoid the transfer of risks to the weakest. To achieve this it is necessary to 'take responsibility seriously'.[5] This question leads one to extend the principle of responsibility in a broader sense such as the obligation to prevent or repair the harmful consequences of one's actions without prejudice to whether the responsibility is civil, penal or contractual or fault- or risk-based.

Our collective thinking focuses on responsibilities for what Karl Polanyi has termed 'fictitious commodities' – nature, labour and currency. They are fictitious because capitalism causes them to be treated as commodities despite the fact that they are not the products of economic activity. They are in fact preconditions for any market activity. What is in play here are legal fictions, i.e. non-material means whose function is to make a certain mental representation of the world liveable. To fulfil this function, legal fictions must – unlike literary fiction – take into account the principle of reality. Property law for example gives legal form and force to humanity as 'master and possessor of nature'. But for this representation to be sustainable over the long term, it is necessary to take full account of reality, which is also that of man's dependence with respect to nature. So it is necessary to regulate the use of property law in order to avoid the destruction of our rural milieu. That is precisely the purpose of environmental law. By means of legal provisions guaranteeing the protection of nature, one can act *as if the* earth were a commodity. Similarly, through labour law ensuring long-term training and replenishment of the workforce, one can act *as if* labour were a commodity and thus institute a labour *market.* And through those institutions that guarantee the value of currency, one can act as if currency were a commodity like any other, able to be traded on financial *markets.*

The danger of these constructs is that they encourage the treatment of fictions as real and the forgetting of the legal foundation on which capitalism rests. As it is no longer supported in this way, capitalism becomes 'insupportable' – neither sustainable nor tolerable. This omission is widespread because of the economic orthodoxy which serves as a credo of globalisation and thrusts all states into a race to deregulate the use of nature, labour and currency. Treating nature, work and currency as realities and not as fictions clearly runs the risk of a brutal return of the principle of reality. For example, it was foreseeable that financial markets, which were the most

Confronting the insupportable thoroughly deregulated, would be where this principle would return first. But the implosion of financial markets in 2008 was not enough to shake the world, or rather the world's leaders, out of their doctrinal sleep. Instead of working to re-regulate failing financial markets, all governmental parties in Europe made deregulation of labour markets their overriding political priority. The disappearance of trade borders having replaced the rule of law by 'law shopping' on a global level, each state tries to acquire or maintain its comparative advantage embodied in more and more lax and thus more 'attractive' regulation for investors. Such a system undermines the financial foundations of the welfare state just where it was the most fully developed. It also slows its development in the emerging economies who are always threatened with losing their comparative advantage if they take it upon themselves to raise labour costs, increase taxes or protect the environment. It also makes businesses themselves more vulnerable. Their networked organisation exposes them to new risks insofar as they now only have indirect control over the production chain of their products. And they find themselves subject to higher and higher demands for short-term profitability, notwithstanding their financial security and long-term investment needs.

Given their crucial importance for the common future of humanity, fictitious commodities are at the same time those for which irresponsible behaviours are the most dangerous and where it is the most difficult to apply the principle of responsibility. That is why we have centred our work on responsibilities with regard to ecological, social and financial risks. Each of these risks raises specific questions, which should not be ignored, but they are also interdependent, so one must also take account of what links them. There are many examples of these links. The financial crisis of 2008 gave us an idea of the social disasters that that could be brought about through the collapse of deregulated financial markets. More broadly, a system that

Error! No text of specified style in document. Confronting the insupportable encourages sourcing from distant suppliers rather than those closer to home for purely financial reasons based on comparative advantage and lower labour and environmental constraints engenders irresponsibility in all these areas at the same time. For example, the recent dismantling of customs barriers which protected agriculture or small farmers in African countries to increase the profits of European agri-food companies is a decision with severe consequences for labour (unemployment and mass emigration in Africa, proletarianisation of farm labour in Europe) and the environment (pollution and the many other harmful effects of industrial farming). So the risks attached to fictitious commodities are not only systemic, they are also inter-systemic.

These themes are reflected in the organisation of our work[6]. Following a method that reflects a perspective of *mondialisation*,[7] the first part aims to examine the notion of responsibility through the lens of the diversity of civilisations. Our legal concepts are neither intemporal nor universal. They have a history and are not necessarily identical everywhere they occur. It was thus useful to explore this historical depth and adopt for a moment outside perspectives on what we call 'responsibility'. We can learn a great deal from this exploration. It shows both the distinctiveness and the diversity of the different branches of our own legal tradition and how it was appropriated by other civilisations in the form of neologisms each with its own shade of meaning. It shows too that these civilisations share an idea that is masked in our case by the crushing weight of the concept of property: the idea that all human societies, if they are to last, need guardians of their *oecumene*, the guarantors of the ties between people and their milieu in which they live. (. . .) This is an important lesson which invites us to see responsibility in terms of duty to take charge, conduct to follow and balances to preserve and not only as the duty to respond to harm that may be caused after the event. This lesson also raises a major question that has had no response: who are the guardians of the earth in the age of globalisation?

In the second section[8], the responsibility for fictitious commodities is dealt with by themes, through the study of questions relating to ecological, social and financial responsibility. (. . .) From this panorama a contrasting picture emerges: where the shadows unsurprisingly dominate over the highlights. The Ebola crisis revealed the deadly effects of structural adjustment policies imposed by the International Monetary Fund (IMF) as well as the serious shortcomings of the World Health Organization (WHO). Where it is not simply misleading advertising, corporate social responsibility appears as neo-paternalism, admirable no doubt, but without any significant legal weight.

Lacking meaningful reforms, financial markets are now latching on to the ecological crisis as a new gaming table, from which they can take profits without providing in compensation the least protection against the ensuing risks. There are some encouraging signs, however, which can guide future reforms. This is notably the case of ecological responsibility, which is appearing in both civil and criminal contexts. This legal progress is happening in tandem with greater political awareness as is shown by regulatory initiatives in the United States designed to mitigate climate change. Finally, there are increasing signs that corporate social responsibility is acquiring a degree of legal force as is shown in France by legislation on the duty of care by multinational companies and the recent reforms of commercial law in China.

The third part[9] considers responsibility for fictitious commodities from a horizontal point of view, starting from three unavoidable questions for anyone who takes responsibility seriously: who are those responsible? Who can initiate recourse relating to responsibility? Who is the judge of responsibility? The first question is especially important when it comes to invoking the responsibility of businesses. Recourse to moral personality, in other words legal masks, gives economic decision-makers the ability to appear masked on the stage where transactions take

place. Thus the responsibility of their actions falls on other people whom they are in control of or for whom they establish a legal presence. The limitation of responsibility was since the beginnings both one of the most powerful levers and one of the greatest dangers of recourse to two important tools of capitalism, the trust and the limited company. Nowadays, the internationalisation and the networked organisation of companies enables them to be made the tools of what Pierre Calame has called an 'unlimited irresponsibility company'. Lacking legal means to remove these masks, it is always in the end states that find themselves having to be the response of last resort to ecological, social or financial disasters brought about by this irresponsibility. That is a reason to impose on large companies a social and environmental responsibility worthy of the name, with legal force and applicable to the management level. There has been some progress in this direction as is seen by the legal status given to corporate social responsibility in India, and US laws establishing the personal responsibility of business leaders for accounting and finance. But the competition of standards that characterises globalisation pushes states towards complacency or even complicity with the irresponsible behaviour of 'their' major companies. This leads to the growing issue of the protection of whistleblowers who expose this behaviour and more generally of action by civil society or unions.

The third challenge in order for responsibility for fictitious commodities to be taken seriously is establishing the competent authority to judge it. The judge is the cornerstone of any legal system. Our work has shown that there are ways of bringing those responsible for ecological, social or financial disasters to justice either nationally or internationally. If they are little used, it is often because of timidity or the collusion of states with the perpetrators. The contrast between Europe and the United States here is striking. In order to bring to heel

Confronting the insupportable multinationals guilty of corruption, the US Department of Justice has acquired extraterritorial powers to apply US law abroad so sweeping that they have become matters of concern. In Europe, however, it seems no-one dares to point out the responsibility of Goldman Sachs bank in the bankruptcy of Greece by assisting with the false accounting that allowed Greece's entry into the Eurozone. And this was despite the fact that the market power available to the EU to investigate such questions of responsibility would be equivalent to that of the US.

We are at a turning point in the law of responsibility comparable to the one that gave rise to the welfare state. In some respects this turning point might seem like a U-turn. States can no longer assume their role of guarantors of an objective responsibility in the face of risks stemming from the dynamic of capitalism. The mechanisms advocated by liberalism of old resurface: savings, corporate paternalism and private or public charity. But this resurgence is not simply a repeat, for these mechanisms have taken on a new character when employed at a global level. Today, savings take the form of pension funds and banking insurance, promising financial security that has no need for a guarantor of the value of the currency. Paternalism has taken the form of corporate social and environmental responsibility, promising self-regulation which by virtue of procedure-based compliance systems provides freedom from any heteronomous responsibility. Public charity has taken the form of *workfare* or the *active welfare state*, promising to make poor people more responsible, and to control public expenditure, while universal social security is changed by stealth into a minimum foundation of social rights. Private charity has taken on the form of non-governmental organisations and foundations whose growth corresponds to the withdrawal of the state. In all but extreme cases, the state hands over to private entities a large share of its social, environmental and financial powers. This should logically be accompanied by a greater responsibility on the part of these entities, first and

Confronting the insupportable foremost transnational corporations whose choices contribute to determining the fate of people and nature and the value of the currency. But it must be said that this transfer of power has not been accompanied by a corresponding transfer of responsibilities, i.e. by a re-articulation of public and private responsibilities which reflects the new distribution of power.

If such a re-articulation appears difficult to conceive, it is because we continue to think within a paradigm of a legal order ruled by the law. Under such an order, which corresponded to a society of sovereign states, the latter were responsible for preserving the long-term viability of people, nature and the currency. This responsibility does not arise from an economic assessment; it is the necessary condition for making such an assessment. As long as these unquantifiable values are the responsibility of states, businesses have no responsibility towards them beyond obeying the laws by which states undertake their protection. As long as they pay their taxes and social levies and respect labour and environmental law, they are free to concentrate solely on the calculation of their utilities. In this context, the famous statement by Milton Friedman according to which "the only social responsibility of businesses is to make a profit"[10] reflected a very primitive conception of the company, but was not at all shocking at the time.

The situation is different in a legal universe where the free circulation of goods and capital allows companies to escape from oversight by states through law shopping. At this global level there is no independent external body which can assume social, environmental or monetary responsibilities, which consequently fall on the businesses themselves. For financial risks, they have had recourse to derivatives whose enormous growth over the past 30 years is well-known. The amount tied up in derivatives held off-balance sheet by so-called systemically important banks reached the extraordinary amount of 720,324 billion dollars in 2012, fifteen times their balance sheets and ten times global GDP. The 2008 financial collapse nonetheless showed that

these horizontal guarantees, far from militating against the absence of an international guarantor of the value of currency, were leading instead to an uncontrollable dissemination of risks in this area, reinforcing irresponsibility rather than responsibility.

For natural and human resources, environmental and social responsibility (ESR) like the former paternalism has a purely voluntary basis and businesses that adopt it seek as far as possible to keep it out of legal frameworks. Taking responsibility seriously implies on the contrary giving legal force and coherence to these undertakings. This can occur in specific cases through a legislator, a national judge or a collective international negotiation. But more broadly, the question of the re-articulation of corporate or state responsibility for social or environmental matters cannot be understood independently of the profound changes affecting legal relationships in the post-industrial world.

The thinking embodied in 'government by numbers' which accompanies the digital revolution and the plan to establish a total market has the dual effect of overturning the rule of law and creating a resurgence of ties of allegiance as a paradigm of a legal relationship. This new paradigm makes one subject subordinate to the objectives of another which at the same time oversees it and cedes a degree of autonomy to it or accords it a degree of protection. It takes account of new form of individual labour relationships (salaried or non-salaried) as well as new forms of organisation of businesses (in production chains and networks) and new forms of dependency of some states through their voluntary adherence to unequal treaties or structural adjustment programmes which take away part of their sovereignty. Instead of being occupied by subjects acting feely under the auspices of a common law through which all responsibilities are determined, the legal stage is now occupied by subjects engaged in multiple ties of allegiance.

This retreat of the law in favour of allegiances throws light on the present impasses of social, environmental and financial responsibility. The tie of allegiance allows the dominant party (the lord) to impose on the dominated party (the vassal) responsibility for decisions that the latter is obliged to take in the management of its affairs. The Guinean or Greek state will thus be held responsible for the deterioration of the health situation among their population even though this deterioration results from conditions imposed by the IMF or the Troïka. The sub-contracting business, the farmer who is a part of the agri-food industry or the subsidiary of a multinational will be judged solely responsible for the pollution or work accidents which stem from the economic conditions which are imposed on them by those they are contracted to. But the structure of the tie of allegiance also provides an insight into the means of avoiding these perverse effects. The power of control they give to the dominant party is both a right of oversight and a duty to protect the long-term interests of the dependent party. That is where the German notion of *Sorgenpflicht* is reappearing, a duty of care which includes oversight and protection, control and support. It has been rediscovered in modern law as the 'duty of care'. The evolution of the employment contract is as always a good indicator of this resurgence. The 'flexibility' now demanded of the employee calls for a corresponding duty on the employer's part to ensure the maintenance of the employee's professional skills and an obligation to provide security of earnings. The logic of a more or less long-term personal relationship thus goes beyond that of a simple exchange of services.

This evolution is not confined to employment contracts. It is seen also in networks of companies and more generally what are called relational contracts. It leads to a distribution of responsibilities through networks of dependence which rest not on obedience but rather on the workings of the entities that they link. This carries the risk of allowing those who create and

Confronting the insupportable profit from these networks to get rid of their responsibilities by handing them over to subordinates. To confront this risk various legal instruments have arisen, which however so far lack a sound theoretical base or a coherent framework. In France the Catala bill (2005) to reform the law of obligations proposed giving this type of responsibility a broad application, envisaging that "a person who manages or organises a work activity of another person and gains economic advantage from it is responsible for the harm caused by the latter in the exercise of this activity."[11]

Many of these arrangements seek to 'lift the veil' of moral personality to expose the person actually responsible for the harm. They are found within the laws pertaining to competition, undeclared work, dismissals, workplace safety, expatriation of employees and the environment. In France, a similar rule was envisaged for the person "who controls the economic or capital activities of a professional in a situation of dependence even if acting independently, when the victim can establish that the harm caused is related to the exercise of control". [12]The adoption of this far-reaching proposal would have given a legal foundation to the phrase *ubi emolumentum ibi onus* (the onus should lie where the profit is) by linking the harmful consequences of an economic activity to the person who controls it or profits from it. This could potentially have been able to make French companies accountable in the Rana Plaza[13] disaster. Parliament held back at the time because of the threat of production moving abroad, but the idea resurfaces from time to time, most recently in the form of a bill on the duty of care of parent companies.

At the end of the nineteenth century, it was the judge who, confronted with the inaction of the legislator, first discovered the founding principles of the responsibility for things. And today still, the judge could find responses to the new questions raised by the ties of allegiance in

the law of responsibility. Following the model of 'tenure-service', these ties combine real and personal elements. A dominant party cedes to a subservient party the use of a good (the real element) accompanied by the obligation to achieve objectives stipulated by the dominant party (the personal element). Allegiance thus combines techniques of concession with subservience of persons. The refinement of the notion of guardian in respect of civil liability should allow a fair distribution of responsibilities in the case of concessions of things while the general principle of responsibility for others should allow the same in the case of the subservience of persons.

The responsibility for things creates as yet under-utilised possibilities for lifting the veil of moral responsibility in case of transfer of guardianship. The Court of Cassation concluded for the first time in 1993 that the owner of the thing, even though it had been entrusted to a third party, does not cease to be responsible for it unless it is established that the party has itself been given the means of prevention for the harm it could cause. The case concerned pollution of water caused by barley waste which was dumped by the business entrusted with the demolition and removal of an industrial building belonging to the company La Malterie de Moselle. The Court of Cassation found the latter responsible, holding that the company:

> could not be unaware in its professional quality, of the risk presented by barley, a substance which may undergo a dangerous fermentation and had not drawn this to the attention of the company [tasked with its removal] to the risk that could not reasonably have been assumed to exist, from which it followed that La Malterie de Moselle had retained guardianship of the thing, which had caused the harm.[14]

This general rule enables the seeking out of the responsibility of the person who has the knowledge and the power to prevent the harm. It involves all forms of allegiance where a subservient party is granted some authority along with the guardianship of dangerous things. It could also notably be applicable to intellectual property, where the distinction in medieval

Confronting the insupportable property law between an eminent domain which retains the intellectual property and a domain of utility devolved to the owner of the thing could apply. The result is to create between the two parties a bond of allegiance, since the possessor can only make use of their good under conditions and limits that have been ceded to it and which accompany the thing no matter in whose hands it is. The appropriately named operating systems of computers provide us with the everyday experience of dependence of this type with respect to the IT giants which have given us the use of them. Another example with broad implications is that of genetically modified organisms (GMOs) sold by their manufacturers to farmers who then are placed into a long-term relationship of allegiance towards them. In these various circumstances, one should consider that the owners of the intellectual property remain the guardians and thus the responsible entities for the products that they bring to market. Such an objective possibility should be incurred, each time that the intellectual property goes hand in hand with the technological know-how of the object that is marketed. The responsibility for defective goods as it is today regulated by European law[15] is a particular case of this general principle of the objective responsibility of the guardian. Thus the principle should be applicable in cases where, as in the 1993 judgment by the Court of Cassation, the conditions for its effective application of the directive are not met.

Thus many tools exist for the establishment of responsibility of those who put dangerous goods into circulation, for example the creators of financial products, especially so-called structured products, whose explosive dimension was revealed in 2008. The idea of applying responsibility for defective products to them was put forward by Jean-Francois Gayraud, a police superintendent specialised in financial crime. It is particularly interesting because there is no reason that this type of product should escape the reach of the European directive, according to which “A product is defective when it does not offer the degree of safety that one could

Confronting the insupportable legitimately expect".[16] It could however be argued (and the financial institutions concerned would not hesitate to do so) that the directive only covers bodily harm, or harm caused by something other than the product itself, which would risk excluding purely financial harm. Assuming that they were outside the coverage of the directive, another possibility would be to make use of responsibility of the originators of financial products under the principle of 'guardianship of the structure', which unlike guardianship of behaviour is not necessarily transferred with the ownership of the good. The notion of 'guardian of the structure' also has the advantage of putting into practice an active conception of responsibility as an obligation to act in a responsible manner, and not solely an obligation to repair harm once it has occurred.

Secondly, *responsibility for actions of others* [vicarious liability] offers the means of a fair division of responsibilities within a relationship of allegiance. As it did a century earlier for responsibility for things, the Court of Cassation upheld in 1991 in paragraph 1 of article 1384 of the Civil Code a general principle of responsibility for actions of others. It is also a strict liability, from which an entity cannot be exonerated by proving that it has committed no fault. The reach of this general principle has not yet been fully established by case law. Originally, it was limited to institutions in charge of organising and controlling on a *permanent basis* the *living conditions* of others (in practice minors and the disabled). But these references to the permanence of living conditions have disappeared from subsequent jurisprudence which has laid this responsibility on associations – mostly sporting – who on a professional basis take on the organisation, direction and control of the activities of their members.

The power of organisation, direction and control is thus the source of vicarious liability for actions of others which goes beyond special cases already recognised by the law (i.e. the responsibility for actions by one's agents, children or pupils). As has been pointed out earlier, the

Confronting the insupportable emergence of this general principle responds to the necessity of repairing harm that results from the degree of freedom granted to those persons through whom authority is exercised. This consideration could be applied fully to the ties of allegiance that are woven in the economic sphere. They imply the exercise of control by a dominant entity, a degree of autonomy granted to the subordinate entities and a distribution of risks. The holding or ownership of the material means of production is conferred on subsidiaries, suppliers or sub-contractors. That means managers operating with degrees of autonomy within an organisation that they do not control, but rather which controls them. The way of understanding these ties and organising them in networks is central to the new forms of organisation of major companies whose value is less dependent on the material ownership of the means of production than on the conception and oversight over the information systems that determine the structure of these networks. A source of value for the business, this articulation of networks of allegiance also gives rise to new type of risks – *organisational risks* stemming from the dilution of responsibilities down through the value chain.

In this way, the potential of the general principle of vicarious liability can be better understood. Responsibility for the actions of agents reflects integrated and hierarchical systems whose members must obey the orders that they receive. In such systems, typical of the Fordist industrial world, the responsibility fell to managers and led to the civil immunity of their agents in the exercising of their functions. Unlike the latter, ties of allegiance introduce a degree of freedom of operators. This freedom is codified and monitored but it is still freedom, which thus takes away a necessary share of responsibility from each operator bound up in the network of allegiance. When harm has been determined to be imputable exclusively to one or the other, there is no need to mobilise vicarious liability. But it is different when the harm has wholly or

partly been attributable to the overall conception and coordination of the supply, manufacturing or distribution system as a whole. In such circumstances, which applied in the Rana Plaza case, the manifest fault of one of the members of the production system (the Bangladeshi garment manufacturer) does not absolve from their responsibilities the major companies which organised the system (i.e. the leading US and European brands).

The case may also arise that no individual responsibility can be attributed because the harm results from an inherent risk in the organisation of the activity. It was a case of this type that led to the widening the perimeter of the general principle of vicarious liability – the case of a rugby match that led to the death of one of the players not being attributable to one identified player; the responsibility of the club was found to be involved. There is no need to refer to game theory or sporting metaphors in vogue in managementspeak to understand that a multinational company which has organised a value chain to win market share is in a similar situation. It should be judged responsible for harm caused by the organisation when it cannot be exclusively imputable to any one link in the chain. In other words, the general principle of vicarious liability is an appropriate response to the specific risks engendered by these new forms of allegiance-based organisations. When the existence of these risks cannot be imputable to the sole fault of the subsidiary, supplier or sub-contractor of a dominant enterprise, the latter thus should in principle be fully or jointly liable. And it should be the same in the case where a country's economic policy has become subject to control by international institutions such as the IMF or the Troïka.

(. . .) It is thus possible to affirm that there is no lack of legal instruments for 'taking responsibility seriously'. The true difficulties lie elsewhere: in the crushing weight of the economic ideology that leads judges and legislators to think that any far-reaching initiative

Confronting the insupportable would risk harming their country's comparative advantage on a global stage dominated by law shopping. Or, in the strength of the illusions maintained by the ideology of the total market which taking the earth, work and currency as commodities like any others is fated sooner or later to come up against its catastrophic limit. As Paul Valéry pointed out:

> Society lives by illusions. Every society is a sort of collective dream. These illusions become dangerous when they no longer create illusion. The awakening from this kind of dream is a nightmare.[17]

To avoid the illusions of globalisation and the total market turning into a nightmare, we need to break away from what Karl Polyani called the 'economic solipsism'. This would require of law the regulation of financial markets and making the free circulation of capital and goods subject to social and economic conditions. As the century-long experience of the International Labour Organization shows, it is a vain hope that all states in the world might agree on ambitious international rules respected by all. But it is realistic to think that some states, determined to respect within their territory strict labour and environmental laws, would make access to their markets conditional on respecting a similar level, thereby encouraging a movement of positive emulation. There are resources in the law which would enable the replacement of the globalisation juggernaut by a *mondialisation* which respects the diversity of people and of the conditions under which they live out their lives.

Notes

[1] This originally appeared in French as the introduction to *Prendre la responsabilité au sérieux*, Alain Supiot, Mireille Delmas-Marty (eds) Presses Universitaires de France 2015. It is translated and reproduced here by kind permission of the author Alain Supiot.

[2] Robert Surcouf (1773–1827).

[3] The notion of *patronat* comes from Roman law, where it designated the obligations that tied a freed slave to his former master, the one who had given him a place in civil life and whose name he now carried.

[4] Preamble to the ILO Constitution (1919), reaffirmed by the Philadelphia Declaration (1944).

[5] The concept is inspired by the title of the well-known work by Ronald Dworkin. Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, MA, 1978).

[6] In this and following paragraphs, Alain Supiot summarises and synthesises the content of the book to which this chapter was an introduction(see note 1). In order to retain the flow of the argument, references to sections of the original publication have been retained here.

[7] (Translator's note) There is no separate English translation of this term which is usually simply rendered by 'globalisation'. The difference as explained by the author is that *globalisation's* focus is 'the uniformisation of the world as a total market'. *Mondialisation* puts the emphasis on 'a world made liveable through the intelligence and diversity of civilisations and of their growing interdependence'. It is thus a much broader concept than globalisation, which is restricted to the economic sphere. In order to maintain the distinction in the translation, the term *mondialisation* will be used as in the original.

[8] See note 6

[9] See note 6

[10] Milton Friedman "The Social Responsibility of Business is to Increase Its Profits" *New York Times Magazine* (13 September 1970).

[11] (Translator's note). Cf. the common law concept of vicarious liability, which is employed *infra* in the translation.

[12] Draft proposal to reform the law of obligations (Articles 1101 and 1386 of the French Code civil, 22 September 2005 (draft article 1360)

[13] (Translator's note). The Rana Plaza was an eight-storey garment factory in Bangladesh which collapsed in 2013, killing over a thousand people.

[14] Cour de Cassation, Première chambre civile, 9 June 1993 Arrêt no. 91–11.216.

[15] Directive 85/374/CEE 25 July 1985.

[16] Ibid.

[17] Paul Valéry *Mauvaises pensées et autres* Gallimard, Paris(1942).