The European Tradition in International Law: Georges Scelle

The Thought of Georges Scelle

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There are several key reasons why the thought of Georges Scelle has always provoked and continues to provoke interest.

The first of these reasons, and an obvious one, is that Georges Scelle was a great jurist, which is evidenced by both the range and reputation of his work and the influence which he exerted on the community of French international legal scholars. The thought of Scelle was so influential that, for a time, the concept of sovereignty was all but banished from the research and teaching of the international law faculties of French universities. Knowledge of Scelle's works is still an integral part of legal culture and while it is true that several authors have now adopted voluntarist theories very much opposed to the thought of Scelle, their position is at least in part a reaction to Scelle's thought, which is used as a straw man and is thus found in their work.

A second reason for the interest in the work of Scelle is its alluring nature from which, it seems, few readers are immune. This allure is rooted principally in the unity of elaborated and logically ordered work, with its view of the whole field of law, including not only international law, but also any legal phenomena. The Scellian concept of international law is derived from this vision. A single thread runs through all aspects of Scellian thought, linking them together. When Scelle tackled the burning legal questions of his day – whether they dealt with governing minorities, a subject which he addressed in 1919, or with the mandates of the League of Nations, or with the continental shelf, to which he devoted a study in 1955[1] – his

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1 *Revue générale du droit international public (RGDIP)* (1954) 6.

method was to form analyses and derive conclusions from his own body of thought, from his own "legal truth."

But elegance also forms part of the appeal of Scelle's writings. Scelle wrote with force, intensity and insistence; he invented formulae and concepts ("*dédoublement fonctionnel*" or "role splitting" is one of the most famous) in such a way that, when reasonably familiar with his writing it is necessary, as with some pieces of music, only to read a few lines before immediately recognizing the author.

The third reason for returning to Scelle's writings is, however, the most important, and it merits closer examination. It lies both in the convictions which underline his writing and in his commitment to the causes or values based on these convictions: the primacy of the law, solidarity, federalism, and individual and collective freedom. In fact, the inspiration behind Scelle's thought must be sought outside of the sphere of law in the dramatic circumstances which surrounded its elaboration. His thought is legal, but it developed out of a political philosophy.

Without doubt Scelle was a lawyer through and through, and his work was all in the field of law. He often insisted on the scientific character of his approach and on the autonomy of law as a scientific discipline. The expression "*science juridique*" ("legal science") occurs frequently in his writing. Moreover, Scelle paid considerable attention to legal techniques, defined as being "the use of competences" ("*la mise en œuvre des compétences*").[2] "*Acte-règle*", "*acte-condition*", legal order ("*ordonnancement juridique*"), objective and subjective legal conditions, law-making, jurisdictional and enforcement functions – these are the technical concepts which he developed significantly and which articulate his legal system.

However, it is no less true that the inspiration behind Scelle's work is political in the widest and most noble meaning of the word. It emerged out of the confrontations of the inter-war period and out of the role that Scelle deliberately played in these confrontations. To be ignorant of this involvement, as are many commentators who concentrate on the theoretical aspects of Scelle's works without connecting them to his ideological stance, is to fail to understand the depth of his thought.

Scelle was in effect close to the radicalism inspired by Alain's philosophy and Léon Bourgeois' theories on solidarity. Individualism (the citizen against power), rationalism (as opposed to mystical beliefs), a belief in progress based on scientific knowledge – these were the major themes in this strand of thought. At the international level, the move towards greater harmony, the demise of the state ("*dépassement de l'Etat*"), and the formation of a world order generated by law, seemed to be the normal and probable outcome of scientific and technical progress and the development of trade relations – trends which, at the time, gave rise to greater astonishment than today. Since then, these themes have been abused and derided, and it is true, that they did not take account of the strength of destructive and evil forces, of the herd instincts and fanaticisms which brought about the Second World War and which still rage in some regions of the world. Yet these themes were certainly less detestable than those to which they were opposed.

2 *Précis de droit des gens* (hereinafter *Précis*) (Vol. I) (1932) 15.

Indeed, at the time, fascism was in place in Italy, Hitler was hurrying to power in Germany, while in France the agitation of the "*ligues*" which reached its height in 1932 – the year the *Précis du droit* was published – threatened the institutions of the Third Republic. These movements were not only "anti-parliamentary", as was said at the time, they were also violently hostile, under the banner of nationalism, to everything that the League of Nations represented.

That in this tumult Georges Scelle took part, taking sides in the legal field, is what clearly stands out in both the Preface to the *Précis du droit des gens* and in other passages of this work, passages which, it seems, have not received enough attention.

Scelle stated firmly but with reserve that legal doctrines are linked to convictions. "Every internationalist," he writes in the Preface, "is attached to a legal-philosophical school which dominates his teaching. Faced with the threat of his sincerity towards himself and towards his pupils disappearing, he can only underline with force what he believes to be scientific truth."[3] This "scientific truth" is completely summed up in this sentence in the Preface: "Henceforth internationalism is the crucial fact."[4] This is a statement which reaffirms belief in the progress of the "social solidarity" in "the interdependence of states" and, in the last analysis, in the belief in "progress" in the broadest sense.

But it would be mistaken to think that Scelle deluded himself about the circumstances prevailing at the start of the Thirties. He did nothing of the sort. Proclaiming himself a "realist", he observed straightaway that "what constitutes reality for some is for others only a fiction or an ideological construct."[5] And immediately after having said "henceforth internationalism is the crucial fact", he added: "And all the same, the attitudes of individuals and of groups have never been more hostile towards it."[6] In the second volume of the *Précis*, published in 1934 (and therefore shortly after Hitler had taken power), he writes: "The whole world is suffering from a kind of medieval anarchy made up of state tyrannies. The fiction of collective personality is reappearing in dogmas and in mystical doctrines with a virulence which is perhaps nothing but the death throes of political and legal structures in the process of transforming themselves to adapt to new needs."[7]

Finally, it would be impossible not to cite a remarkable passage which appears as a note below the chapter heading in the *Précis* (Volume II) on "collective and individual freedom." Alluding directly to the persecution of the Jews and other political minorities in Germany which in October 1933 had been brought to the attention of the Assembly of the League of Nations, Scelle writes:

> It may perhaps seem paradoxical to devote this first chapter to what the classic legal literature calls individual rights at a time when in many countries these rights are openly ignored or brutally violated by governments while other governments, and the

3 *Précis* (Vol. I), Preface, viii.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*, at 294.

> League of Nations itself, which, it is submitted, have a duty to intervene and safeguard the law, do not appear willing to make the necessary effort to fulfil this legal duty. Their excuse can perhaps be found in their impotence. Without question, the law is in a period of regression. Is this a reason to refrain from setting forth the rules? Quite the contrary, it is important not to weaken their expression. Nothing could be more pernicious than to imagine that the violation of positive law can be confused with its evolution. Already in the history of humanity there have been several periods of regression followed by enlightened stages of progress. It is while waiting for the return of these enlightened stages that we are continuing with the academic study of legal phenomena.[8]

This passage – which establishes a sort of duty of interference ("*devoir d'ingérence*") – is particularly instructive about the inspiration underlying the work of Scelle and about the idea he had of his mission.

In the same spirit, in the conclusion of the Preface to the *Précis du droit des gens* he wrote: "[P]olitical leaders do their job devising policies. Lawyers do not do theirs by bowing to contingencies and by presenting as objective law, practices that contradict the rule of law. Whether conscious of it or not, they become apologists for the rule of force. And *Faustrecht* is the negation of Law."[9]

Thus Scelle was led during a period of "legal regression" to construct a system of legal thought opposed to "the dogmas and mystical beliefs of collective personality", to "state tyrannies", to "medieval anarchy." This system will be described in broad outline in the first part of this article.

In this period, the "realism" of Georges Scelle was to a great extent idealism, and it was an idealism against all odds. The events of the Second World War, of the Cold War which followed, and other wars as well, have more than revealed this. It is easy, and vulgar, to speak ironically when contrasting the realities of international relations as they were in Scelle's time with his harmonist vision ("*vision harmoniste*"), to use the phrase coined by Professor René-Jean Dupuy. It is more interesting, however, to examine how Scelle's thought can account for the current evolution of international law. Here certain traits, above and beyond the reinforcement of sovereignties, appear to bear witness to the progress of this solidarity (which Scelle called for) through a realism, the fragility of which he knew.

I. The Scellian Legal System

The stance of Georges Scelle is not that of a positivist who assigns himself the task of identifying the rules of positive law, of determining their content, and of explaining them (comparing practice with rules on "formal sources", that is to say governing the creation of law). *A fortiori*, Scellism is far removed from the viewpoint of lawyers who, following in the tradition of Jean Bodin, defend the state's interests and

8 *Précis* (Vol. II) (1934) 15 (note below the title: "Les libertés individuelles et collectives").

9 *Précis* (Vol. I), Preface, x.

its "legal policy." This concept of legal policy is totally contrary to Scelle's thought, where law stands against politics and dominates her.

Neither positivist nor pragmatic, the Scellian approach to law is dogmatic. It is a sociological theory about law in general, one in which international law is envisaged as one of the aspects of the "legal phenomenon."

Scelle paid attention to positive law, but only selectively. Thus he attached great importance to Article 15, section 8 of the Covenant of the League of Nations which dealt with the exclusive jurisdiction "left to" the states by international law. This item was in effect in harmony with the "hierarchy of laws", an essential part of his thought. All the same, Scelle mentions the decisions of the PCIJ, for example the Advisory Opinion No. 4, which also touches on "exclusive jurisdiction", or Judgment No. 7 where there is a question of "common international law." Nonetheless, it is no exaggeration to say that Scelle referred to positive law more to confirm his vision of law than to develop it. Indeed, Scellian theory is based on another plane – that of "objective law" ("*droit objectif*"); law which derives from "social reality" ("*fait social*") and which is revealed by "legal science", a branch of sociology.

Scelle distinguishes "objective law" from "natural law", a distinction which will be discussed further below, but the relationship between these two categories is nevertheless close. Objective law is the carrier of the virtues and reputation belonging to the concepts of law and of science. Thus when Scelle claims that sovereignty is an "anti-legal" ("*antijuridique*") concept he puts himself in the field of objective law without ignoring the position of sovereignty in positive law but regarding the latter as the poor relation of objective law.

This method of proceeding suggests (doubtless more in the mind of the reader than in the thought of Scelle) a certain confusion between the *lex lata* and the *lex ferenda*, between law as it is and law as it ought to be. But this confusion appears more debatable or deplorable to us than it was in Scelle's time. Professors of law then exercised a kind of moral authority which encouraged them "to lay down the law" ("*dire le droit*"), the law of which they were in some sense the guardians since they were outside governments, even when they were consulted by them. Furthermore, the tradition of natural law meant that the law, although so thoroughly secularized, retained some theological basis. Like morality, law appeared to be quite independent of existence, experience, and legal practice, and the latter was supposed not to make law, but to conform to it. Scellian objective law founded on "science" was the heir to this tradition.

An archaic vision of things, one may object! But this is not necessarily so. Natural law does not die so easily. Today one does witness voluntarist authors – more voluntarist than positivist – declaring that international law is in a malaise or that it is "anti-legal" in nature when it deviates, as certain judgements of the I.C.J. may lead one to believe, from consensualist orthodoxy. This is a paradoxical resurgence of natural law.

But if the distinction between objective law and positive law is essential for understanding the Scellian system, consideration of Scelle's aims is no less necessary. Scelle intends to subjugate the state to law and, even more, to deflate or "demythologize" the state. Thus the first axiom of his legal thought is the primacy

of law as an expression of social solidarity. Since the notion of state sovereignty is incompatible with the sovereignty of law, Scelle played an impassioned role in putting on trial state sovereignty and the state itself. The demise of the sovereign state permits the construction of federalism, exalted by Scelle, and which is also in his system, both as a future and a reality, sometimes institutional and sometimes normative such as in the concept of an "Ecumenical community of the law of people" ("*communauté oecuménique du droit des gens*").[10] Lastly, the raising up of the individual, alone capable of willing, alone responsible for his actions and the only subject of international law,to the exclusion of legal entities, is, in the final analysis, the yardstick of the Scellian system.

These then are the concepts to emphasize in Scelle's system – the sovereignty of law, the trial of state sovereignty, the advent of federalism, and the promotion of the individual. At the same time, one must also be wary of distorting Scelle's dense works, in confining one's analysis to these principal themes.

A. The Sovereignty of Law

"Law alone", writes Georges Scelle, "is sovereign. Every subject of law who claims to be sovereign immediately rises up against law and denies it."[11] This sentence is written in the style of the Declaration of the Rights of Man of 1789! But what, in Scelle's system, is the basis of the sovereignty of law?

It has two roots. First, it develops from the origin of law, from its nature as an expression of social reality identified with societal or intersocietal solidarity, which confers on it the force of necessity. Second, it comes from the unity of law, that is, the "law of people" which forms a whole, but is, at the same time, both hierarchically structured and divided.

In Scellian thought, objective law ("*droit objectif*"), far from being the product of the will of the state, or, at the international level, the product of a confluence of states' will, develops out of society itself. "*Ubi societas, ubi ius.*" He saw it as expressing the unity and the universality of law in time and space, in the international order as well as in national legal systems. Furthermore, the same adage could be seen as reflecting the need for a law which binds societies much in the same way as the laws of nature bind human beings.

Indeed, Scelle claims that law is "biological" in origin. According to him, in the same way that living beings are subject to biological constraints, which ensure their equilibrium and their survival, societies are subject to laws which condition their cohesion and progress. Scelle emphasized this theme in an important article dedicated to Duguit[12] (who also believed in the supremacy of law over the state, though more

10 We deliberately refer here to the "*droit des gens*" as the "law of people" (instead of the more commonly used expression "law of Nations") for, in Scelle's view, individuals are the only genuine subjects of international law. See on this point M. Lachs, *The Teacher in International Law* (1987) 98.

11 *Précis* (Vol. I), at 13.

12 *Archives de philosophie de droit* (1932) 85.

with regard to domestic legal systems than to the international level). In addition, in the *Précis du droit des gens* he cited the famous definition of law given by Montesquieu: "Laws are necessary relationships which derive from the nature of things." But is it scientifically sound to equate legal constraints with those of nature? Probably not, but the comparison stems from the foundation of objective law in science and contributes to the rule of law. The state violating legal rules is like the individual who risks his life by violating the laws of nature.

In spite of those biological roots, law develops nevertheless from social reality, which is identified with solidarity, "the only real reason for the existence of objective law."[13] This solidarity has two forms: one is solidarity "by similarity", and the other is solidarity "by division of labour." (Scelle borrowed this distinction from Durkheim). The first, solidarity by similarity, did not wholly find favour with Scelle because, fundamentally, it is the basis of national exclusivity. Solidarity by division of labour, on the other hand, is what makes individuals indispensable to each other. It corresponds, said Scelle, to "a law of integration and progress."[14] Here again, one finds the idea of bringing peoples closer together by developing exchanges and economic partnerships.

In Scelle's thought, these solidarities give birth to "objective law", whose precise relationship to both natural law and positive law will now be explained.

The difference between objective law and natural law lies in the origin of each. Natural law, as it was conceived in the 18th century, is a product of reason and possesses a static, immutable character. In contrast, objective law conforms to social necessities which change with time and place; it has therefore an evolutive character. Despite these distinctions, however, in Scelle's thought, objective law plays the role traditionally given to natural law. It is the source of positive law, and is the benchmark by which positive law must be assessed, and approved or rejected.

As for "positive law", according to Scelle, it is (or ought to be) the "translation" of objective law. This translation is secured by governments who carry out the law-making function in the international legal system through what Scelle calls "role splitting" ("*dédoublement fonctionnel*"). Their task is not "to create" law but to ascertain it and express it. Thus in the international legal system, custom and treaties have "the same juridical function", and the same "intrinsic nature." "They are ways of ascertaining and expressing pre-existing rules of objective law, which are thus translated into normative or constructive rules of positive law."[15] Scelle acknowledges that positive law must be assumed to conform to objective law by virtue of the theory of "*bien légiféré*" ("good legislation"), but this assumption may be proven false, and thus positive law can be "anti-legal."

The role of will is therefore reduced to its most simple expression. The law-making function, which in the international legal system is accomplished by means of a "*dédoublement fonctionnel*", does not imply the settlement of conflicting or discordant interests in the international community, but is the expression of solidarity re-

13 *Précis* (Vol. I), at 37.

14 *Id.*, at 3.

15 *Id.*, at 298.

quirements within the international society. Normative treaties ("*traités-lois*"), which are the outcome of converging wills, like laws in domestic legal systems, ensure the expression of these international solidarity requirements, and the latter must take precedence over national solidarities.

In the Scellian system, the sovereignty of law also stems from the unity of the legal system. There is only a single source which determines the competence of subjects and that is the "people." In Scellian terms, the "Law of people" ("*Droit des gens*") is in no way synonymous with international law, as it once was in the "*Ecole libre des sciences politiques.*" In Scelle's language, old expressions take on new meanings and the "law of people" is universal, all-embracing law. As Scelle himself said: it is *the* law ("*le droit tout court*"), which encompasses all branches of law. "The law of people", he writes, "reigns without any limits to its sphere of action, not only over domestic or constitutional legal systems, but also over interstate, suprastate and extrastate legal systems of secondary international communities, or, as they are also called, special communities of the law of people, communities of independent states, whether regional or continental, federal or confederal systems, any Church or 'International'."[16] It is this extreme form of monism ("*monisme intégral*") which confers on the Scellian system its harmonious character. There is a legal *Weltanschauung* where the statute of the most lowly association belongs to the same body as does national law, canon law or the law of the universal community. Since law is rooted in social reality, all societies generate their laws according to the same fundamental process, be it at the level of the state, of the world community, or in a given religious community; only the procedures differ. Consequently, there is an infinite plurality, a countless number of legal systems within the same all-embracing structure. An individual is a citizen of his state and of his town, and is a member of his church, of his sports club, and of the universal community; he is therefore subject to several legal orders which are interlaced and superimposed. The "law of people" is thus hierarchically structured.

In fact, Scelle postulates that "every superior legal system necessarily conditions lower legal systems",[17] in such a way that the law of universal society – ecumenical, in Scelle's terms – governs national laws just as national laws govern local laws in accordance with the principle of federalism encapsulated in the saying "*Bundesrecht bricht Landesrecht.*"

The principle of the hierarchy of legal rules implies the superiority of international law over national law and the automatic abrogation of national laws that are contrary to international law. Scelle was therefore very much opposed to "dualism", not only because dualism is linked to a voluntarist vision of international law, but because it destroys the unity of the "law of people." Moreover, the hierarchy of legal rules implies that universal solidarity requirements are superior to that of partial (including national) solidarities. This is equivalent to saying that the interests of the universal community take precedence over national interests. Scellian thought is universalist.

16 *Précis* (Vol. II), at 6.

17 *Id.*

It is in this respect, that Scelle conceived of the idea of constitutional law for international societies, writing: "Every intersocietal collectivity, including the universal community of the "law of people" rests, like the best integrated collectivities, and notably state collectivities, on a body of constitutive rules essential for their existence, for their longevity, and for their progress."[18] Included among the constitutional laws Scelle envisioned for international society, were laws relating to the exercise of essential social functions: law-making, adjudication and enforcement; in short, those laws which correspond to what is called the organization of public power. In addition, Scelle included laws relating to "individual and collective freedoms" which define the limits of power and, featured in the Declaration of Rights, have been incorporated into many constitutions. The hierarchy of legal rules does not permit any breaks or cuts. This is why there is no place in the Scellian system for state sovereignty.

B. The Trial of State Sovereignty

"It is a vain task", writes Georges Scelle, "to want to build law, and international law in particular, on the notion of sovereignty. In practice, this concept only leads to the release of governments' will from the grip of law, to destroy the notion of competence, and with it the notion of legality."[19]

The denial of sovereignty ties in with the political inspiration underlying the thought of Georges Scelle, in particular his opposition to nationalism. Recognizing that the concept of sovereignty, and its corollary, that of domestic jurisdiction ("*domaine réservé*") reinforced nationalism, Scelle pointed out that in October 1933, during the debate about the pillaging, abuses and atrocities of Hitler's regime (these are Scelle's words), Germany successfully made use of the argument of domestic jurisdiction.

Scelle claims that sovereignty is contrary to reality because "human power is always limited by the resistance of the environment" and further, that sovereignty is "anti-legal."[20] In Scelle's terms, sovereignty is defined as "the competence of competence", an expression which he borrowed from German legal theory, and more specifically from A. Hänsel's "Kompetenz-Kompetenz." For Scelle, competence is "the socially guaranteed powers and duties of action." Such was also the meaning assigned sovereignty by both the voluntarist view of international law, and, in principle, positive law. Since the state itself determines which law is applicable to itself, be it treaty law or customary law (which it can challenge, at least at the time of its formation), it is the state, in effect, which determines its own competences.

Georges Scelle thought that this was an unacceptable consequence for objective law which, founded in social necessity, could not be challenged. It was also unacceptable insofar as Scelle's view of the state was concerned. He writes:

18 *Id.*, at 7.
19 *Précis* (Vol. I), at 14.
20 *Id.*, at 13.

> One might say about states what Aesop said about verbs: that they are the best and the worst of things. They are the best if it is admitted that hitherto man has found society governed by the state to be the most satisfactory milieu for the realization of his genius. They are the worst if one thinks of the fearsome accumulation of individual crimes and collective blunders which have given birth by the deification of the state, leading to government actions escaping the check of law. This is why we have rejected the recognition of a special, privileged legal essence to the personified state collectivity.[21]

Scelle uses the terms "state societies", "state collectivities", "state government" but, in the final analysis, for Scelle, the state does not exist. In fact, at the time he was writing, the notion of legal entity ("*personnalité morale*") was a subject of doctrinal controversy. There was much discussion as to whether such legal entities actually existed. In this debate, Scelle adopted an extreme point of view. He utterly rejected the concept of "*personnalité morale*", claiming that as only the individual was capable of willing something, only he could be a legal subject ("*sujet de droit*"). Now, if the state is not a legal person, *a fortiori* it cannot be a sovereign person. Here we have reached the heart of Scelle's thought.

Scelle admits, however, as if by way of concession to positive law, that since the state is "the social milieu where the legal phenomenon is most fully realized",[22] its autonomy must be guaranteed by law. This is the meaning that he gives to the concept of independence. Professor Charles Rousseau, relying on this concession made by Scelle, has developed a theory of independence. According to this eminent author (who is in some respects Scellian, though he follows legal practice more closely than Scelle), independence involves a plenary and exclusive control of the competences assigned by law. Thus, independence appears to be a substitute for sovereignty. In the international community, however, independence or autonomy place the state in a situation which, on the legal plane, at least, is analogous to that of federated bodies in a federal system.

C. Federalism at Work

"Sociology", writes Georges Scelle, "teaches us that federalism is a constant in the evolution of human societies. This continual development of solidarity thus requires the existence of a legal and institutional hierarchy culminating in world federalism."[23] This passage, among others, bears witness to the federalist faith of Georges Scelle. According to him, federalism, based on the autonomy of societies, their identities and particulars, and on societies participating in bodies guaranteeing peace and security, was the means of going beyond the state, of ensuring the sovereignty of law and the elimination of violence.

But in Scelle's thought, federalism is both a reality and a vision for the future. According to Scelle, federalism is already present, at least in its legal guise, in the

21 *Id.*, at 74.
22 *Id.*, at 73.
23 *Id.*, at 188.

universal community. But institutional and organized federal systems, federal states, confederations and other groupings will multiply: this is the lesson of history.

In his *Précis du droit des gens*, Scelle gave much space to the constitutions of federal states like the United States, Switzerland, and the Soviet Union which are usually discussed in works on comparative constitutional law rather than in those on international law. But for Scelle, the federal state is only one of the conduits of the "federal phenomenon", which, implying autonomy and participation, lies beyond the state and outside it, regardless of whether the federation is in constitution or in treaty. On this score, Scelle devoted great attention to the British Commonwealth which was, in his terminology, a remarkable example of federalism by "segregation", resulting not from the association of independent bodies that joined together to form a federal body, but from the division, or the splintering, of a unitary system, the British Empire. In the same vein, Scelle examined colonialism from a federalist point of view. He claimed that "metropolitan and colonial collectivities form distinct social and legal systems",[24] as was later admitted by the United Nations at the start of decolonization. Furthermore, Scelle devoted an entire chapter of the *Précis* to the right of self-determination, a right which, he said, included the freedom to secede. However, he considered that "the aspiration for secession is really the aspiration for sovereignty, for the illusory phantom of unlimited free will. When peoples realize that in reality safety does not lie in the mirage of unfettered liberty, but in the rigorous regulation of common competences, they will most likely be satisfied with an autonomy guaranteed by law."[25] Finally, Scelle envisaged the League of Nations as a federal system. One of the sections of the chapter of the *Précis* on the "federal phenomenon" is entitled: "The League of Nations as a Federal Organization." In Scelle's view these examples amply demonstrated that federalism was working with increasing success.

But federalism does not necessarily take an institutional form. Scelle admits that as regards the hierarchy of norms, the international community is a form of normative federalism. It is in this context that the concept of role splitting ("*dédoublement fonctionnel*") intervenes. The institutional flaws of the international community mean that national governments are called on to provide for the international system's legal functions. They must therefore assume law-making, adjudication and enforcement roles. Thus the actions of national governments can produce results both in the national legal systems and in the international legal system. Governments act at times as national authorities and at times as international authorities – just as in French law the Mayor of a commune, or the Prefect of a *département*, act at times as a local authority and at times as agent of the state.

Although Scelle did not explicitly say so, the concept of "*dédoublement fonctionnel*" implies that when governments act as organs of the international community they are acting in its interest, and not only in their own national interest.

24 *Id.*, at 146.
25 *Id.*, at 273.

D. The Individual, Sole Subject of the "Law of People" (*Droit des gens*)

"The theory of individual and collective freedom", writes Georges Scelle, "is the very basis of the 'law of people'."[26] And in fact, the laws of the Scellian system are addressed to the individual, who, freed from state tyranny, is considered as an individual and not as a member of a group. In this respect, Scelle was an outstanding advocate of human rights. But this truth has been somewhat obscured by Scelle's attachment to his "objectivist" standpoint, which denied the notion of "subjective rights." For Scelle, social reality and solidarity give rise to objective law, and, from this, emerges positive law, which attributes competences, not rights, to the individual. On this topic, Scelle writes: "Individuals cannot possess fundamental subjective rights, nor can collectivities have fundamental rights, if by fundamental rights one means legal conditions ("*situations juridiques*") which precede any society, which are superior to any social rule, and in respect of which the legislator would be legally powerless. For the rule of law and for legislation to exist, there must first be society; this social reality is anterior and superior to any legal right." [27] This formulation moves away from the concept of human rights as inherent rights, derived from the nature of man and inalienable – which, regardless of the theoretical difficulties it raises, is the best foundation for the guarantee of these rights. However, we are faced here, it is submitted, with a terminological dispute which should not hide the individualism of Scelle. The place which he reserves for the individual as exclusive subject of the "law of people" and for "individual and collective freedoms", bears witness to this.

For Scelle, the individual is not only the immediate subject of the "law of people", but is the only subject, because he alone is capable of willing and of being responsible. Legal rules are intended not for mere legal entities, but for governments, for representatives of groups and for simple individuals. Here Scelle's concern is still to counterbalance the mystical doctrine of the state. "When one says that the commune or the state orders something, the action, the will, the command given by the Mayor or by the government is concealed; one surrenders to a mystical doctrine which attributes inherent characteristics to fictional beings, but which benefits real people who have become irresponsible and all powerful behind the screen which shields them."[28] It was in this Scellian spirit that, at the end of the Second World War, the Nuremburg case law dealing with crimes against peace and against humanity was drawn up, which spelled out the personal legal responsibility of state agents, and not only that of the state on whose behalf they were acting.

According to Scelle, the theory of freedoms includes "the rules which in all communities of the 'law of people' guarantee for the legal subjects an individual or collective freedom of action, which is liberally regulated and which is often largely discretionary in the essential areas of human activity."[29]

26 *Précis* (Vol. II), at 15.
27 *Id.*, at 16.
28 *Précis* (Vol. I), at 12.
29 *Précis* (Vol. II), at 16.

The freedoms which were recognized as "necessary" by "common conscience and common experience", and which were consecrated by objective law were, according to Scelle, the right to live, and in a somewhat disparate fashion, the struggle against war; international asylum and humanitarian intervention; the right to physical freedom, to which he added the struggle against slavery (Scelle devoted to this topic a few works which are still of great interest); the right to freely choose one's nationality, the right to economic liberty; including the right to property; the right to religious freedom; and freedom of language and education. In effect, Scelle paved the way for the Universal Declaration of Human Rights.

These are, presented in a rather schematic fashion, the main lines of Georges Scelle's thought, which, despite references to "scientific truth", is universalistic, humanistic, and idealistic. Some of these traits suggest that Scellism belongs to the history of legal philosophy. Other traits, however, suggest it also belongs to the reality of today.

II. The Current Relevance of Georges Scelle's Legal Thought

As already noted, numerous lawyers, although influenced by Scelle's thought, have moved closer to the thought of Anzilotti than to that of the author of the *Précis du droit des gens*. This reaction was directly brought about by the course of international relations and the apparent evolution of international law after the Second World War. But other aspects of international relations and of the law governing them, clearly demonstrate the element of truth which Scelle's thought contains.

A. Scelle's Thought in Question

Scelle's thought has been harshly challenged. Over the last forty years, conflicting sides of international relations have made an impression on the minds of political scientists, lawyers and of people much more than has the progress of solidarities.

The Cold War, arising from the division of the world into hostile and, it seemed, irreconcilable blocks; the Middle East conflict; the wars of decolonization; the pressure exercised by Third World states in the General Assembly of the United Nations; and the fear, no doubt exaggerated, of the dangers threatening the interests and values of the West have all lent credibility to a view of international relations based on the concept of "power relations." It is this view which, in the tradition of Hobbes and Machiavelli, has been given coherence by Hans Morgenthau in the United States and by Raymond Aron in France. The views of these authors seem to have imposed themselves with the force of evidence and have formed a dominant theory which has hardly any opposition.

Most of the strands of this dominant theory are directly opposed to Scelle's concepts. For example, "the heterogeneity of international society", which means that nations are foreign to each other and are not brought closer by common interests

based on similarity or division of work is at complete odds with Scellism. Similarly, the "anarchic character" of international society, and the "juxtaposition of states" contradict the place given in Scelle's writings to institutional and normative federalism. In the same vein, commonplaces which make up the bulk of political thought, such as states' "sacred egoism" or their being "cold monsters" hardly sit comfortably with Scelle's ideas of the "ecumenical community" and his theory that governments, by virtue of "role splitting" act on behalf of this community. In works written from the "power relations" perspective, the use of armed force is given a predominant role. In fact, according to Aron, discretionary use of force is the distinguishing feature of international relations. This notion and other elements of the power relations theory also conflict with the Scellian denial of the specificity of the international legal order. Finally, all international relations theories based on the concept of power relations tend to minimize the role of international law – a law that Raymond Aron held in very low esteem. At best, when its legality is not challenged, international law appears as a means, a tool of power politics. This is far from the sovereignty of law put forward by Scelle!

The realist view of international relations has rejected Scelle's ideas as has, it appears, the evolution of international law. The role played by sovereignty has been the decisive factor in this process. Far from fading or withering away, the concept of sovereignty has enjoyed the highest favour since the Second World War. Positive law has attached great importance to it. The United Nations Organization was founded on the sovereign equality of its members, and this is one of the fundamental principles proclaimed by Resolution 2625 (XXV) on Friendly Relations. Sovereignty is present in every major convention on the law of treaties, on the law of diplomatic and consular relations, and on the law of the sea wrought out by the United Nations, and by other organizations working under its auspices, during the last forty years. Contrary to the hopes of Georges Scelle, colonial countries, far from integrating themselves in federal structures with the former home country, have chosen sovereignty which, even though illusory, symbolizes a break in the domination that, in their eyes, colonialism entailed.

As for "legal policies" or governmental doctrines, most have been more or less based on the concept of sovereignty, the major principle behind the system of coexistence according to socialist countries, as well as the weapon of new states against neocolonialism. The western powers also invoke the principle of sovereignty in order to contain the power of the United Nations General Assembly to interpret its Charter, or to limit the authority of resolutions. At that level, the French record is especially noteworthy.

Thus the Scellian trial of sovereignty and, even more, the Scellian denial of the legal personality of the state, appear at odds with the trend in the evolution of international law. It can be argued in this respect that Scelle failed to recognize the strength of similarity of common interests ("*solidarité par similitude*"), which is the basis of national and collective exclusivity, and that he exaggerated the strength of solidarity based on the "division of labour" (*solidarité par "division du travail"*).

Moreover, Scelle put too much emphasis on solidarity in social reality. These two concepts, as has been said already, are identical in Scelle's thought; social reality ("*le fait social*") is nothing other than common interest ("*solidarité*"). Social reality,

however, has more than one dimension; it also involves conflict and hostility. Indeed, at certain times the predominant feature of social reality is conflict. This was the case immediately after the Second World War, when the international community was both wider and fiercely divided. This is why it was natural, even in the Scellian perspective where law proceeds from social reality, for sovereignty to win so much favour assuming that conflicts are regarded as a part of social reality.

Thus Scellism lost its appeal during the Cold War, when conspicuous hostility masked the reality of solidarity and legal practice was essentially in agreement with a voluntarist view of law. Machiavellian and voluntarist thought are, however, no less unidimensional than Scellian universalism.

B. The Accuracy of Scelle's Vision

As Professor René-Jean Dupuy shows in convincing fashion, the strategist (Machiavellian) view of international relations is no less limited than the harmonist view. "The harmonists", he writes, "look forward to a brotherly community which possibly will never exist. The strategists, on the other hand, err in thinking that a community generally implies an absence of conflict. They are unable to see that conflict and community are not wholly incompatible. In fact, rather, they go together. Not only is it possible for there to be community and conflict, one might say that one implies the other."[30]

This dialectical and reasonable view is fully supported by history. Apart from the extreme cases of all-out war, in most situations involving conflict the antagonists share some common interests. For example, during the Cold War, the United States and the Soviet Union were able to agree on partial nuclear test bans and on a non-proliferation treaty. Similarly, solidarity relations in the European Community and the Western World could not subsist without incessant negotiations. Even if there are spells when law regresses, as Scelle noted in 1933, there are others when law progresses, and it might be thought that, with the changes in the Soviet Union and, it may be hoped, the end of the Cold War, we are now living in one of these.

It may therefore be argued that Scellism reflects the whole of one side of international law, the sunny side. Hence, some branches of international law are more Scellian than others. This is the case with the law of international development, which cannot be conceived without a degree of solidarity between developed and developing countries. It is also true of environmental law and of the protection of human rights, where legal rules cannot be founded on reciprocity and there is therefore no room for the clause "*non adimpleti*", as can be seen in Article 60 para. 5 of the Vienna Convention on the Law of Treaties.

But the division between laws which translate power relations and those which correspond to common interests in reality affects all branches of international law. In this respect, the evolution of the law of the sea is remarkable. If the extension of sovereignty, or of sovereign rights of states bordering on large expanses of sea, sanc-

30 R.-J. Dupuy, 'Communauté internationale et disparités de développement', 165 *RCDI* (1979) 41.

tioned in the main provisions of the 1982 Convention, bears witness to the progress of anti-Scellian, sea-faring nationalism, other provisions, by contrast, correspond to common interests. The measures related to the safety of navigation, to the preservation of the sea's natural resources, and to the protection of the environment are more significant than those which deal with the sea bed and with the implementation of the concept of the "common heritage of mankind." Without doubt, this principle invoked to prohibit the exercise of sovereignty over the sea bed is a Scellian concept; but Section XI of the 1982 Convention, which governs its application, illustrates well how a concept can be ill-used. The common heritage, in effect, serves a bureaucratic project dedicated to inefficiency, one which may not be of any help to the interests of developing countries, nor to those of industrial countries. Nevertheless, the accuracy of Scelle's vision appears when exploring two areas of development. First, it is worthwhile trying to identify the role of social reality and thus of common interests in recent developments in international law. Second, it is worthwhile identifying the role of truly universal rules in present-day international law.

In order to discover the role social reality plays in the development of law it should be possible, by studying history, to identify social developments which precede and determine judicial constructs. Two fields seem ripe for study. The first is that of European Community law. It appears that the development of common interests between France and West Germany, pursued through commercial exchanges and investments, preceded the major stages of progress in Community law. It may also be suggested that the reluctance of certain governments, those anxious to preserve sovereignty, and thus unanimous voting in the Council of Ministers, was overcome, in the final analysis, by the dynamic of European social reality. In any event, the European Community would not have been possible without the radical changes in the relations between the Western European nations which came after the Second World War. In fact, the power relationships and the hostility among European nations, which gave rise to the two world wars, gave way to relations based on solidarity, not only between these nations as such, but between national and state societies. Thus the Community's positive law appears to be the "translation", in Scelle's terms, of objective law based on social reality (*"un droit objectif fondé sur le fait social"*). It also may be pointed out that the Community quite clearly displays a federalist tendency, to which it brings a new and original development. It is in effect an economic federalism, whose future extension is liable to be increasingly political.

In the field of human rights, too, social reality's influence on the development of law can be shown with precision. The growth of international concern for this subject has been accompanied by a noticeable decline of non-interference in the legal practice of states, evidenced by the measures taken by governments in response to human rights violations in Poland, Iran, and South Africa. This development does not spring from unforeseen changes in legal policies dictated by national interest. On the contrary, since the end of the Sixties, it has been the initiatives of NGOs (and especially Amnesty International's campaigns calling attention to the fate of political prisoners and the use of torture), the actions of Soviet dissidents, among whom Solzhenitsyn has been featured prominently, and above all the role of the media, that has created the political and psychological conditions leading to the shift in govern-

ments' practices. Thus in this field, positive law is certainly the work of governments, but it corresponds to an objective law based on social reality.

Scellism is also sustained by the fact that the concept of international community has acquired a place in positive law. The references to this concept which, in Scelle's time, had more to do with objective law than with positive law, do not only feature in resolutions such as Resolution 2625 (XXV) on Friendly Relations, but also in treaties (the Vienna Convention on the Law of Treaties) and in the case law of the International Court of Justice, which, in the *Barcelona Traction* case, insisted on the obligations of states "towards the international community." Thus, at this point in time, any denial of the Scellian concept of international community goes against positive law.

The role of universal rules in international law has now become considerable: they include not only the norms of general international law, but also the rules arising from universal or quasi-universal conventions, such as the United Nations Charter, the Geneva Conventions of 1949, to which more than 160 states are party, or the Vienna Convention on diplomatic relations.

Finally, if it is eventually admitted that despite the rearguard actions which they have generated, the concepts of *jus cogens* and of obligations *erga omnes* are pushing their way through positive law, it is possible to see in their acceptance the recognition of the idea of an international constitutional law advocated by Scelle. In this respect, the concept of *jus cogens* would be fully Scellian if it conferred a peremptory (*impératif*) character only on provisions protecting individual freedoms, as in the declarations of rights incorporated in national constitutions. The adage "*ubi societas, ubi ius*" is reversible: the existence of universal international law demonstrates the actual existence of an ecumenical community, the members of which, despite their "heterogeneity", are bound by the same legal standards.

What then are the key features of international law? Are they those which proceed from power relations and are geared to sovereignty, or those which stem from solidarities, and revolve around the concept of community? Let us leave the answer to Michel Virally, who, summarizing the essence of his general course to The Hague Academy of International Law, wrote: "The author of these lectures must recognize without circumlocution that he adheres to the ideals of peace, justice and progress for all, ideals from which the idea of international law is, in his view, inseparable. The author believes in the advancement of international law along these lines, which will inevitably stamp his way of presenting it. *The elements of reconciliation are, in his view, more important than the elements of division and disintegration and are therefore especially worthy of being emphasized.*"[31] This statement echoes the thought of Georges Scelle, who, in a period of darkness, struggled with the weapon of law against the forces of division and disintegration.

31 M. Virally, 'Panorama du droit international contemporain', *RCDI*, 35.