Address given by Alexandre Marc at the Congress of Europe (The Hague, 8 May 1948)

Caption: On 8 May 1948, Alexandre Marc, French Director of the Institutional Department of the Union of European Federalists (UEF), outlines to Members of the Cultural Committee at the Congress of Europe in The Hague the principles underlying his proposal for a Declaration of Rights and for a Supreme Court as part of a future European Federation.

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Address given by Alexandre Marc at the Congress of Europe

Mr Chairman, Ladies and Gentlemen,

I would like to begin with a personal comment to clear up a misunderstanding.

A moment ago, something was said, unfortunately, that might have given our Chairman, whom we all highly esteem and appreciate, reason to think that I had put forward the idea that he was against discussing human rights. For all those who know Salvador de Madariaga, and there are several of us who have been reading his books for many years now, it is clear that such an idea could never enter our heads.

(Applause)

That said, it goes without saying that, due to unfortunate circumstances, for which I do not wish to blame anyone, our debate, and the report that I have to submit to you on behalf of a number of people who kindly worked on it, have suffered a fatal blow.

Originally, we intended to allocate an entire day to examining this issue, which we think is vital. Now we have one hour! Clearly, in that time it is impossible for me to summarise for you a report that, unfortunately, is almost 30 pages long, not counting the annex. I refer of course to the draft statement of rights.

Therefore, since needs must, you will forgive me for using forthright statements. But I do strongly request that you take account of the fact that these forthright statements have not been fished out of the depths of my frenzied brain, but are based on the work of legal experts and the proceedings of the United Nations Commission on Human Rights, for example. You will understand that it is impossible for me to quote all my sources.

Even if I put forward ideas that appear revolutionary to you, these ideas are based on earlier work and on a survey that I think was carried out properly.

I will now take up a first point that comes from the preamble, and I will state quite bluntly that the threats hanging over Europe, (totalitarian regimes — both those that used to exist and the one or the ones that exist now) did not come about by accident, but from an internal shortcoming in democracy itself.

There are, amongst others, two essential contradictions. In a democracy, such as those that we have seen function with our own eyes, the first contradiction is the one that opposes or superimposes the rule of law on the one hand and the rule of the majority on the other.

Appearances suggest that these two notions have merged into one. In actual fact, under certain conditions that we have seen in countries that I will not name, they risk becoming contradictory.

The second contradiction is that democracies, or democracy, tended to refer to the rights of Man and of the citizen. Man is a universal being; the citizen is the citizen of a country. As a result, this expression, like the previous one, conceals an internal contradiction. The rights of man and of the citizen do not necessarily coincide.

That is why there are several of us who think that democracy, if it wants to survive, does not only need a joint general-staff, a new common legal, spiritual and moral defence and a new notion of itself. It is a renewal of democracy that is needed if it is not to perish. Otherwise, there will be no point in jointly organising our armies; we will still lose because we know that, historically, regimes only survive if they are able to adapt.

There are several of us who believe that the starting point for this transformation of democracy has to be the law. We must assert that democracy cannot be rejuvenated and cannot be renewed except by the triumph of law and by the rule of law. That is why we believe that the secondary issue, which has to be shifted from one

committee to another, but the fundamental issue, and I would say almost the only issue, because human rights cover all areas, political as well as economic, legal or spiritual [sic]! (Application in teaching, for example.)

Human rights are the very crux of what we are doing. They are neither the dessert nor the starter, but the basis, the foundation and the keystone of everything that we want to do. If the economic committee asserts one or other position, it is in terms of a certain conception of rights that we can use and apply. There are is no other way. We have to choose between law and arbitrariness.

As far as declarations of rights are concerned, we know lots of them. There are about 52 of them that, I believe, are currently valid in different countries. Unfortunately, we know that, sometimes, these declarations remain just words, and the fact that they exist does not prevent governments from implementing a policy that goes against the law!

That shows you that a declaration of rights (and this is a significant point) is not a commitment. Should we avoid any declaration on the pretext that it is not a commitment? I do not think so. We were given the floor in order to say what we think and that is why we must establish the main points of the rights that we must defend.

I think that we should start with what has already been done. In order to produce a document that I think has been distributed to you — a draft statement of 33 paragraphs — I have used drafts and work from the United Nations Commission on Human Rights. Those who have kindly worked on this issue with me have not taken the UN document as it stands. We thought that it had to be modified in some respects, but we have modified it as little as possible in order to ensure that we are on solid ground!

Nevertheless, I wish to draw your attention to one point on which we have gone further than the UN. We have introduced into this declaration which, as you see, is called a Declaration of Rights and not a Declaration of Human Rights, a reference to community rights.

Why a Declaration of Rights and not a Declaration of Human Rights? Because there are some of us who believe that we have to assert in one sweep, with a single will and a single voice, both individual rights and collective rights. I draw your attention to this point because, in a succinctly summarised report, this could have gone unnoticed.

The only really original aspect of this draft declaration, as I have said, is that it introduces community or collective rights.

Why ‘collective’? It covers many things. Of course, we did not want to be specific. What we mean by it, quite simply, is what Mr von Schenck reminded us of this morning, that for us, the basis for Europe is the principle of autonomy.

(Applause)

If we consent to abandon this basis, whatever name we give it, then totalitarianism will enter like a Trojan Horse (as has already happened in Europe). We defend our borders but, within our borders, creeping state control and centralised bureaucracy will continue to cause havoc and we will have rendered meaningless the two reasons why we are seeking to create that which we want to defend.

Having said that, I am not able either to read out my draft declaration or brief you on it. I will leave it to you, of course, if you are interested, as I hope you are, to read it yourselves.

But as I have just said, a declaration is not enough. In legal terms, as you all know, a declaration is not binding. Therefore, we intend to give this declaration the backing of a convention, signed by all member states of a European Union or Federation, which, once signed, will be legally binding.

The need for this is so clear that I will not dwell upon it. However, I would like to take a few minutes to emphasise, somewhat more, another point. Some of us believe that the best way to guarantee human rights is not through written laws or proclaimed rights, which could tend to be seen as merely declaratory, but through social structures. That is why we consider that the protection of European human rights, or even human rights per se (since our thinking is universalist, as Professor Gilson explained this morning), should be buttressed by a transformation of society's moral, political, social and economic structures: this is the very crux of the problem. All the rest can complete and crown the edifice, but if the edifice itself is not built, the roof will end up caving in — if I may use this rather mixed metaphor.

We have seen in particular, and I refer to it in my report, how much these questions are intertwined and how impossible it was, in the discussions in San Francisco and even in Geneva, to separate human rights from the consideration of economic and social structures, even in these official bodies that are perhaps less audacious than we are always able to be here. This subject has often been brought up in debate. We returned, and believe me, not just on one side, to the need, via new structures, to guarantee a minimal level of subsistence and social and economic security that allows human rights to exist not just as a pious hope, but as a reality embodied in institutions.

So, I strongly appeal to you to consider this notion of the transformation of society's structures as the best guarantee of human rights, and the concept of autonomy as the best expression of the formula that these structures should have.

As you see, having clarified these points, I quickly come to the Supreme Court itself. So far we know that the supranational community has not had any body nor any material means to exercise its rights. Lawyers and even politicians have already been talking for several years about the international community. But this community has no defence. If I may say so, this community is a platonic one. That is why we believe that an institution such as the Supreme Court is absolutely essential for completing the edifice that I mentioned a moment ago.

I wish to draw your attention to the fact that, when we start talking about institutions, we must know within which context they are placed.

Rest assured, I do not intend to come up with a draft European constitution for you, but I must, if only for reasons of intellectual honesty, tell you what future I have in mind for the plan that I am proposing to you.

Well, I tell you quite frankly that this future is a federalist future; we believe that the defence of human rights is impossible in international terms except in a federalist framework.

(Applause)

As a result, all the following comments must be linked to this federalist framework, and if, at times, they strike you as simplistic, please forgive me, but I do not have the time to go into details.

Eminent legal minds such as Professor Kelsen, for example, to mention but one, have noted that if the issue of a Supreme Court might be debatable in a centralised state, in a federal state, or, to use the word I much prefer, in a federation, the need for it cannot even be questioned. As soon as you say 'federation', you are saying that a body exists that is above national antagonisms, that judges in fairness, because if this body did not exist, we would have no safeguard against a monstrous centralism which, doing away with today's unviable nation-states, would impose the tyranny of a Moloch-like state, more fearsome than all the rest.

That is why, from the federalist viewpoint, the Supreme Court is not only a pious hope, but an absolute necessity.

What competencies should this Supreme Court have? It seems that its competencies should be very broad, because it has to cover two areas of concern:

1. If there is a Supreme Court within a federal framework, it means that there is a federal constitution — a European constitution. So there has to be a body responsible for safeguarding the principles enshrined in that constitution in order to prevent, on the one hand, the central power infringing upon local or national powers, and on the other, the national powers infringing upon the federation's constitutional rights. Hence the first, very important, competence that we propose for the Supreme Court: constitutional oversight.

2. The second competence is immediately relevant here. It is, as you might have guessed, the very protection of human rights. Clearly, this is the actual purpose of all our efforts, so I will not dwell upon this point here. It is dealt with in detail in the report that was circulated to you and it goes without saying that it is the very backbone of this new institution.

What should be our concern if we accept this proposal? It is glaringly obvious that the independence of the supranational court, as it has been set up, must be ensured. The court runs the risk of being subject to political pressure that would deprive it of its freedom of action. In such a case, the court would simply be at the beck and call, if I may say so, of some or other power.

That is not what we want. We want to protect people against all abuses of power and, therefore, we must ensure this institution's independence.

How can we ensure this independence? I cannot go into technical details, but a general principle has to be stated, and that is that this highest court, this Supreme Court, must be as independent of governments as possible.

As far as I am concerned (and here I am speaking in my personal capacity, since some members of the committee were not fully in agreement with me), I believe that, in particular, the judges, the members of the court, should be selected by non-governmental bodies.

(Applause)

Which bodies? Well, we know that whatever form Europe takes, there will be representative political and economic bodies, so let us not prejudge things! We believe that a formula could be established that allows those bodies to choose from information lists — information lists based on the skills and responsibilities of the judges whose independence would be practically guaranteed. I will not mention the other, standard, clauses.

I will not mention the technical issues on the various chambers that could constitute such a court. There is no room for that in a very brief outline.

What I now wish to say is very important. Who would have the right to come and plead in front of such a court? We all know the traditional idea that only states can bring cases to international courts! Well, I am telling you what I really think by saying that if we do things in that way, we will have achieved nothing, because it is against the state that we must defend ourselves!

The Australian delegate, who, if you will excuse the comparison, was looked on somewhat as the peasant from the Danube at the UN Commission on Human Rights, stood up at one point and said, 'They want to give the competence to the state. I believe,' he added, in a moderate tone since he is of British origin, 'that in the history of humanity, each time violations of human rights are mentioned, it is the governments that are responsible!'

Of course, that comment triggered a slight chill! Nobody responded!

Hence, reserving for the state the right of recourse would, quite simply, cancel out everything that has so far been proposed to you.

That is why I have kept the wording that the UN Commission finally adopted, which is that the right of

appeal must be given to individuals, associations and groups of individuals. These three categories have been studied, very carefully, in order to allow any violation of rights to be punished, and that is the wording that I am proposing.

But again, an objection was raised. It has been said that if the supreme jurisdiction was open to individuals, there would be an awful overload that could not be coped with and it would be overwhelming! Anybody, for whatever reason, on whatever pretext, would go and complain to the Supreme Court.

I am very badly educated. All my friends know it! I must tell you that even though this argument is sometimes submitted by eminent legal minds, I find it childish! It takes only the most basic knowledge of legal matters to know that this difficulty can be overcome far more easily than many others, and that a system of first instance is all that is required: a conciliation procedure at the start as a safeguard. This overwhelming problem is only a pseudo-problem of technical fine-tuning.

There is no danger of being snowed under if the legal approach is properly established. But be careful! There must be the proviso that this approach, this necessary safeguard, is never capable of turning against what we want to achieve. That is why we propose that these safeguards should never be able to stop a case going forward, should never prevent someone from making a complaint and, if the normal channels in each country have not functioned satisfactorily in the plaintiff's view within a given period of time, the latter should still be able to go to the Supreme Court as a last resort.

Now I come to the fundamental objection that has often been made to us against this report. We have often been told: you will be setting up a government of judges.

What does that mean? As you are aware, it is polemical in nature. It was applied particularly with regard to the system in the United States, a system which has functioned in a way that satisfies some but not others, which has perhaps not given the results that some people expected but which has, nevertheless, provided some very solid ones and which, in any case, is supported by the vast majority of American opinion.

But is this really an American invention? In my report you will find some quotations that aim to prove the opposite. I cannot read them all out to you. I will quote just one to you, from Professor André Blondel, who writes, 'Legal science has now almost totally accepted the idea of jurisdictional control. […] Now we need to change public opinion.'

(Applause)

But, it will be asked, will those countries where jurisdictional control is not provided for under the constitution not be opposed to this principle?

Actually, I do not think so. In general, amongst these countries, no mention is ever made of National-Socialist Germany. Everyone knows that the basic principle in National-Socialist Germany was expressed by the great theoretician Carl Schmitt who said, 'Der Führer schützt das Recht' (the Führer protects the law)!

Let us not dwell on that example. It is perhaps not a conclusive one.

It will be said that I am giving a horrendous example. Let us take the example of Great Britain, where the parliament is all-powerful. You know that it can do everything apart from changing a man into a woman …

The President… Even that!

Alexandre Marc Is that not against British thinking?

My answer is, I do not think so. A major theoretician of British law has often expressed the idea that at the basis of British law lies respect for rights. It is, as one of them says, not the result but the underpinning of

the constitutional state of affairs, it is the cause of this state of affairs!

On this point, and I know that this is the major objection, I would like to quote Lord Jowitt, the Lord Chancellor of England, who recently said in a message to France that there had been the principle that the executive power could not be subjected to control by the judicial power, but that since the previous year, that had all been changed and anyone could now introduce a case against the Crown. He said that they wished to go even further and that the British Government intended to protect the individual's rights, even against the executive arm. He said that that plan merited closer examination and that we were living in a period of plans for everything. Despite the needs for regulation, he stated, they did admit that their judicial power, as an independent entity, must be able to control the executive power.

I draw your attention to this passage, because it is of major importance in my view.

My only reason for citing these references is to show that, contrary to the often-heard objection, the idea of a rule of law that is not in line with the idea of an aristocracy of man is not at all an idea that has been rejected by European public opinion.

As I have said, it is not our intention to establish a government of judges in the pejorative sense of the term, but the government of the law, which is different.

And now I come to my conclusion. Some will say: 'this is a beautiful and well-meaning idea, but it is utopian. We have to come back to reality. You cannot create your Supreme Court, which does not yet exist, without basing it on institutions that do not yet exist either. You do not have a framework for creating it.'

But here our duty (and several speakers have already emphasised this) is somewhat different, indeed considerably different, from that of the political committee. It is clear that the political committee must bear in mind the question of timeliness. However, we have to clearly assert here, without the fear of being seen as utopians, what we want to achieve and what the goal to be achieved is.

I do not mind being taken for a utopian, provided that one remembers the phrase spoken by my friend Daniel Rops who said that 'today's utopia is simply tomorrow's truth!'

(Applause)

I know that there will always be sceptics. I do not think that we should back down in the face of a shrugging of the shoulders or a cynical smile! We cannot disappoint Europe and disappoint humanity yet again! We especially cannot do this given that such a disappointment risks being the last.

(Applause)