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**THE FACULTY OF LAW AND THE CLUSTER OF EXCELLENCE
“FORMATION OF NORMATIVE ORDERS”
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and with

**THE CENTRE OF EXCELLENCE
IN FOUNDATIONS OF EUROPEAN LAW AND POLITY RESEARCH
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UNIDEM SEMINAR

**“DEFINITION AND DEVELOPMENT OF HUMAN RIGHTS
AND POPULAR SOVEREIGNTY IN EUROPE”**

Frankfurt am Main, Germany

15 – 16 May 2009

OPENING SPEECH

by

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Today's UniDem Seminar is the 31st to be organised by the Venice Commission since the launching seminar which took place in Nancy 12 years ago, in 1997.

The "UniDem" – University for Democracy – programme was born with a specific aim: that of promoting and stimulating in-depth and mature reflection on issues of law and democracy. These issues are to be approached from several different cultural, historical and geographical angles, in an unbiased spirit of open-mindedness. The Venice Commission has strived to inject into these seminars the enriching and unique experience – both scientific and practical – which the Commission has accumulated through the years.

UniDem Seminars have approached a variety of issues. You will find them in a collection called "Science and Technique of Democracy". The topics are ranging from "the Transformation of the Nation-State in Europe at the dawn of the 21st century", "European and US Constitutionalism", the Protection of minorities", "the protection of constitutional rights by the Constitutional Court", to, very recently, "cancellation of election results" (November 2008) or "controlling electoral processes" (April 2009). This seminar was arranged by the Spanish Government and the Venice Commission in Madrid some weeks ago; I was privileged to participate in this.

None of these topics – neither the more technical ones, nor even the more philosophical ones – represent a sterile, abstract academic discussion, but they all translate into fresh, novel ideas which subsequently enrich the works of the Venice Commission, as well as – we like to believe – those of the scientists, the politicians, the judges and the students who participate in or become familiar with the proceedings of the seminars.

Today's topic – the role of popular sovereignty in the definition of human rights – touches upon one of the main areas of work of the Venice Commission. The Commission has dealt with human rights mainly in three respects :

- the national foundation of human rights protection : constitutional entrenchment, legislation ;
- the national mechanisms of protection of the rights guaranteed in the constitution: constitutional courts, ordinary courts;
- the international protection of human rights : the Council of Europe system of protection, the role of the European Union, the identification and development of international standards.

The international dimension of the protection of human rights indeed represents one of the core concerns of the Council of Europe (and of the Venice Commission). It protects the universality of human rights. It helps avoiding that human rights depend on the belonging of individuals to specific communities or political groups.

Yet, this international dimension now encounters increasing criticism. It is accused of lacking democratic legitimization, of imposing an abstract and authoritative definition of human rights upon national authorities. The obligations as defined by the international bodies are of course "minimum" ones : States are free to go beyond this minimum and to provide original solutions to human rights issues provided that they do not go underneath this minimum. This core content is non-negotiable. This dimension is not the controversial dimension now, however. It is the other way around. If one looks at the case-law of the European Court of Human Rights, it is obvious that this core content has been progressively expanded and represents nowadays a sophisticated and very advanced set of human rights obligations. And some States, those which have joined the Council of Europe more recently, have not even taken part in all of the definition process.

The Venice Commission, of course, has no position on these controversial issues. Neither has the President of the Venice Commission. The rationale behind the fact that the Venice Commission is co-organizing this UNI-DEM seminar is that we think these questions need to be discussed. The Venice Commission is based on two pillars. May I recall that the full title of the Commission is The European Commission of Democracy through Law. The Venice Commission is on alert whenever and wherever these two basic values are challenged.

As a prima facie observation, we see that this dilemma is perceived more acutely in the so-called old democracies in Europe. Then two questions present themselves.

- 1) We hear voices claiming that the root of the problem is that the process of defining the human rights commitments now belongs to an enlarged Europe. The old democracies are not in control any longer.
- 2) We also hear voices claiming that the root of the problem is that the Strasbourg Court has, by extensive interpretation, created a sophisticated system of protection which goes far beyond the intention or acceptance of governments and parliaments in present Europe.

This dilemma, however, is not a concern for the old democracies in Europe only. It brings us outside the European continent. Actually, this is, for the time being, a global dilemma. Some months ago, in January this year, the Venice Commission arranged, together with The Constitutional Court of South Africa the First World Conference on Constitutional Justice, in Cape Town. On that occasion, I gave a press conference together with the honorable Chief Justice Langa. The journalists challenged the Chief Justice. How and why could the judges interfere into the decisions made by the people, in casu the Parliament, in casu the ANC? When the TV-cameras turned on me, I tried to explain that this dilemma is not a South African issue only. This question is truly a global dilemma, a global challenge.

That is why we convene this seminar in Frankfurt today.

This call for a democratic participation in the definition of human rights is rather evident at the international level. In the global human rights discourse governments in the South claim that they are not bound by the international human rights standards, because they did not participate in the drafting of these documents.

Then one must ask: Does this call manifest itself at the national level too? Does the people – of Europe today - claim to have a role to play in the definition and development of human rights, or is this task conferred merely on the courts, be they national or international?

The discussion at this UNI-DEM seminar will explore these issues and many more. Consistently with its aspirations and mandate, the Venice Commission should explore certain fundamental questions, such as: how would an increased democratic radicalization of human rights at the national and international level benefit the level of their protection?

And, even more, we should not be afraid of asking the most radical, the most challenging question: The international protection of human rights is a child born out of the two World Wars. Already in 1941, the allied forces stated that the war they were fighting was not only against regimes, it was also against ideologies.

The UN Charter from 1945 is based on the premise that human rights are too precious, too dangerous to be left to the national authorities, whether democratic or autocratic. It must be elevated to become an international concern.

More than 60 years have elapsed since then. The world has witnessed the establishment and consolidation of full fledged democracies. Sadly, the world has also witnessed brutal dictatorial

regimes. As we are convening here in Frankfurt, the generals in Myanmar has jailed the Nobel Peace Prize Laureate Aung San Suu Kyi, and by doing so, bringing her beyond international control.

If one listens carefully to the most critical voices today, I think the message they wish to convey is this:

When can a democratic society be considered to be mature enough, when can a democratic society be trusted, to provide its own definition of human rights obligations?