Introduction

Today states and the international order are challenged by many threats and risks, old and new. One could speak of a world in disorder not only due to the actions of international terrorists, on-going civil wars or the negative effects of climate change, but also because of an increasing economic inequality, populist waves in democratic states, electoral authoritarianism, major disagreements about the basics of political justice, the absence of a functioning state, mass refugee flows, and rapid technological progress.

This book will look at a trio of key concepts that help to stabilize states and the international order: human rights, democracy, and legitimacy. These notions have been used pervasively by philosophers, legal scholars, and politicians from World War II until today. Although there is dispute about the precise content of these concepts, undoubtedly human rights are not only an ethical concept but also exist as legal obligations, enshrined in international treaties or part of customary international law. Democracy can be characterized as "government of the people, by the people, for the people";[1] and the normative concept of legitimacy covers at a minimum the notion of the justifiable exercise of coercive political power.[2]

However, these are only first approaches. There are a series of legal and ethical challenges related to these concepts. It is questionable, for instance, how democracy and human rights are interlinked, as mutually supportive or in tension. Furthermore, it is not clear whether legitimacy can be reached without relying on democracy and how the three concepts could have a stabilizing effect in a world of disorder. To explore these issues, we convened an interdisciplinary symposium at Harvard Law School in May 2016. This book is an edited collection of essays based on the presentations at the symposium.

[1] Abraham Lincoln, Gettysburg Address, November 19, 1863, Gettysburg.
[2] Cf. John Rawls, Political Liberalism 137 (1996).

I. POINTS OF DEPARTURE

Our aim is to examine whether and how the key concepts of human rights, democracy, and legitimacy can be useful tools not only to analyze but to help stabilize our world in the twenty-first century. Every author deals with specific challenges and looks at different problems of our world today. In addition, the approach of the book is an interdisciplinary one and the authors use a variety of methodological tools to answer the questions that they put forward. Overall, we think that some common starting points and premises are important.

A. *The Three Key Concepts*

From an analytical point of view, it is important to note that each of the three concepts – human rights, democracy, and legitimacy – can be understood from a normative or a descriptive perspective. For example, we (explicitly or implicitly) differentiate between *human rights* as ethical and philosophical concepts or norms (i.e., suprapositive norms/moral background norms/pre-institutional norms), and human rights as part of a (national and/or international) legal order (i.e., positive norms).

The same is true for the concept of democracy: what democracy means can be viewed and discussed as a philosophical concept that is not necessarily linked to any particular existing legal order, or it can be laid down and spelled out as a positive legal concept in a certain legal order (especially as part of the constitutional norms of a state).

If we discuss the concept of legitimacy, we may view it from a normative perspective (legitimacy as justified acceptability of a certain norm or order), or from a descriptive/empirical perspective (legitimacy as factual acceptance of a certain norm, order, i.e. factual legitimacy). An empirical conception of legitimacy gives a descriptive account of the conditions under which the members of a group or society ascribe legitimacy to something;[3] a normative conception specifies conditions under which it can be rightfully asserted that something has the kind of moral standing that goes with the notion of legitimacy. In the latter case, legitimacy means the relationship the state or any other powerful entity needs to have to those over whom this entity claims the right to rule.[4]

Certainly, these differentiations are only analytical starting points, and do not mean that we argue that the alternative perspectives are absolutely

[3] Cf. below, Wilfried Hinsch, Part I, Chapter 4.
[4] Cf. below, Mathias Risse, Part I, Chapter 1.

dichotomous. Hence, authors of this book may link descriptive and normative elements of the three concepts, just as they combine philosophical, historical, and legal perspectives. In addition, the issue of legitimacy can be understood as a binary question or as a matter involving comparative degrees of impaired legitimacy.[5]

If we look more closely at normative accounts of legitimacy, one may assume that legitimacy is justice based and that only laws that meet at least minimal standards of justice qualify as legitimate laws. If this is correct, one can argue that a constitution could serve as a country's public pact on legitimacy, if it includes certain basic rights, i.e. if it is a publicly reasonable, reciprocity-regarding constitutional contract.[6] However, we must not neglect, as well, that in a pluralistic society individuals endorse (at least partly) incompatible moral or religious doctrines, and therefore reasonable disagreements on matters of basic justice are unavoidable. Because of this, it is an important question whether it is correct to argue that in situations of mutually recognized, reasonable disagreement about basic justice, claims of public peace and stability can override claims of justice.[7]

Additionally, we have to think about differing accounts of international legitimacy. International legitimacy could refer (in a broad sense) to all the international standards that aim at ensuring the proper exercise of power by governments over the governed; in a narrower sense, international legitimacy could be defined as the standards of human rights performance that affect the perceived legitimacy of a state's governing authorities in relation to the international system and their entitlement to full respect as equal sovereigns.[8]

B. *Common Minimum Claims*

The concepts of human rights, democracy, and legitimacy are not outdated. Although the concepts have developed under certain historical conditions, we do not have to reinvent or abolish them because of the challenges and threats of the twenty-first century. The threats and risks, the developments, and the challenges we face demand new adjustments in the application of the concepts. However, we do not find an argument that there is the need for the reinvention or abandonment of the three key concepts. Quite to the contrary:

[5] Cf. below, Gerald L. Neuman, Part I, Chapter 2.
[6] Cf. below, Frank Michelman, Part I, Chapter 3.
[7] Cf. below, Wilfried Hinsch, Part I, Chapter 4.
[8] Cf. below, Gerald L. Neuman, Part I, Chapter 2.

the importance of human rights and their general links to concepts of legitimacy and democracy seems recognized as a starting point.

The concepts of human rights, democracy, and legitimacy have established core meanings. Although different accounts of these concepts can be given, the general normative orientation of each – toward universal claims of individual persons, toward broadly shared political power, and toward justified exercise of authority – are commonly recognized. These understandings limit the content that can be attributed to these concepts.

The requirements of human rights, democracy, and legitimacy are not self-evident and not unchanging. The entailments of these concepts not only have to be spelled out in greater detail because of old and new threats, risks and challenges we face, but they also should be justified in relation to our changing and pluralistic world. This makes it important to identify conceptions of human rights, democracy, and legitimacy that do not necessarily rely on acceptance of any Western philosophical tradition.[9]

The concepts of human rights, democracy, and legitimacy are not the only relevant concepts in a world of disorder. Moreover, one can think of other (possible) central concepts of the twenty-first century as, for instance: justice, fairness, responsibility, and common humanity. However, human rights, democracy, and legitimacy are key concepts as they helped structure the world order after World War II and they caused major philosophical and political disputes about the question of how to develop a future national and international order and society. Moreover, the concepts of human rights, democracy, and legitimacy are linked and overlap with many of the notions that could also count as central concepts of the twenty-first century.[10] Even if some of us may think that today we are facing a *Zeitenwende* – the beginning of a new era – a good point of departure seems to be to look at these key concepts of the past and examine whether they have enough force to elucidate the future.

Furthermore, there are reasons for a prima facie view that human rights, democracy, and legitimacy can have a stabilizing effect in times of disorder This seems to be a far-reaching starting point at first glance. However, different arguments can be advanced in support of this premise. One is that legal norms have the power to stabilize the expectations of individuals and of entities regarding how other individuals and entities will conduct themselves in the future, and how others will respond to their own conduct in accordance with the content of the norm.[11]

[9] Cf. below, Mathias Risse, Part I, Chapter 1. [10] Cf. below, Mathias Risse, Part I, Chapter 1.
[11] Cf. below, Wilfried Hinsch, Part I, Chapter 4.

And there are prima facie arguments as well for why we have to look closer at the three key concepts, as they may have an especially stabilizing force in a world of disorder. Legitimacy can be seen as the minimum requirement of a durably peaceful global system; moreover, it can be stated that the pursuit of human rights can be viewed as common enterprise that binds together the people of the world,[12] and that the Universal Declaration of Human Rights correctly identified respect for human rights as essential for freedom, peace and justice, and avoiding the need to rebel against oppression. Furthermore, considerations of both human rights and democracy support the view that there is a need for the participation of rightsholders in the adoption of human rights-based policies, i.e. to combine elements of procedural and substantive legitimacy, in order to achieve a legitimate human rights framework in different states and communities.[13]

II. OUTLINE

Part I: General Aspects of Human Rights, Democracy, and Legitimacy

The first part of the book seeks to identify the major features of the concepts and conceptions of human rights, democracy, and legitimacy in times of disorder in the twenty-first century from a philosophical, historical, and legal perspective. The aim is to understand the way the concepts are interconnected and separate, and to determine what might be learned from the ethical, historical, and legal approaches and solutions to (re-)frame the concepts for our current world.

From a philosophical point of view *Mathias Risse* argues that human rights are membership rights in the world society. Instead of thinking of human rights exclusively as rights that individuals hold in virtue of being human, one can understand them as those rights for which there is a genuinely global responsibility (which could then be the case for a variety of reasons). "World society" is a term common in certain parts of sociology to capture global interconnectedness among individuals. To think of human rights as membership in that world society allows the author to spell out the idea that human rights are indeed accompanied by genuinely global responsibilities. His approach thereby also subsumes human rights under (distributive) justice and moves beyond an orthodox conception of human rights that is much more narrow in its core ideas

[12] Cf. below, Frank Michelman, Part I, Chapter 3.
[13] Cf. below, Alicia Yamin, Part II, Chapter 8; Tyler Giannini, Part II, Chapter 9.

about the substance of human rights and also keeps human rights and distributive justice as entirely separate subjects. As legitimacy means the relationship the state or any other powerful entity needs to have to those over whom this entity claims the right to rule, the author argues that it is a necessary condition for full legitimacy that the entity in question realizes justice (which then includes but is not limited to human rights). *Risse* shows why his conception of human rights does not turn to any particularly Western philosophical baggage, but could be acceptable to in particular Confucians, and especially why human rights have the best prospects of creating global harmony.

Gerald L. Neuman explores the link between human rights law especially as expressed in treaties, and the notion of international legitimacy. He understands human rights law as the positivization of perceived moral norms into legal form as a result of international political activity. Although from a normative perspective, respect for some fundamental set of human rights is essential to the legitimacy of governments, it is difficult to identify what subset of human rights law norms have actually become prerequisites for the full legitimacy of a state's government vis-à-vis the international system. *Neuman* argues that even the nine core human rights treaties that exist at the global level are too detailed and ambitious in their content to thicken the list. Hence, this set of treaties does not provide the standard of international legitimacy. From a descriptive perspective, only a thin set of very basic human rights norms have become these kinds of prerequisites: at present, *jus cogens* norms of human rights set a rather low standard for international legitimacy. The same is true with regard to norms of international criminal law or the responsibility to protect doctrine, both areas in which the international system overrides usual practices of sovereign equality in response to certain extreme violations of human rights. Moreover, the author shows that there does not exist a right to democratic governance, and that in the twenty-first century the international human rights regime faces challenges and threats, both from the risk of deterioration of material conditions and from ideological challenges, that could limit its growth or even result in regression. Ideological challenges are, inter alia, the alternative normativity of anti-cosmopolitan religious movements, including non-state forces such as al Qaeda and ISIL, and the efforts of some states to undermine the human rights system by promoting, for example, a regime of counterterrorism law that evades human rights constraints. At the same time, the proliferation of new rights (e.g., human rights of peoples or the right of peoples to solidarity without any conditionality) in conflict with existing human rights appear intentionally designed to undermine the effectiveness of the regime protecting rights of individuals. This shows that threats

to the international human rights system come not only from outside but also from inside the system.

Frank I. Michelman looks closely at the question of whether a morality of political liberalism, as developed by John Rawls, may require some deviation of nation-state constitutional law from a true global morality of human rights. *Michelman* undertakes to explain why, in a Rawlsian view, you or I may not necessarily find a moral shortcoming in a country's body of substantive constitutional law that omits to protect, as a local constitutional right, some right – *Michelman* uses as an example a right of same-sex marriage – that you and I might hold to be contained within a true universal morality of human rights. According to a liberal principle of legitimacy proposed by Rawls, a country's body of substantive constitutional law has as one of its chief functions to serve as a public standard or test for the regime's continued deservingness of wide acceptability in a liberal society, so that citizens will be justified in demanding of each other a general disposition of compliance with all constitutionally compliant laws regardless of their own, independent judgments of the moral and other merits of these laws. *Michelman* calls this a proceduralizing function for substantive constitutional law. According to the Rawlsian principle of legitimacy (as understood by *Michelman*), a body of substantive constitutional law qualifies to fulfill this function, if but only if it protects all the rights, but only those rights, that would make this a constitutional pact acceptable to all reasonable and rational citizens considered as free and equal. As *Michelman* argues was the view of Rawls, this requires a certain thinness of constitutional law. The list of basic rights must be kept sufficiently short and abstract to ground the claim of the regime's resulting acceptability to every reasonable and rational citizen. The case is furthermore complicated by the legitimation-bearing constitution's having at any moment to contain the system's complete and latest word on basic rights and liberties. *Michelman* concludes, in spite of this complication, that a gap must persist between your or my considered convictions of global truths of human rights and our observance of moral obligations of civility, as Rawls calls them, that obtain among fellow citizens in a constitutional-democratic regime.

Wilfried Hinsch addresses the shortcomings of purely justice-based conceptions of legitimacy and looks into the problem that reasonable but incompatible interpretations of principles of justice render it impossible to authorize or legitimize social norms solely by means of principled arguments of justice. In his paper about expectation-based legitimacy, he argues that in a situation of reasonable disagreement in matters of basic justice (and about constitutional essentials), there may be no way to identify legitimate norms that have normative authority for all those involved or to make incontrovertible

legitimate law. His focus is on normative legitimacy and the conditions under which it can be obtained in the context of constitutional and ordinary legislation. A starting point is to show the difference between justice and legitimacy as distinct normative concepts, even with regard to justice-based conceptions of legitimacy. Referring, as well, to John Rawls's liberal principle of legitimacy and the constitutional essentials that are conditions of legitimate government, *Hinsch* states that it is nevertheless unclear what explains the normative authority of an established constitution as long as a principle of legitimacy presupposes a constitution as a normative framework. Only if there is reasonable agreement about basic justice and the constitutional essentials themselves, disagreement about questions of constitutional design can be handled, for instance, by majority voting. But as a world of disorder is a world in which there is irresolvable reasonable disagreement about the basic justice constitutional essentials, another viable conception of legitimacy, one that is not a justice-based account, is necessary. According to his approach, constitutional rights of liberal democracies that are legal rights (and that are not constitutional essentials, which are moral requirements) obtain democratic legitimacy only by means of a factual democratic process that realizes the idea of popular sovereignty and contains non-deliberative elements of factual procedural decision-making: finally, authority can serve as a tie-breaker in situations of reasonable disagreement, if it is justified itself. Therefore, no factual process of law-making can generate legitimate law, but there is the need for a background story that explains the legitimacy and authority-generating quality of the process. In the end, in situations of mutually recognized reasonable disagreement about the relevant criteria of justice, according to the author the claims of public peace and stability override claims of justice. In these situations, the factual pedigree element of legitimacy provides indirect moral reasons to accept norms as morally binding; such indirect moral reasons are, for instance, the desire to meet justified expectations of others and the desire to maintain a stable system of peaceful cooperation.

Against the background that the current populist wave in democratic states can be traced to the dislocated and stagnating former constituencies of the old welfare states, *Samuel Moyn* analyzes economic and social human rights from a historical perspective. He reconsiders the American New Deal and President Franklin Roosevelt's proposal for a Second Bill of Rights. Although the observance of basic human rights is part of how legitimacy is established across the world, there is a legitimacy deficit in established democracies: in the eyes of many voters, economic and social rights do not provide enough for their state to strive for, hence they do not furnish a sufficient quantum of *factual legitimacy*. The Second Bill of Rights, however, was linked to

a normatively egalitarian project to achieve a moderation of class inequality. *Moyn* argues that the core of the New Deal was an attempt to regulate the basic functioning and organization of the economy, directed at a vision of a fair society – even if white males were the (factual) beneficiaries. He explains how during World War II, members of the US government tried to identify social rights as new content to the democratic pursuit of happiness, and why, nevertheless, the idea of social rights died after 1945: social rights were understood to be about the reshaping of the economy, not about judicial enforcement, but, inter alia, business interests after the war neither supported distributive equality nor economic planning.

Part II: Current Problems of Human Rights, Democracy, and Legitimacy

After discussing basic problems of the analytical and historical conceptions of and linkages between human rights, democracy, and different notions of legitimacy in the first part of the book, including the interconnectedness with conceptions of justice, constitutional essentials, constitutional rights, and concepts of authority, the second part of the book aims to look at specific fields of current problems in our world in disorder. The authors of the second part want to shed light on problems of the concepts of human rights in certain areas as well as examine potential solutions for stabilizing the national and international order in the twenty-first century.

Silja Voeneky examines existential and global catastrophic risks resulting from scientific and technical progress in the twenty-first century and whether and how these existential and global catastrophic risks should be governed by positive international human rights norms. Her paper concentrates on existential and global catastrophic risks that result from scientific and technical progress: (firstly) these risks are man-made, which means that humans are fully responsible if a certain risk materializes and damage is caused, and (secondly) these risks threaten, *by definition*, to cause the extinction of all human beings or a majority of human beings on earth. Hence, these risks have an absolute or highly destabilizing force. Examples of these kinds of risks include certain studies in the area of biotechnology (e.g., so-called gain-of-function studies of concern or certain gene drive experiments as a result of genome editing), certain types of geo- and climate engineering, and the development of artificial intelligence (AI). Since these experiments can be viewed as low probability/high risk scenarios or unknown probability/high risk scenarios, *Voeneky* discusses what principles and rules are currently the bases for a legitimate international governance regime. Her core question is whether legally binding human rights are and should be important pillars of a multi-layer international

governance regime. On the basis that legitimate international governance should be understood as requiring that the guiding norms and standards have to be justified in a supra-legal sense *and* have to be coherent with existing international law – insofar as international law reflects ethical values – she concludes that legally binding human rights are today and should be in the future elements of an existential and global catastrophic risk governance regime. According to her interpretation, international human rights norms oblige states to assess and reduce existential and global catastrophic risks in a proportional way that reflects the probability and severity of a certain risk. This approach makes it possible to develop a governance regime in coherence with relevant and morally justified core values of a humane world order that is aiming for future scientific and technical advances in a responsible manner: these are the human right to life and the human right to freedom of science.

The human right to health is prima facie an important right for improving the lives of many individuals in different states in the twenty-first century. In order to bridge the gap between bioethical principles and human rights, *I. Glenn Cohen* considers the human right to health and the human rights norms' focus on harms to identified lives rather than statistical lives. His starting point is to differentiate between who is a moral agent and who is a moral patient. The former is the one who bears moral responsibility, the latter the one to whom moral obligation is owed. The paper deals with the latter notion and the question of a human rights patient to the human right to health: *Cohen* asks to what extent should a human right to health focus on identified lives as opposed to statistical lives and whether a human right to health ought to encompass as its moral patients only those who currently exist, or additionally those who will certainly exist as well as possibly those whose existence may be contingent on the decisions we make. One of his questions is whether a human right to health treats contingent persons (e.g., if a person comes into existence because of a sperm donor that was chosen in order to prevent an illness) as its moral patients. A point of departure is the principle of the equal moral worth of all human lives. Nonetheless, there are arguments for favoring identified lives: these are (un)certainty (we know the claims of the identified lives); negative/positive side effects (we may experience discomfort in denying resources to identified lives, because of our biases as human beings); and legalism (a focus on identified lives may be legally necessary). The author, however, establishes reasons why a human right to health might not be best formulated so as to favor identified over statistical lives. It seems implausible that a human right to health ought to treat children who do not yet exist but are certain to exist in the future as improper moral patients. An argument supporting this is the one for producing the most well-off

population of future children, that focuses of the population as a whole (non-person affecting benefits). It would be a valid argument if contingent persons are moral subjects of the human right to health. Arguing for this, however, also leads to very complicated moral questions. In the end, for the human right to health, it means that – in view of how it serves as a guide to how resources must be allocated – at a minimum one must decide whether or not to limit this right to person-affecting considerations.

Alicia Ely Yamin examines the right to health from a different angle. In her paper "Democracy, Health Systems, and the Right to Health: Narratives of Charity, Markets, and Citizenship," she analyzes the problem of health inequities and the growing phenomenon of health rights litigation in courts, considering both its potential and its limitations. Questions persist as to when and how judicialization can lead to greater equity in health rather than distorting priorities and budgets. *Yamin* starts by setting out an account of what treating health as a right, especially an international human right, means. It is important to note, for instance, that to claim that health is a right is not to claim a right to be healthy, but to claim that health has special value and is not merely a commodity to be allocated according to the market mechanisms. Another implication is that health is subject to societal influence. Economic and social equality are inextricably linked to elements of a human rights framework, including active participation by those affected by political decisions. Hence, taking the idea of a right to health seriously requires a just health system. The author explains that health questions can reflect democratic values and then focuses on the justness of a health system. Justness means the legitimacy of process through which priorities are set. Concerned with the procedural aspect of rights, she argues that this reflects our understanding of human dignity: people shall actively participate in the health-related decisions that affect them. Furthermore, courts can play an important role in regulating the power of private actors in health systems and in catalyzing greater public deliberation regarding the contours of an enforceable right to health. *Yamin* concludes that the democratic legitimacy of the right to health depends upon reforming human rights frameworks and strategies to explicitly address pathologies in economic and political power and designing methods to promote meaningful participation in health systems.

Another major challenge for the international order of the twenty-first century, one reason why we could speak of a world in disorder, and an important problem for the implementation of human rights norms are absent states. In his paper on "Political Legitimacy and Private Governance of Human Rights: Community-Business Social Contracts and Constitutional Moments," *Tyler Giannini* focuses on the problem of how to maximize

human rights protection in a situation where a functioning State is absent or largely so. The core questions of the paper are: what are the implications of privatizing human rights governance with regard to creation and legitimacy of institutions, and how should one think about private actors that take on the functional role of public actors? The author explores the implications of private actors' involvement in human rights governance, and examines the risks and new opportunities for advancing rights while also raising questions about whether and when such governance is legitimate. He argues that good governance is essential for human rights protection, but explores how legal form and substantive outcomes without a political foundation are less likely to lead to lasting and sustainable good governance. He argues that depending on the severity of the state's absence, the traditional state-citizen social contract should be supplemented or even replaced by a community-business social contract. In addition to social contract theory, communities and business should approach particular private governance issues through the lens of a constitutional moment that leads to agreed parameters and principles. Constitutions are a functional way of describing a given political order, and when businesses play a constitutional role in administering traditional state functions like a sovereign, political legitimacy analysis associated with social contract theory and constitutionalism should apply. In doing those, the political elements of legitimacy will be part of the analysis, avoiding an undue focus on procedural legitimacy (understood as legal form) and substantive legitimacy (understood as outcomes).

Iris Goldner Lang discusses the current crisis regarding the mass influx of refugees in Europe and shows how the new EU measures and policies being adopted may not only jeopardize asylum seekers' rights, but also destabilize the EU regime of fundamental rights and lead to a changed paradigm of European Union law. Her concern is the decrease of rights for refugees in the case of mass influx. She argues that the EU political discourse related to refuges is dominated by discriminatory statements of some EU Member States' political leaders, which challenge the core EU values, and that – at the same time – the refugee influx has led to a partial dismantling of EU asylum rules: EU Member States violate EU-based human rights obligations; and the EU response to the refugee influx was partially not legitimate and not in compliance with human rights law. Hence, *Goldner Lang* analyzes that current EU asylum law is inadequate in responding to mass refugee inflows. The relevant Dublin Regulation (and especially its state-of-first-entry rule) tries to ensure that a Member State is responsible to determine a certain asylum case and to avoid "asylum shopping." However, the state-of-the-first-entry rule, which is applicable to the majority of asylum cases, places those EU

Member States that are geographically most exposed, especially Italy and Greece, under the highest pressure. This is not in line with the EU principle of solidarity. Additionally, the last years of high refugee inflows have shown deficiencies in the asylum systems of some EU Member States. These states are not capable or do not have the capacity to treat asylum applicants in a human rights compliant manner. Nevertheless, the Dublin state-of-first-entry rule is based on the (normative) principle of mutual trust among EU Member States, i.e. the premise that there is an adequate level of quality and efficiency in the asylum systems of every EU Member State and that these systems are in compliance with EU law and international law, including human rights standards. As a consequence, the current Dublin Regulation remains unsuited to respond to the challenge of high refugee inflows in a human rights compliant manner. Besides, modifications of the Dublin rules, such as the Dublin IV Proposal, could further violate the asylum applicants' human rights because applicants would in certain cases, not have a right to an effective remedy for denial of protection.

At the core of *Vlad Perju*'s paper, "On Uses and Misuses of Human Rights in European Constitutionalism," lie the questions of what are constitutional foundations in a new age of integration as well as whether and how human rights were part of the legal system of the European Union. *Perju* starts with the conception of EU constitutionalism and the myth that human rights were absent from the genesis of the EU legal order. According to his "radical vision of European constitutionalism," human rights are not late additions but have been part of a European legal order since the beginning. Therefore, the famous 1974 *Solange I* decision of the German Constitutional Court – holding that EU law lacks supremacy over German law so long as the European legal order fails to include human rights protections – should not be interpreted as a successful national rebellion against European supremacy on a human rights platform. Instead, human rights have been an early means (later replaced by the tool of democracy) to a larger end, which was to prevent the Union from moving toward statehood. Even if there was no bill of rights included into the Treaty of Rome and the Treaty of Paris, the author argues that rights-granting provisions in the Treaty of Rome were visible. These include the four fundamental freedoms (goods, capital, services, and workers), general principles of law (legal certainty, fair hearing, good faith, etc.) and the rule of law enforced by the European Court, that are (and were in 1974) part of the European legal system. Human rights therefore have been used and misused alongside other doctrines – such as, for instance, self-government – as part of the political strategy of constitutional resistance to European unification. Identity appears, according to the author, as the normative

background of human rights. In a later decision of the German Constitutional Court (esp. the 1993 *Maastricht* ruling) identity was linked with self-government. Today, the normative medium is that of identity and democracy. In the end, the study of the history of human rights in the European Union can be read as an argument that some of the constitutional bases for deeper integration are present in the foundational doctrines of European constitutionalism.

III. CONCLUSION AND OUTLOOK

In May 2016, when the symposium on human rights, democracy, and legitimacy took place, we were concerned about the increasing of challenges and threats that appeared to the concepts of human rights, democracy, and legitimacy because of changes in the national and international order. These challenges and threats did not disappear during the year that followed but rather have been materializing and growing.

There is no dispute that there are norms of right and wrong that apply to states and other entities exerting power,[14] but it is unclear which set of norms defines the wrongness that might frame our century and limit those entities that possess power over individuals. We might conclude that we need a continuing debate concerning problems that already arose in the twentieth century, as, for instance, the priority between individual rights and economic development or the debate about the questions of supremacy of constitutional rights and human rights. If we assume that human rights are norms that require states to deviate from otherwise permissible choices of laws,[15] there is still reason for the optimism that human rights will matter in the twenty-first century because of the belief that people of different races, classes and creeds come together on the bases of reason and conscience to create more just societies.[16]

From a normative perspective, therefore, on the one hand, respect for some fundamental set of human rights seems essential to the legitimacy of governments in the modern international system: a state exists for the sake of its population and legitimacy requires reference to the standards that aim to ensure the proper exercise of power by governments over the governed as human rights law does.[17] Therefore, even if the UN General Assembly laid

[14] Cf. below, Frank Michelman, Part I, Chapter 3.
[15] Cf. below, Frank Michelman, Part I, Chapter 3.
[16] Cf. below, Alicia Yamin, Part II, Chapter 8.
[17] Cf. below, Gerald L. Neuman, Part I, Chapter 2.

down the Universal Declaration of Human Rights nearly 70 years ago, human rights are still a common standard of achievement for all peoples and nations.[18]

On the other hand, we may not overlook the additional risks posed to an overburdened human rights system. How can we deal with existential risks,[19] bioethical challenges,[20] the problems of a fair health system,[21] private companies more powerful than states,[22] or the mass influx of refugees,[23] if we rely on a framework of human rights that was drafted with different targets in different times? We inherited from the twentieth century the project of rights,[24] and one of the greatest challenges seems to be not to undo it – whether by failing to adjust it and hence making it irrelevant, or by broadening it so far that it becomes blurred, unrecognizable, and inoperable.

Therefore, an important task for our future seems to be to articulate a set of human right norms that can continue to serve as the standard for the legitimacy of governments and take into account demands of justice.[25] If this is the case, then we can state that human rights would spell out security and that legitimacy can count as the minimum requirement of a durably peaceful global system.

One author has stated in his paper: "*If it is true that the past bears lessons for the future, it is never without a present-day struggle over which ones to teach.*"[26] This book is part of this present-day struggle – a struggle that did not just start but that has to go on with great intensity, including all who are concerned with human rights, democracy, and legitimacy in the twenty-first century.

[18] Cf. below, Gerald L. Neuman, Part I, Chapter 2.
[19] Cf. below, Silja Voeneky, Part II, Chapter 6.
[20] Cf. below, I. Glenn Cohen, Part II, Chapter 7.
[21] Cf. below, Alicia Yamin, Part II, Chapter 8.
[22] Cf. below, Tyler Giannini, Part II, Chapter 9.
[23] Cf. below, Iris Goldner Lang, Part II, Chapter 10.
[24] Cf. below, Gerald L. Neuman, Part I, Chapter 2.
[25] Cf. below, Mathias Risse, Part I, Chapter 1.
[26] Cf. below, Samuel Moyn, Part I, Chapter 5.