Introduction

Why dedicate another collection to the public/private distinction? Countless articles and books have been written on this subject, and numerous symposia and conferences dedicated to it. Is there anything left to be said? Are there any questions left unanswered? The articles collected in this issue not only reveal that there is still much to be said, but also emphasize the need for a step forward in legal discourse on the public and the private — a step beyond the distinction itself.

The question posed in the issue's title — *beyond distinctions?* — can be understood in two ways. First, it relates to the longstanding debate on whether the public and the private are still distinct, or whether they have — fully or partially — converged. Some articles in this issue discuss the demise of the distinction. They show that public values and norms can be found within the private sphere, as can private considerations in the public sphere, and that public norms are being implemented with respect to private entities. On the other hand, some articles show that despite the common image of a convergence between public and private, the distinction still informs legal discourse and trenchantly affects the formation and implementation of rights, regulations, legal doctrines, and social policies.

This kind of inquiry also deals with the role and consequences of the distinction and of its demise. Some articles show that the distinction has traditionally served as a means of economic development, allowing private property to be secured and encouraging investments by entrepreneurs. Another article warns that the convergence of the public and the private might bear negative consequences, specifically the expansion of social inequalities, since it leads to a selective implementation of public values in private disputes. At the same time, others point to one of the major downsides of the persistent public/private distinction, particularly in an era of growing privatization: prioritization of the interests of private corporations over public values and goals. Each article problematizes a different aspect, role and consequence of the distinction and of its demise. Each article pulls in a different direction.

The ambivalence that characterizes the question whether there is still a distinction between public and private and what its consequences might be leads us to a different and more radical meaning of the question posed in this issue's title. The ambivalence implies that what matters is not whether there is a distinction and what its consequences are, but rather what lies *beyond* the distinction and its demise — beyond the major significance attributed

to them in legal discourse. If we keep asking if there ever was a clear line between the public and the private, whether it still exists, and how it has been relocated throughout history, and even if we argue that the distinction is past its prime, we tie ourselves time and again to the same old terminology and classification. We disregard other aspects of the law that do not rely on the distinction or on its demise — aspects that are neither "private" nor "public" in essence. These are the aspects it is crucial to discuss, explore and develop in contemporary legal discourse.

One such aspect is the radicalization of democracy. The term "radical democracy" was coined in the mid-1980s, and has since been developed in many disciplines, including philosophy, sociology, and political science. It promotes broad civil participation in both public and private decision-making processes; it encourages a variety of voices and opinions, reflecting societies' various classes, genders and races; and it does not focus on the need to reach a conclusive decision by majority or consensus, but rather on the participatory process itself. Since radical democracy is not limited to specific institutions or spheres, it challenges dichotomies inherent to the public/private distinction. It undermines the notions that each sphere can be essentially characterized and defined. It focuses on the specific content and procedures of various social, political and legal institutions, rather than on their characterization as "public" or "private." However, despite the rich, diverse and multidisciplinary literature on radical democracy, it has rarely been discussed in legal scholarship.

The radicalization of democracy emerges as a central theme — explicitly and implicitly — in all the articles in this issue. It is present in the promotion of public civil participation in a globalized world, which is tremendously influenced by private powers; and it encourages the participation of workers in decision-making processes in private workplaces. It lies at the basis of understanding the variety of voices, actors and considerations — both public and private — within the market. It reveals the public features of private settlements; and it constitutes the reconceptualization of social laws. These and other instances of radical democracy are embedded in the articles collected here.

Therefore, this issue is not just another collection about the public/private distinction and its demise, but rather a springboard for renewal in legal discourse. It goes beyond the questions regarding the distinction itself towards developing new and more complex analysis that focuses on the essence and structure of institutions and processes, while undermining the significance of their traditional classification as "private" or "public."

The opening article, by Hila Shamir, lays the foundations for such an approach. It begins by briefly stressing the history of the public/private debate in legal literature and then articulates the challenges to the distinction, pointing to the spheres' fluid and changing characteristics and borders. Despite this fluidity,

Shamir shows that legal discourse still clings to a vision of a clear public/private distinction, and this bears negative consequences. She demonstrates this by examining the test-case of prison privatization in Israel. Shamir analyzes the Supreme Court judgment that declared legislation establishing a private prison in Israel unconstitutional, and shows that the majority took for granted a clear distinction between the private and the public, disregarding their changing and unstable nature, borders and content. The court assumed, for example, that private, profit-oriented entities cannot serve public goals. In so doing, the court not only ignored the way in which the legislature had crafted a carefully balanced and detailed blueprint for the privatization of prisons, which could have promoted efficiency without infringing on human rights, but also missed a significant opportunity to consider the changing nature of the traditional public/private distinction, and to explore the promise embedded in looking beyond it.

The shifting meanings of the distinction are what animates Xingzhong Yu's article, which explores distinction and fusion of the public and the private in historical and contemporary Chinese law. Yu opens with the long period of the dynasties, when public values and norms were enforced on private people and entities. This trend continued, albeit in a quite different manner, after the foundation of the People's Republic of China (PRC) in 1949, when socialist policies were implemented and the public/private distinction was rejected, being identified with the bourgeois legal theory. After the 1978 Cultural Revolution in China, private law began to evolve and was considered a major factor in national economic development, allowing a strong private economic sector to flourish. Interestingly, this development was not intended to protect private citizens' rights; nonetheless, citizens have begun using private property legislation, since the 2000s, to resist forced evictions from homes or land takings. Currently, Yu recognizes two prominent trends in Chinese law: on the one hand, the influence of private considerations in public law, and on the other hand the application of public values and norms in private relations. These trends reflect some confusion between the public and the private, but Yu concludes by estimating that the distinction between the two still persists in Chinese law, and has not yet completed its role in China's social and economic development.

Robert Hockett and Saule Omarova provide a rich discussion of the promise embedded in looking beyond the public/private distinction in the realm of the market. The authors discuss how the two traditional roles of the government in the market — regulating it from above and setting the market's foundations from below — rest on the rigid distinction between public and private and align with the view of government as an *inherently public* actor. An additional role is usually overlooked: the government's participation in

the market as a *private* actor with *public* ends. This role is neither public nor private in essence: it highlights the dependence of markets on key public actors, who use "private" market tools in order to maintain markets, expand their viability, prevent them from collapsing, or move prices. This role, therefore, undermines the public/private distinction and its significance. As the full potential of this role of governments has yet to be realized, Hockett and Omarova propose further development and theorization.

The next article, by Leora Bilsky and Talia Fisher, discusses the public implications of settlements in three arenas: private civil disputes, public structural reform suits, and transnational Holocaust lawsuits (THL). Against the common perception of settlements as nullifying the public advantages of adjudication, Bilsky and Fisher explore the ways in which they actually promote public goals such as fact finding and norm setting. For example, they show how a THL settlement process succeeded in forcing private corporations to open and reveal their archives, in establishing public inquiry commissions, and in encouraging corporations to independently investigate their past relations with the Nazi regime and their consequent responsibility for Nazi crimes. The settlement led to the exposure of important historical documents and thus achieved a significant public goal. Bilsky and Fisher compare two THL cases, revealing that one succeeded much more than the other in promoting such public goals. They conclude that what matters is not whether a case is determined by adjudication or by settlement, i.e., whether the process is considered "public" or "private," but rather how the process is handled. Settlements, in this context, are neither essentially private nor essentially public, but rather may fulfill both public and private goals simultaneously.

Doreen Lustig and Eyal Benvenisti's article explores another aspect of the interpenetration of public and private in the context of multinational companies (MNCs) active in foreign countries. The authors begin by recalling John Stuart Mill's theory of colonial governance, which rejected the idea of a Good Despot that could treat foreign communities with fairness and dignity. However, while Mill aimed his critique at the colonial state and not at private entities (such as companies), Lustig and Benvenisti turn Mill's critique on itself, by showing that MNCs are in fact a foreign and distant analog to Mill's Good Despot. MNCs tend to fulfill some roles traditionally exercised by governments, on the one hand, but strive on the other hand to maintain their "private" profit-seeking nature. Consequently, they exclude local communities from participating in decision-making processes regarding crucial elements of their lives. Lustig and Benvenisti conclude that the identity of the actor (state or corporation) is less important than ensuring democratic decision-making procedures with genuine voice for the citizenry.

Guy Mundlak's theme is also the influence of globalization and privatization on democracy in the context of the complex and controversial idea of workplace democracy. Mundlak examines the varied justifications for workplace democracy, including the participation it enables all affected parties to enjoy, its contribution to the workers' self-fulfillment, economic wellbeing and political empowerment, and the way it turns the workplace into a learning laboratory for democracy. He then turns to discussing the main reasons for the demise of workplace democracy: marketization and globalization. Both undermine the sense of community, which was a dominant feature of the workplace during the Fordist labor regime, until World War II. However, Mundlak highlights two contemporary phenomena that may point to a new form of workplace democracy. The first is the growing reliance on proceduralism in labor law, such as the obligation for due process, transparency and compliance processes. The second is the multilayered arena in which labor takes place, and the various public and private agents that shape it. In the wider context, the revival of workplace democracy serves as a blueprint for further research on the demise of the public/private distinction and the decline of its significance.

Contrary to the picture drawn by the articles thus far, of a growing fusion between the public and the private, Yishai Blank and Issi Rosen-Zvi challenge the widespread assumption that the public/private divide no longer exists, particularly in the realm of environmental regulation. The authors show that in fact the "private" and the "public" permeate this discourse, which relies, explicitly or implicitly, on a strict divide between characteristics that are considered inherently "private" (efficiency, selfishness, profit-seeking, etc.) and those that are considered "public" (altruism, public-good orientation, inefficiency, and so on). The authors emphasize the major flaws of the persistent distinction: the consistent preference for private goals over public ones, the problematic consequences of the *de facto* distinction *vis-à-vis* the fantasy of a frictionless and undivided world, and the disappearance of a "third way." A third way, according to the authors, would allow both public and private entities to have a genuinely merged public and private nature. It would acknowledge the public, coercive nature of local governments as well as their private, independent and profit-seeking nature. It would encourage the legal enforcement of private corporations' voluntary self-regulation, based on the business-case approach and the corporations' duty to its shareholders. The third way, therefore, would overcome not only the distinction, but also the significance attributed to the public/private classification of entities and institutions.

The issue ends with a warning from Mitchel Lasser. Lasser offers a critique of the jurisprudence of the Court of Justice of the European Union (CJEU) in respect to E.U. fundamental rights and freedoms. The critique is based

on the Scandinavian *Viking* labor dispute, in which the CJEU implemented a proportionality test and struck a balance between fundamental rights and freedoms of private parties. As Lasser shows, not only did the CJEU ignore the special framework and context of the Scandinavian labor regime by applying the European regime of fundamental rights and freedoms to a local dispute, but it also subjected private parties to public norms. Furthermore, Lasser reveals the selectiveness of the CJEU's approach, which awards preference to firms' freedom of movement and establishment over the workers' and unions' right to collective action. Thus, Lasser concludes and warns, the CJEU does not bridge the public/private divide, but mistakenly and selectively overrides it. However, Lasser does not suggest that the solution is to maintain a strict distinction between the private and the public, but rather to engage in a more careful, balanced and nuanced examination of concrete parties and of the context of specific disputes, while paying attention to the interrelation between European norms and local laws and institutions. His analysis may imply that the problem lies in the manner in which "public" or "private" norms are applied in specific cases, and not necessarily on the nature of the applied norms themselves.

The articles collected here are the product of the *Public and Private, Beyond Distinctions?* Conference, held at Cornell Law School in October 2012, cosponsored by Cornell Law School and the Cegla Center for Interdisciplinary Research of the Law, Buchmann Faculty of Law, Tel Aviv University. *Theoretical Inquiries in Law* thanks Mitchel Lasser, Roy Kreitner, and Hila Shamir, the organizers of the conference, for bringing together an outstanding group of contributors and for serving as guest editors of this issue, Ruvik Danieli for style-editing the articles, and all the conference participants and commentators. Comments on the articles published in this issue are available online in the *Theoretical Inquiries in Law Forum* (http://www.degruyter.com/view/j/til).

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