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Claiming 'Private' to Evade Democracy? The Leviathan Gas Deal and the Jordanian Constitutional Court

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In 2014, a Jordanian activist stumbled upon [an article](#) in the New York Times claiming that Jordan is planning to sign an energy deal with a number of multi-national corporations planning to exploit gas fields controlled by Israel in the Mediterranean. A few weeks later, the Jordanian minister of energy confirmed the claims in a press conference, the news was met with condemnation from the majority of parliamentary members, political parties, unions and civil actors in Jordan, as [thousands took to the streets](#), with a good number of activists arrested and/or harassed for their involvement. These movements led to the establishment of [the campaign against the gas deal](#). Popular dissent for the deal is backed by economic, policy and moral concerns especially with the lack of transparency on either side of the bargain, as more evidence showed that the deal was driven on an agenda of foreign relations rather than the wellbeing of the fragile Jordanian economy and its poverty stricken public. The absence of legal tools to contest the deal led the coalition of political parties to organise a symbolic popular court where the concerns of the Jordanian public were laid out. The government did not provide proper responses, claimed that secrecy clauses forbade such intervention, and that it is already too late as sunset clauses in the contract would put a heavy burden on the economy. On the Israeli side, civil society actors have expressed environmental concerns surrounding the extraction of gas leading to a [case at the Israeli Supreme Court](#) that temporarily halted the extraction.

Recent [leaks](#) shed further light on the terms of [the contract](#) (in Arabic), reigniting [public dissent](#). In sum, the contract's signatories were the government owned electricity company NEPCO, and NBL Jordan Marketing Limited, an offshore corporation registered in the Cayman Islands and owned by three Israeli corporations: Delek Drilling, Avner Oil Exploration, Ratio Oil Exploration alongside a subsidiary of the US based multi-national corporation Nobel Energy. Nevertheless, the contract confers rights and obligations on the Jordanian, Israeli and US governments (which is the main guarantor of the contract). The contract regulates the supply of 45 billion cubic meters of natural gas to be used for powering electricity in Jordan for over 15 years, for the amount of \$10 billion, a rather big commitment for such a small country. Most notably: the deal limits Jordan's capacity to exploit its local gas, if such a source were to be discovered during the period of the contract; it mandates a five year secrecy clause over any relevant contracts and arbitration awards; it contains a stabilisation clause that explicitly excludes consideration of changes in Jordanian law as a *force majeure*; the deal is also designed in a manner that escapes the Jordanian taxation regime at all stages; and as per dispute resolution, the contract explicitly excludes the jurisdiction of Jordanian courts and assigns an arbitration agreement. It also provides for uneven cancellation terms in favour of the of the multinational corporations.

The contract stresses its own private nature, pre-emptively excluding any public related counterclaims. The relevant social reality is in contrast to this clause, as the proceeds will be paid

from a governmental budget, the gas will be used to supply electricity to the Jordanian public, and the buyer is a state-owned corporation with a monopoly on the supply of this basic service, all of which are factors that confirm the public's interest in contract. Such terms stress the exclusion of public-oriented considerations that can be used as counterclaims in arbitration in case NEPCO breaches the contract on the basis of their obligations towards the Jordanian public. Such clauses dodge recent arguments for the inclusion of human rights considerations in investment law arbitration found for example in [Urbaser v. Argentina](#) and [LG&E v. Argentina](#), where Argentina put forth counterclaims based on its duties towards the public.

As indicated previously, no internal mechanisms exist to challenge the decision as there is no standing for civil actors representing the public interest in Jordanian courts. In an attempt to overcome public outrage exemplified in repetitive [parliamentary dissent](#), the government posed a question to the constitutional court (created in 2011 as a part of a reform package in response to mass protests against the government) as to whether or not parliamentary validation is required for a contract between a state-owned corporation and a private corporation.

This question touches upon a constitutional issue that has been deeply controversial; the relevant constitutional clause stipulates that a treaty or an agreement that places considerable costs on the budget of the state, or touches upon the public or private rights of Jordanian citizens is not valid without the consent of the parliament. However, a prior opinion by the High Committee for the Interpretation of the Constitution in 1955 reasoned that this is only valid with regard to treaties between two states thus excluding parliament's vote from economic agreements with other legal persons. This is a decision that many deem to be highly politicized.

The [recent opinion](#) of the constitutional court yields the same effect as it states that: "agreements entered by the state with any natural or legal person do not fall under public international law", concluding that it falls outside parliamentary considerations. The statement is in agreement with main stream positivist account of public international law, but remains contested in scholarly literature. The absence of corporate legal personality in public international law finds its roots in liberal separationist discourses and its fruits are, arguably, the systematic impunity of multi-national enterprises in the global sphere and especially with relation to their conduct in the global south. Moreover, this statement has been contested in the history of public international law as corporate legal personality was affirmed in the course of the Nuremberg Industrialists trials (ex: [I.G. Farben](#)), and clearly stressed in the [works](#) of the group of eminent experts on transnational corporations in the 1970s at the UN. More recently, an increasing number of public international law instruments refer to corporate legal personality with relation to [crimes against humanity](#), [environmental discourses](#) and [human rights](#).

The court also stressed that the status of NEPCO as a corporation denotes that it is governed strictly by private law rather than public law and hence outside the realm of public consideration. This statement stands correct when viewed from the perspective of Jordanian law, as its conception of the public/private divide is heavily reliant on French law from which it was transplanted. But from a more global perspective, this conception is lacking in accuracy as the status of publically owned corporations remains contested. In this respect, the indeterminacy of the public-private distinction enshrined in international law, and transplanted into the laws of developing countries has always posed a risk to democracy because the transfer of governmental functions from the public sphere to the private sphere can deprive parliaments of their capacity to scrutinise functions which have been transferred, especially in cases where the judicial system provides no lee-ways for strategic litigation.

This indeterminacy is especially relevant in the case in hand, where the activity involved could have been seen as a function of a public character for which Jordan should be responsible. In this respect, Article five of [the ILC Articles On State Responsibility](#) provides that the actions of entities empowered by the state to exercise functions of a public character may be attributable to the state. The commentaries of the ILC articles demonstrate that this attribution is based on how the activity is conferred on the entity and the purposes for which the activity is to be exercised. In the case in hand, the question arises as to what constitutes 'functions of a public character'. The commentaries of the ILC articles provide a brief response: the determination of public character is dependent on the understanding of the society in question. This statement by the ILC is perplexing once placed in the context of a developing state such as Jordan, where the understanding of what constitutes a 'function of a public character' is derived from the understanding of international financial institutions rather than that of local jurists; as these institutions are the main influencers of Jordan's economic agenda, constantly stressing on the elimination of a welfare state, indirectly reshaping the meaning of governmental function.

This disparity could have been a window for progressive legal reasoning; the actions of NEPCO could possibly be attributed to the state under Article five of the ILC articles, if a monopolistic supply of electricity is understood as a governmental function. Likewise, the contract clearly places direct logistical and financial obligations on the Jordanian government alongside NEPCO.

The opinion of the court safeguards governmental authorities from the will of the people, and completely overlooks a united parliamentary stance, using the shield of the private-public distinction. Moreover, it stands in the opposite direction of legal developments aiming to integrate public law considerations into economic dealings, especially in fragile economies of the global south which are prone to foreign pressures. Whether or not the gas deal will proceed remains a mystery, but risks to its progression are more real in Israeli courts than they are in Jordanian courts despite constant public dissent.