



**A position assessment paper issued by "SHAMS" center on the possible second extension of the declaration of a state of emergency in Palestine**



مركز إعلام حقوق الإنسان والديمقراطية «شمس»  
Human Rights & Democracy Media Center «SHAMS»

The Consultative member of the United Nations Economic and Social Council (ECOSOC)

Observer member of the Permanent Arab Committee for Human Rights of the League of  
Arab States

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## INTRODUCTION

Human Rights and Democracy Media Center "**SHAMS**", The Consultative member of the United Nations Economic and Social Council, in the Palestinian territories issue paper on the possible second extension of the declaration of a state of emergency in Palestine, which will end on 05.05.2020, in a special series of papers launched in light of the outbreak of the new Corona virus pandemic. The paper includes an introduction about the first declaration and extension attached to the extension decree from the Official Gazette, and the national legal framework governing the state of emergency in Palestine represented by the basic and international law represented also by the Covenant on Civil and Political Rights, and a reading of the legality of the emergency declaration, the first extension and scenarios after the end of the first extension - there is no point in a second extension, and finally, position of "**SHAMS**" Center.

On 5/3/2020, President Mahmoud Abbas declared a state of emergency in all Palestinian territories for a month, through Presidential Decree No. (1) of 2020 in efforts to confront the Corona pandemic, based on the Basic Law of the Palestine Liberation Organization and the amended Basic Law of 2003 and its amendments, especially the provisions of Chapter Seven of it, stated in the decree: "The competent authorities shall take all necessary measures to confront the risks resulting from the Coronavirus, protect public health, and achieve security and stability. This state of emergency is for a period of 30 days.

Following this declaration, the government took a set of decisions and preventive measures to prevent the spread of the virus, as follows:

1. The declaration of a state of maximum emergency in all the Palestinian territories for a full month
2. Prohibition of movement between provinces, except in extreme and necessary cases
3. Close all political and religious areas
4. Close all educational facilities from schools, universities, institutes and kindergartens for a whole month
5. Cancellation of all hotel reservations for tourists
6. We are considering closing crossings and borders with the world
7. Canceling all conferences in Palestine
8. prevent strikes and mass movements in all provinces of the country
9. Any media statements are prohibited from any official except those authorized by the Prime Minister
10. The security forces will be deployed in all its equipment in all provinces.

The declaration of the state of emergency was subsequently extended for another month ending on 5/5/2020 through Presidential Decree No. (3) of 2020 issued by President Mahmoud Abbas based on the recommendation of Prime Minister Muhammad Shtayyeh, and which was based on the recommendations of the Health Committee and the National Emergency Committee which was based on the recommendations of the Health Committee and the National Emergency Committee for managing and following up on facing the Corona virus in Palestine. This was accompanied by a civil and legal debate on the extent of the constitutionality of the step and the necessary need for it in light of the availability of legislative alternatives provided by the Palestinian legal system, this is likely to happen again with the

approaching term of the first extension. Below is the extension decision taken from issue (166) of the Official Gazette.

## مرسوم رقم (3) لسنة 2020م بشأن تمديد حالة الطوارئ

رئيس دولة فلسطين  
رئيس اللجنة التنفيذية لمنظمة التحرير الفلسطينية  
استناداً للنظام الأساسي لمنظمة التحرير الفلسطينية،  
وللقانون الأساسي المعدل لسنة 2003م وتعديلاته، لا سيما أحكام الباب السابع منه،  
وبعد الاطلاع على المرسوم الرئاسي رقم (1) لسنة 2020م، بشأن إعلان حالة الطوارئ،  
وعلى قرار بقانون رقم (7) لسنة 2020م، بشأن حالة الطوارئ،  
وفي ظل الظروف الاستثنائية التي يمر بها الوطن،  
وعملاً بواجباتي الدستورية في رعاية مصالح الشعب الفلسطيني رعاية كاملة،  
وبناءً على الصلاحيات المخولة لنا،  
وتحقيقاً للمصلحة العامة،

رسمنا بما هو آت:

### مادة (1)

تمديد حالة الطوارئ لمدة ثلاثين يوماً في جميع الأراضي الفلسطينية، لمواجهة تفشي فيروس "كورونا".

### مادة (2)

تستمر جهات الاختصاص باتخاذ جميع الإجراءات اللازمة لمجابهة المخاطر الناتجة عن تفشي الوباء،  
وحماية الصحة العامة، وتحقيق الأمن والاستقرار.

### مادة (3)

على الجهات المختصة كافة، كل فيما يخصه، تنفيذ أحكام هذا المرسوم، ويعمل به من تاريخ  
2020/04/04م، وينشر في الجريدة الرسمية.

صدر في مدينة رام الله بتاريخ: 2020/04/03 ميلادية  
الموافق: 10/شعبان/1441 هجرية

محمود عباس

رئيس دولة فلسطين  
رئيس اللجنة التنفيذية لمنظمة التحرير الفلسطينية

## The national legal framework regulating the state of emergency in Palestine

The amended Palestinian Basic Law of 2003, which is considered as the constitution, regulated the state of emergency in three basic articles, which are as follows:

### **1. Article (110) - Declaration of the state of emergency**

- When there is a threat to national security due to war, invasion, armed rebellion, or the occurrence of a natural disaster, a state of emergency may be declared by decree of the President of the National Authority for a period not exceeding thirty days.
- The state of emergency may be extended for another thirty days after the approval of the Palestinian Legislative Council by a two-thirds majority of its members.
- The decree declaring the state of emergency must clearly state the objective, the area it covers and the time period.
- The Legislative Council has the right to review all or some of the procedures and measures that were taken during the state of emergency at the first meeting at the parliament following the declaration of the state of emergency or during the extension session, whichever is earlier, and to conduct the necessary questioning in this regard.

### **2. Article (111) - Restricting limitation on rights and freedoms**

It is not permissible to impose restrictions on fundamental rights and freedoms except to the extent necessary to achieve the goal declared in the decree declaring a state of emergency.

### **3. Article (112) - Arrest in a state of emergency**

Any arrest resulting from the declaration of the state of emergency shall be subject to the following minimum requirements:

- Any arrest made pursuant to a decree declaring a state of emergency is reviewed by the Attorney General or the competent court within a period not exceeding fifteen days from the date of arrest.
- The arrested has the right to appoint a lawyer of his choice

## **The International legal framework regulating the state of emergency in Palestine**

In April 2014, the State of Palestine acceded to the International Covenant on Civil and Political Rights, the provisions of which regulated the declaration of a state of emergency and imposed restrictions on the contracting states in this regard, as Article (4) of the Covenant stipulated that:

1. In cases of exceptional emergency threatening the life of the nation, whose existence is officially declared, the States Parties to the present Covenant may take, within the narrowest limits required by the situation, measures that do not comply with their obligations under this covenant, provided that these measures do not contradict their other obligations under international law and do not involve discrimination, the only justification for which is race, color, sex, language, religion or social origin.
2. This text does not permit any violation of the provisions of Articles 6, 7 and 8 (paragraphs 1 and 2), 11, 15, 16 and 18.
3. Any state party to this covenant that has used the right of derogation must immediately inform the other states parties, through the Secretary-General of the United Nations, of the provisions which it did not comply with and the reasons that led them to do so. It shall, on the date on which it terminates the

derogation, inform the Secretary-General of the United Nations again and in the same manner.

In spite of the blurring of the status of international agreements, treaties and instruments in the Palestinian legal system, especially in light of the fact that the Basic Law does not address their status and suffices to indicate in its Article No. (10) the need for the National Authority to work without delay to join regional and international declarations and covenants that protect human rights and the problem of not publishing in the official gazette so that the agreements take their natural and clear space and the interpretative constitutional court decision issued on March 12, 2018 in application No. (2) for the controversial (3) judicial year, which decided the supremacy of international agreements on internal legislation, but linked that in a manner consistent with the loose terminology of the national, religious and cultural identity of the Palestinian Arab people, and therefore we return to the first argument square, However, but the constant is that international law is superior to national law.

The Vienna Convention on the Law of International Treaties of 1969 and 1986 came to establish the binding on international treaties on three principles that moved the agreement from the circle of custom to the written, and therefore it is customarily binding if it is not binding as a written treaty to the states that are not signatories to it. There is no contradiction between the two situations, but rather integration and closure, the first principle of the international treaties is *pacta sunt servanda*, the second one is the principle of good faith, and the third is the principle of the primacy of international obligations over obligations arising from national law. It is a fixed and well-established principle advocated by jurisprudence, recognized by states and



ruled by international courts long ago, and it is no longer a matter of debate or controversy between supporters of the doctrine of unity and supporters of the doctrine of dualism as before, even if it contradicts the state constitution.

In this case, the national law (the Basic Law) is compatible with international law (the Covenant on Civil and Political Rights) in that the extension of the state of emergency is a violation of the two frameworks.

### **A reading of the legality of the declaration of the state of emergency on 5/3/2020**

Article (110) of the amended Basic Law of 2003 stipulates that among the conditions, justifications and causes of declaring a state of emergency is the presence of a threat to national security. This article stated that the pillars of this threat include the occurrence of a natural disaster, it is a description that applies to the outbreak of the Corona virus, as it has been classified by the World Health Organization as a pandemic and a global epidemic. The article also stipulated, as explicitly understood, that the declaration of emergency be made through a decree issued by the President of the National Authority, and this declaration was made through Presidential Decree No. (1) of 2020. The article also stipulated that the decree should clearly include the goal, the geography and the period of time. In the Basic Law the goal was stated in its first article to confront the outbreak of the Corona virus and the geography of the legislation has been defined in all the Palestinian territories and its period of time is (30) days, in a way that does not exceed the constitutional conditions set by the Palestinian constitutional legislator. Accordingly, based on the general reading, the declaration of the state of emergency on 5/3/2020 was in line with the amended Basic Law of 2003. Especially since no serious indications were noticed of a widespread and systematic violation of freedoms and human rights by exploiting the

state of emergency. The restrictions on movement to confront the epidemic came in accordance with the text of Article (111) of the Basic Law.

### **A reading of the legality of the extension of the first state of emergency on 5/4/2020**

The declaration of the extension of the state of emergency for a period of (30) days on 5/4/2020 coincided with a widespread case of controversy in the civil and legal fields. With reference to the amended Basic Law of 2003, the state of emergency may be extended for another thirty days in one case, which is after the approval of the Palestinian Legislative Council by a two-thirds majority of its members, and the explicit article did not provide alternatives to the absence of the Legislative Council, which constitutes an obstacle and a milestone that reflects a deep crisis plaguing the Palestinian political system as a whole. The Palestinian-Palestinian division between Fatah and Hamas in July 2007 led to the disruption of the Council's work and its overthrow. It also paralyzed its ability to exercise its original legislative and oversight role in accordance with the amended Basic Law of 2003, which deepened the loss of the most important official tool of oversight and accountability for the performance of the executive authority, whether the presidency, the government or the security institution.

It also entrenches the absence of parliament as a *fait accompli*. Until the Palestinian President announced on 12/22/2018 that the Constitutional Court decided in its interpretative decision No. (10/2018) on 12/12/2018 to dissolve the Legislative Council and hold legislative elections within (6) months. It is the interpretative decision that has only been committed to its first part related to the solution, without holding elections for 14 years. ◌◌Accordingly and without going into the limits of

the powers of the Constitutional Court with regard to the solution and interpretation, and the extent of its compatibility with the previous interpretative decision No. (3/2016) issued by the same court, the mandate of the members of the Legislative Council has been extended until new elections are held. Without going into the details of the extent of the causation of the interpretative decision to dissolve the parliament, and the robustness of the procedures for establishing the court from the ground up, the absence of the Legislative Council, which is the only body authorized to approve the extension and with a two-thirds majority of its members, makes the first extension step On 4/5/2020, it is totally unconstitutional.

### Scenarios after the end of the first extension period on 5/5/2020 - The second extension is useless

The 30-day period extended to declare the state of emergency is about to expire on 5/5/2020, although there are indications that the executive authority intends not to extend it, including the decision of the Palestinian Monetary Authority to re-operate the bounced check system in the local market as of 5/5/2020 as was the case before the crisis. But, this cannot be considered a clear statement not to go towards a second extension, and while the Basic Law stipulated a two-thirds majority of the members of the Legislative Council for a one-time extension, it did not address in principle the possibility of an extension again from the ground up, which makes this step unconstitutional if it is taken, and requires reading scenarios and alternatives, which can be summarized as follows:

- 1- **Issuance of a decree by law in place of a decree:** Despite the apparent requirement of Paragraph (1) of Article (110) of the Amended Basic Law of 2003 that the state of emergency be declared by decree, Article (43) of the Basic Law granted the President of the National Authority The right to issue

decisions that have the force of law in cases of necessity that cannot be delayed, and in other than the sessions of the Legislative Council. This state of necessity applies to the outbreak of the Coronavirus, as well as the absence of the Legislative Council in the current political context. Although presidential decrees fall into the category of subsidiary-secondary legislation in the legislative hierarchy as it is a genuine legislative competence of the executive authority, it does not reach the strength of ordinary legislation issued by Parliament that is its original competence and although it is not believed that the application of the jurisprudential rule is that whoever has the most a fortiori has the least is consistent in this context. However, issuing a law decree that includes the terms of the state of emergency will be less harmful than issuing another decree of extension.

- 2- **Waiting for hours and then declaring the state of emergency with a new decree:** One of the scenarios proposed is cutting the period, waiting for the end of the situation for hours (24 hours or less, for example), and then going to the issuance of a new presidential decree announcing a new emergency, which is a step that is considered less violation of the constitution, but it could be understood that it is a fraud against the constitution and the will of the constitutional legislator, which will detract from the prestige, status and supremacy of the constitution in the collective conscience of the contracting parties. In alternatives, this avoids a trade-off between the steps that are least violated.
- 3- **Resorting to ordinary legislation:** It is good that regular Palestinian legislation is rich in what can be used to implement a state of quarantine and broad public safety measures based on it. In this regard, two important laws emerge, namely the Public Health Law No. (20) of 2004, Article No. (14) of which stipulates: “By a decision from the Minister, the Ministry may impose

quarantine in Palestine to prevent the transmission of epidemic diseases to and from it.” The law granted the Ministry, in coordination with the competent authorities in Article No. (9) of it, the authority to combat infectious, non-communicable and hereditary diseases by all means. In connection with the Palestinian Civil Defense Law No. (3) for the year 1998 in the definition, which stipulates that civil defense is: “The set of measures necessary to protect civilians and their property, secure transportation of all kinds, ensure regular workflow in public facilities, and protect public and private buildings, installations and institutions, whether from the dangers of air raids and other acts of war or from the dangers of natural disasters, fires, maritime rescue, or any other dangers. ” The aforementioned law also contains other provisions that granted broad powers to the Minister of Interior - the current Prime Minister, to implement all necessary measures, including seizing supplies and foodstuffs and transportation, restricting movement and controlling the time and departure of employees working in the health, industrial, food and public sectors, the transport sector, and others in addition to the provisions of the Jordanian Penal Code No. (16) of 1960 in force. Accordingly, these regular legislations constitute a legal framework sufficient to confront the pandemic without prejudice to the amended Basic Law of 2003 and its superiority.

- 4- **Continuing some practices of restricting movement without declaring a state of emergency:** Over recent days, the security establishment has accumulated a positive balance through flexible and disciplined dealing with citizens at checkpoints and during hours of movement restriction and providing assistance in some areas. In light of the presence of a serious and clear threat such as the Coronavirus, Palestinian citizens understand the continuation of the measures to restrict movement and prevent movement for the public good, especially since they showed a high responsibility, especially

in the first days of the outbreak of the virus, which would eliminate the justifications for extending the state of emergency or cutting the period and declaring it again, which may be understood as circumventing the law. At the same time - That is, the continuation of some necessary practices without announcing the extension – will relieve Palestinian society and civil organizations from fear of abuse in using the declaration of a state of emergency to restrict public rights and freedoms at some stage, and the danger that this may pose to fair trial guarantees or the exploitation of the declared emergencies to confront the pandemic to achieve goals beyond the health goal. Therefore, this scenario will balance between restricting practices to restricting movement, preventing movement, closures and social distancing policies, and out of the framework of the potential targeting of public rights and freedoms.

Therefore, we believe in "**SHAMS**" Center that the safest scenario is the third or fourth, and that the Palestinian Basic Law should remain intact and not be violated or passed or justified under any circumstances, especially since legislative alternatives are available. In the Palestinian legal system there is enough legislations and no need to place the right to health in comparison to the supremacy of the constitution and the principle of the rule of law. We clearly demand the executive authority not to extend and end the declared state of emergency in respect of the provisions of the Basic Law that do not accept jurisprudence in the source of its clear text.