



AL-HAQ

# Governor-Ordered Detentions

Al-Haq

2018



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“The State party should end the practice of administrative detention currently in force, amend the Law on Crime Prevention so as to make it consistent with the Covenant and release or bring to justice immediately all persons who are detained under this law.”<sup>1</sup>

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<sup>1</sup> Human Rights Committee, 100th session, Geneva, 11–29 October 2010, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations on the fourth periodic report of Jordan.



## Introduction

1. The right to personal freedom is enshrined in the Palestinian Basic Law and confirmed by the international conventions, which the State of Palestine acceded to without reservation. Any restrictions on this right must be in accordance with the law. In reference of recognised guarantees, a regulation that restricts the right to personal freedom must be consistent with the Basic Law and international conventions. Detention or arrest of any person in contravention of these guarantees is arbitrary and considered a constitutional crime. As characterised by the Basic Law, this crime involves an abuse of the detainee's personal freedom.
2. Under the title "Public Rights and Freedoms", the Palestinian Basic Law asserts that fundamental human rights and liberties are protected and respected. Personal freedom is a natural right, is guaranteed and may not be violated. It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. Every arrested or detained person will be informed of the reason for their arrest or detention. They will be promptly informed, in a language they understand, of the nature of the charges brought against them. They have the right to contact a lawyer and to be tried before a court without delay. Any violation of any personal freedom, of the sanctity of the private life is considered a crime. Criminal and civil cases that arise from such violations may not be subject to any statute of limitations. The National Authority guarantees a fair remedy to those who suffer from such damage.
3. International human rights conventions and declarations place binding safeguards on the right to personal freedom. Article 9 of the Universal Declaration of Human Rights (UDHR) highlights that "[n]o one shall be subjected to arbitrary arrest, detention or exile." According to Article 9 of the International Covenant on Civil and Political Rights (ICCPR), "[n]o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." In conformity with the categorisation of the United Nations Working Group on Arbitrary Detention, any detention without a legal basis that justifies deprivation of liberty, detention resulting from the exercise of particular rights under international human right conventions, and any non-observance of the international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character.
4. Al-Haq monitors and documents violations of the right to personal free-



dom through unlawful detention and arrest of persons without regard for procedural and objective safeguards established by the Basic Law, relevant regulations, and international human rights conventions. A key violation is detention by orders from governors, the Joint Security Committee, and directors of security agencies. This paper examines governor-ordered detention as the most widespread form of detention. It investigates how constitutional and lawful governor-ordered detention is in reference of the Palestinian Amended Basic Law, relevant regulations, and international human rights conventions.

5. This paper is informed by a thorough review of the Jordanian Law on Crime Prevention No. 7 of 1954, which governors cite to detain persons. Governor-ordered detention reflects an inaccurate understanding of the legal provisions, which regulate detention and arrest under this law, which is in conflict with the subsequent Basic Law. The paper also reviews the Decree No. 22 of 2003 on the Mandates of Governors, which vests governors with the capacity of officers vested with judicial duties and with the power of arrest persons in flagrant crimes. Questions arise about how lawful it is to endow this capacity by means of a decree, rather than a law as is established by the Palestinian Penal Procedure Law. In addition, the paper provides an overview of Palestinian court decisions. According to established jurisprudence, governor-ordered detention is unconstitutional and is deemed as an impingement by governors on the jurisdiction of courts and the Public Prosecution.
6. Article 119 of the Palestinian Basic Law prescribes that all legal provisions that contradict the provisions of the Amended Basic Law shall be repealed. To this effect, detention by governor orders, either on the grounds of the Jordanian Law on Crime Prevention or the Palestinian Decree on the Mandates of Governors, is inconsistent with the constitutional guarantees enshrined in the Basic Law. As it involves a constitutional crime, this measure should be halted by governors. Any arrest or detention procedures beyond the principles set by the Palestinian Basic Law, relevant regulations, and international human rights conventions, which the State of Palestine acceded to without reservation, must also come to an end.

### **Governor-Ordered Detention: Context and Practice**

7. Governors detain citizens in accordance with the Jordanian Law on Crime Prevention No. 7 of 1954. This law vests a provincial governor



and governor with the power to issue orders for the arrest and detention of persons in line with specific controls and criteria. The Law on Crime Prevention is an extension of both the Jordanian and British Mandate Laws on Crime Prevention of 1927 and 1933, respectively. Article 3 of the 1954 Law on Crime Prevention gives the governor the powers to arrest and detain:

- 1) Any person found in a public or private place under circumstances that give the governor good cause to believe that the said person was about to commit, or assist in the commission of, a crime;
  - 2) Anyone with a record of committing acts of larceny or robbery, receiving stolen property, protecting or harbouring thieves or assisting in the concealment or disposal of stolen property;
  - 3) Anyone whose status would make him a public danger if he remained at large without a warranty.
8. The 1954 Law on Crime Prevention does not make reference to governors or their powers. It only refers to the provincial governor [*mutasar-rif*], including the Governor of the Capital, and his powers. Later, the designation *mutasar-rif* was changed to governor. According to Article 2 of the Provisional Law Amending the Law on Public Administration No. 10 of 1965, “Article 6. In all governorates, the word *mutasar-rif* shall be replaced, wherever it is occurs under any previous regulation that concerns the powers of *mutasar-rifs*, by the word governor.”<sup>2</sup> Having replaced the *mutasar-rif* under the 1954 Law on Crime Prevention, governors derive their powers from the same Law.
9. Provisions of the 1954 Law on Crime Prevention entail multiple violations of the right to personal freedom, right to freedom of movement, right of residence, and the most fundamental guarantees of a fair trial. Along this vein, the governor has an absolute authority to issue decisions on imprisonment for an indefinite period of time; request a pledge; require that a warrantor be presented; object to and replace the warrantor; and determine the type of warranty, either financial or judicial. The latter requires that the warrantor present property title deeds in order to finalise the warranty procedures or pay exorbitant fees. Otherwise, the suspect will continue to be detained until a pledge is submitted.<sup>3</sup>

#### 10. The Law on Crime Prevention prescribes applicable procedures in the

<sup>2</sup> Institute of Law (2009). Transitional Phases of the Transference of Authorities and Powers and Change of Designations: Impact on Effective Legislation - (for the purposes of consolidating legislation). Ramallah: Birzeit University (in Arabic).

<sup>3</sup> National Centre for Human Rights (2009). Judicial Powers in Executive Hands. Jordan (in Arabic).



case of arrest and detention. Article 4 of the law stipulates that, in cases of suspicion, a summons be served to a person to appear before the governor. If the suspect does not do so, the governor may issue an arrest warrant against him, provided that his trial is held within a week as of the date of his arrest. Article 5 also provides that the suspect will be interrogated, once he is brought before the governor. His statements and any evidence on the charges imputed to him are heard. If the governor sees that there are sufficient reasons to bind that person with a pledge, the governor makes a decision in this regard, on condition that this pledge is not different from the subject matter stated on the summons or the arrest warrant. If the governor is not convinced with the charges imputed to the suspect, after his statements and the enclosed evidence are heard, the governor makes a decision to release him.

11. The Law on Crime Prevention requires that the procedures provided by the Penal Procedure Law be applied in relation to taking the testimony after the oath, examination of the witnesses, the attendance of the lawyers, the service of orders and summonses, and enforcement of judgments. A condition precedent is that no charges are made other than those stated on the summons. Also, the pledge may not exceed the obligation to maintain the security or abstain from acts that might affect the public security negatively or to be of good conduct.
12. Pursuant to Article 5(2) of the Law on Crime Prevention, the governor has the power to imprison the suspect for an indefinite period of time in case the suspect abstains from providing an pledge. The governor has an absolute power to set the term of imprisonment. If the governor considers that it is possible to release the suspect who failed to provide the pledge, the governor shall promptly provide a report in this regard to the Minister of Interior, who may ordain the release of the suspect. In all cases, the Minister of Interior may cancel at any time any pledge given by the governor or modify it in the interest of the suspect.
13. Under the Law on Crime Prevention, the governor's power to imprison the suspect are not absolute. These are limited to the cases where the suspect, who is brought before the governor, refuses to provide a "pledge" to be of good conduct and to not perform the acts stated on the summons served to the suspect.
14. According to Article 12 of the Law on Crime Prevention, assigned residence may be imposed by a decision from the governor in case the governor orders that the suspect provide a warranty for being of good conduct. In addition to providing a warranty, the governor is also entitled to





order that the suspect be put under surveillance of the police for a period that does not exceed one year. Under assigned residence, the suspect must stay within the boundaries of the city or village, where he resides. He shall be banned from leaving the city or village without obtaining a written permission from the commander of the area. He shall inform the commander of the area where he lives if he changes his place of residence. He shall report to the nearest police station to prove his presence. He shall stay at his residence one hour after sunset until sunrise. Police officers shall be allowed to visit his residence at any time. In case the suspect violates the decision on assigned residence, he shall be subjected to confinement for a maximum period of six months, a fine that is not more than fifty dinars, or both penalties.

15. Of the criteria established by the Law on Crime Prevention, the suspect shall be held in a correction and rehabilitation centre, rather than in a detection centre of security agencies or a psychiatric institution in case the governor makes a decision on confinement, rather than assigned residence.
16. Contrary to the controls and criteria prescribed by the 1954 Law on Crime Prevention, in the West Bank, governor-ordered detention is of various forms and is implemented under a variety of pretexts. Sometimes, detention is conducted directly by the governor. A person is arrested and held in custody in a detention centre of security agencies, particularly of the General Intelligence and Preventive Security. According to Al-Haq documentation, these cases are rare. By contrast, arrest and detention are implemented by security agencies. These agencies submit a request to the governor to detain a person based on an order from the governor. The latter approves the request, but does not play a role in the arrest, detention, and investigation procedures. In contravention of the 1954 Law on Crime Prevention, persons are held in places other than correction and rehabilitation centres. Detentions requested by security agencies are the most common cases of governor-ordered detention.
17. Security agencies refuse to enforce some court decisions on the release of detained persons either on bail or following an acquittal, but continue to detain them based on orders from governors. In relation to the safeguards for arrest and detention, this measure is a grave violation of the provisions of the Palestinian Amended Basic Law of 2003, Penal Procedure Law of 2001, and Jordanian Law on Crime Prevention of 1954. Governors and security agencies must respect court decisions. Judicial pronouncements have authoritative force (*res judicata*) and provide a source of legitimacy. A violation by the Executive Authority of a final



court judgement is tantamount to violation of the law and, consequently, impingement on the principle of legitimacy.<sup>4</sup> According to Article 106 of the Palestinian Amended Basic Law and Article 182 of the Penal Law in force, failure to enforce court decisions is a constitutional and legal offence as it involves unlawful deprivation of personal freedom.

18. In the absence of laws that protect women against community violence, but based on the 1954 Law on Crime Prevention, governors detain and place women, whose lives are in danger, in protection centres or in women's prisons, allegedly to save their lives.<sup>5</sup> In reference of the safeguards for arrest and detention, detaining women contravenes the Law on Crime Prevention, Palestinian Amended Basic Law, and Penal Procedure Law. Although claims are made to protect them, detention is the most brutal form of psychological and physical violence against violently abused women and girls. Detaining women by governor orders entrenches the community discriminatory and stereotypical view of women. Regulations need to be enacted to ensure protection of women against violence, preserving their human dignity and image in society and family.

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4 Hafez, Mahmoud (1987). *Administrative Justice in Jordan*. Ed. 1. Amman: Publications of the University of Jordan, p. 16.

5 Wattan TV and Arab Reporters For Investigative Journalism (ARIJ) (2 September 2014). *Detained by Orders from Governors: Victimised by the Circumvention of Law*. <http://www.wattan.tv/tv/104148.html> (Last accessed, 9 November 2017) (in Arabic).

According to Wattan TV monitoring, Elaine al-Hammouri, a woman, was detained by a governor order on grounds of a family conflict. Elaine had a sharp dispute with her husband and family. She said she was married when she was 14 years old. Her husband abused her. "I was surprise to see a conspiracy between my husband and father, who retained my identification papers (my and my children's passports). My father detained me in his house in the Beit Dajan village (Nablus) for a year and three months. Finally, I managed to escape and sought refuge at the Family Protection Centre in Nablus. I filed a complaint against my father in order to receive my identification papers." Elaine was also surprised that her three children were sent to her husband in Kuwait. Eventually, Elaine found herself in a village (Jericho), where she stayed at the Environmental Centre for almost a month, waiting for a replacement passport to be issued. On the other hand, Majed al-Fityani, Governor of Jericho, said he had received complaints from residents of the Al-Auja village against Elaine's conduct, which they described as "socially unacceptable". However, the Environment Centre staff completely denied these allegations. They confirmed that Elaine was "of good conduct and morals. She did not go out late at night. Sometimes, we helped her to provide for her necessities." According to the staff testimony to Wattan TV, Elaine was surprised that her brother and uncle visit her at the Centre and request that she come back to her home. The police intervened and convinced Elaine to go to the Jericho Governor Office, where her family would sign a pledge to not abuse her. Nevertheless, when she was there, she was requested to sign a waiver of the complaint she had lodged against her father. As she insisted to refuse to sign, the governor threatened to imprison her. A week later, instead of releasing her, the governor transferred Elaine to the Family Protection Department. She spent one and a half month in the Nablus prison. She was never released nor a charge was imputed to her. So far, she has been struggling to get her children back.



19. Citing the Law on Crime Prevention, governors detain persons in the detention centres of security agencies, ostensibly to save their lives or protect them from being arrested or extra-judicially killed by the Israeli occupying forces. As such, detention is legally baseless and in violation of the provisions of the Basic Law as well as relevant laws on the safeguards for arrest and detention. In this context, Al-Haq has documented multiple cases of governor-ordered detention. After they had been released by the Palestinian security agencies, the majority of detained persons were arrested by the Israeli occupying authorities. As they are immediately caught by the Israeli forces, questions arise about what it means to be detained for a long time by governor orders.

### **Governor-Ordered Detention under International Human Rights Standards**

20. The fact that the State of Palestine has acceded without reservation to an extended number of international conventions, including fundamental human rights instruments, gives rise to a set of obligations. In particular, Article 9 of the ICCPR provides that “[n]o one shall be subjected to arbitrary arrest or detention. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” This is one of the most important guarantees of a fair trial as everyone enjoys the right to liberty and security of person.
21. In General Comment 35 on Article 9 of the ICCPR, the Human Rights Committee confirms that “[t]o the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available.”<sup>6</sup>
22. The Human Rights Committee expressed its concern that the Law on Crime Prevention (1954) empowers governors to authorise the detention without charge, effective access to guarantees or trial of anyone “deemed to be a danger to society”. The Committee demanded that Jordan end

<sup>6</sup> Human Rights Committee, General Comment No. 35 on Article 9 of the ICCPR (Liberty and security of person), Doc. CCPR/C/GC/35..



the practice of administrative detention currently in force, amend the Law on Crime Prevention so as to make it consistent with the Covenant and release or bring to justice immediately all persons who are detained under this law.<sup>7</sup>

23. In its concluding observations on the third periodic report of Jordan, the Committee against Torture (CAT) was highly concerned at the continuous recourse to administrative detention by the State party under the Law on Crime Prevention (1954), which allows for detention without charge and raises issues about the separation of powers between the executive and judicial branches. The Committee was also concerned that administrative detention is used in particular against women and girls who are victims of violence, under the pretext of protecting them. The Committee reiterated its previous recommendation to abolish the practice of administrative detention. The Committee also called on Jordan the State party to take immediate measures to amend the Law on Crime Prevention with a view to bringing it into compliance with international human rights standards and with the State party's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; alternatively, the State party should abolish the Law on Crime Prevention.<sup>8</sup>
24. The United Nations General Assembly (UNGA) has confirmed that States should fully respect their obligations in line with [the rules of] accession to international human rights treaties. In its Resolution A/RES/62/159, the UNGA opposes any form of deprivation of liberty that amounts to placing a detained person outside the protection of the law, and urges States to respect the safeguards concerning the liberty, security and dignity of the person and to treat all prisoners in all places of detention in accordance with international law.<sup>9</sup>
25. The Working Group on Arbitrary Detention is the only body in the international human rights system entrusted by the former Commission on Human Rights and the Human Rights Council with a specific mandate to receive and examine cases of arbitrary deprivation of liberty. In this capacity, the Working Group has interpreted and enforced the international

7 Human Rights Committee, 100th session, Geneva, 11–29 October 2010, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations on the report of Jordan, Doc. CCPR/C/JOR/CO/4.

8 Committee against Torture, Concluding observations on the third periodic report of Jordan, 29 January 2016, Doc. CAT/C/JOR/CO/3.

9 UNGA, Sixty-second session, Agenda item 70 (b), Resolution adopted by the General Assembly on 18 December 2007, Protection of human rights and fundamental freedoms while countering terrorism. Doc. A/RES/62/159.



legal rules on deprivation of liberty as they have developed in domestic, regional and international jurisdictions. In order to determine the definition and scope of arbitrary deprivation of liberty under customary international law, the Working Group has reviewed international treaty law and its own jurisprudence and that of international and regional mechanisms for the protection of human rights. The Working Group regards cases of deprivation of liberty as arbitrary under customary international law in cases where: (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty; (b) The deprivation of liberty results from the exercise of the rights or freedoms guaranteed by the UDHR; (c) The total or partial non-observance of the international norms relating to the right to a fair trial; (d) The deprivation of liberty constitutes a violation of the international law for reasons of discrimination, and which aims towards or can result in ignoring the equality of human rights.<sup>10</sup>

26. Guarantees of a fair trial are grounded in the principles and standards provided by an extended number of international human rights instruments, particularly the UDHR and ICCPR. Of these, Article 9(3) of the ICCPR prescribes that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.” That requirement applies in all cases without exception. In General Comment 35 on Article 9 of the ICCPR, the Human Rights Committee confirms that the requirement applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion. The right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control. It is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. Accordingly, a public prosecutor cannot be considered as an officer exercising judicial power under paragraph 3.<sup>11</sup>

### **Governor-Ordered Detention under Palestinian Regulations**

27. The Palestinian Amended Basic Law of 2003 provides many safeguards for arrest and detention. These must be protected by law enforcement

<sup>10</sup> Human Rights Council, Doc. A/HRC/22/44, Twenty-second session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Report of the Working Group on Arbitrary Detention, 24 December 2012.

<sup>11</sup> Human Rights Committee (CCPR/C/GC/35). General Comment No. 35 on Article 9 of the ICCPR (Liberty and security of person).



agencies. According to Article 11(1) of the Basic Law, “[p]ersonal freedom is a natural right, shall be guaranteed and may not be violated.” Any restriction on this right must be consistent with the relevant constitutional guarantees established by the Basic Law and international human rights conventions. To this effect, Article 11(2) of the Basic Law emphasises that “[i]t is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. The law shall specify the period of prearrest detention. Imprisonment or detention shall only be permitted in places that are subject to laws related to the organisation of prisons.” Arrest or detention without a judicial order impinges on the Basic Law and constitutional guarantees. This is considered a constitutional crime, which is characterised by Article 32 of the Basic Law: “Any violation of any personal freedom, of the sanctity of the private life of human beings, or of any of the rights or liberties that have been guaranteed by law or by this Basic Law shall be considered a crime. Criminal and civil cases resulting from such violations may not be subject to any statute of limitations. The National Authority shall guarantee a fair remedy to those who suffer from such damage.”

28. The Palestinian Penal Procedure Law No. 3 of 2001 is in harmony with the constitutional guarantees of the right to personal freedom as established by the Basic Law. Article 29 of the Penal Procedure Law provides that “[n]o person may be arrested or imprisoned except by order of the competent authority as designated by law.” According to the law, the right to file and conduct a penal action is vested exclusively in the Public Prosecution. In flagrant crimes, officers tasked with judicial duties may arrest a person without a warrant of arrest. Detaining any person without observance of the criteria set forth by the Basic Law and Penal Procedure Law is deemed as arbitrary detention.
29. Detained persons must be brought, without delay, before a competent court to examine the reasons of detention. They should be informed of the reasons of their detention and of the charges imputed to them. They should also be enabled to contact a lawyer. In this context, Article 12 of the Basic Law provides that “[e]very arrested or detained person shall be informed of the reason for their arrest or detention. They shall be promptly informed, in a language they understand, of the nature of the charges brought against them. They shall have the right to contact a lawyer and to be tried before a court without delay.” Failure to bring a detained person before a court to consider the reasons for their arrest and their continued detention on the basis of a governor order is a violation



of the constitutional safeguards for arrest and detention as established by the Basic Law. It also infringes on guarantees of a fair trial as provided by the Palestinian Penal Procedure Law as well as those enshrined in the ICCPR in reference of the right to personal freedom.

30. Presumption of innocence is a fundamental legal principle. Article 14 of the Palestinian Basic Law stresses that “[a]n accused person is considered innocent until proven guilty in a court of law that guarantees the accused the right to a defence. Any person accused in a criminal case shall be represented by a lawyer.” Also, Article 11 of the UDHR provides that “[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” Additionally, Article 14(2) of the ICCPR prescribes that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” In other words, continued governor-ordered detention of a person and failure to bring them before a court for a fair trial, which ensures their right to a defence, is considered a constitutional crime under the Basic Law and a violation of international conventions, to which the State of Palestine acceded.
31. Current practice shows that governor-ordered detention is designed to punish the detained person. It does not fall within the scope of pretrial arrest. A person detained on the grounds of a governor order is not brought before a court, violating their right to personal freedoms as well as the principle of penal legitimacy, namely *nulla poena sine lege*. Lacking a judicial order, continued governor-ordered detention without bringing detained persons before a court is tantamount to punishment and derogates from the principle *nullum crimen sine lege, nulla poena sine lege*. Along this vein, Article 15 of the Basic Law provides that “[p]unishment shall be personal. Collective punishment is prohibited. Crime and punishment shall only be determined by the law. Punishment shall be imposed only by judicial order and shall apply only to actions committed after the entry into force of the law.”

### **Detention Ordered by Governors in light of their Powers and Mandates**

32. For the purposes of enforcing its provisions, the Law on Combating Corruption No. 1 of 2005 provides that abuse of power in violation of the law is considered a corruption crime. This is further confirmed by





Decision 155/2005 of the High Court of Justice, which states that “[a]ny arrest, custody or detention conducted by governors in cases other than flagrant crimes shall be commensurate to arbitrary detention, which is impaired by the deficiency of the abuse of power. It contravenes the law and must be annulled.” In cases other than flagrant crimes, governor-ordered detention is, therefore, a corruption crime for the purposes of enforcing the Law on Combating Corruption.

33. Presidential Decree No. 22 of 2003 on the Mandates of Governors sets forth governors’ powers and mandates. Article 1(2) provides that “[t]he governor shall exercise his power in the administration of his governorate in accordance with his powers, which are prescribed under this Decree.” Article 5 identifies the powers vested in governors as follows: “The governor shall exercise the following mandates and powers:
- 1) Preserve public security, morals, order, public ethics and public health, as well as protect public freedoms and citizens’ rights.
  - 2) Protect public and private properties and bring about security in his Governorate, to be assisted in this by the commanders of police and public security in the governorate. Regular and permanent meetings shall be in place between them.
  - 3) Work towards economic, urban and social prosperity in the governorate, achieve equality and justice, and safeguard the rule of law.
  - 4) Take all measures and actions necessary to confront natural disasters and incidents of significance.”
34. Article 7 of the Presidential Decree addresses the capacity of officers tasked with judicial duties: “The governor shall perform the function of officers vested with judicial powers in relation to flagrant crimes. He shall notify the Public Prosecution of non-flagrant crimes, which he has access to.” Having identified the officers vested with judicial powers, Article 21(4) of the Penal Procedure Law determines other functionaries who are *statutorily* vested with judicial powers. The capacity whereby governors serve as officers vested with judicial duties is not provided for by the Jordanian 1954 Law on Crime Prevention nor by any other law. Accordingly, the provision on the judicial powers vested in governors under the said Decree is in contrariety to the Penal Procedure Law; namely, the capacity of officers tasked with judicial duties is conferred by a law, rather than a presidential decree. In tandem with the hierarchy of legal norms, a decree is inferior to a law in terms of its binding force. In other words, governors do not have the status of officers vested with





judicial powers due to lacking a legal basis that endows them as such.

35. Assuming that governors have the capacity of officers tasked with judicial duties under the said Decree, these duties are limited to flagrant crimes. For others, governors should notify the Public Prosecution. According to Article 30 of the Palestinian Penal Procedure Law of 2001, “[t]he judicial officer may, without a warrant, arrest any person present when there is evidence sufficient to charge him in the following cases:
  - 1) The case of a flagrant crime or of a flagrant misdemeanour punishable by imprisonment for a term of more than six months.
  - 2) If he resists the judicial officer during the latter’s performance of the duties of his post, or if he was legally detained and escaped or tried to escape from the place of detention.
  - 3) If he commits or is accused of committing a crime before the judicial officer and refuses to give his name and address or if he has no known or permanent residence in Palestine.”

Hence, any arrest or detention in contrariety with these cases requires that the provisions of Article 11 of the Basic Law and Article 29 of the Penal Procedure Law: “No person may be arrested or imprisoned except by order of the competent authority as designated by law.” Against this background, any detention effected in cases other than those mentioned above falls within the scope of arbitrary detention. Pursuant to the provisions of the Amended Basic Law and relevant penal legislation, governors should be held to account for the criminal offences involving the deprivation of personal freedom.

### **The Palestinian Judicial Authority’s Position towards Governor-Ordered Detention**

36. The Presidential Decree on the Mandates of Governors of 2003 defines the governor as the “representative of the President of the Palestinian National Authority, the Head of Public Administration and the supreme authority in his governorate.” As such, the governor is part of the Executive branch. Governors’ decisions to arrest or detain persons are administrative ones, which are subject to judicial control. According to Article 30(2) of the Palestinian Amended Basic Law, “[l]aws may not contain any provisions that provide immunity to any administrative decision or action or against judicial review.”



37. The High Court of Justice has the jurisdiction to examine all governors' decisions on arrest and detention. To this effect, Article 33(3) of the Law on the Formation of Regular Courts provides that the High Court of Justice exercises jurisdiction over "[a]pplications in the nature of motions opposing imprisonment which entail the issuance of orders to release persons who are illegally detained."
38. Jurisprudence of the Palestinian High Court of Justice has consistently established that governor-ordered detention is unconstitutional. In many decisions, the Court asserts that public rights and freedoms under the Basic Law should be protected and consolidated; namely, the right to personal freedom, impermissible arrest or detention except by a judicial order, presumption of innocence, and principle of penal legitimacy. To this avail, Article 119 of the Basic Law confirms that any law that contravenes the provisions of the Basic Law may not be enforced.
39. Accordingly, in its Decision 167 on Case 119/2005, the Palestinian High Court of Justice ruled as follows: "Whereas the respondent (Nablus Governor) has continued to detain the applicant in the Nablus prison despite the fact that the Nablus Court of First Instance rendered a decision to release him on bail, he has as such refrained from enforcing an enforceable judicial pronouncement. By his action, he has encroached on the principle of the separation of powers and usurped the judiciary's authority. In this regard, his decision is baseless and of no effect. Therefore, the causes of the objection apply to the decision under objection, whereby the decision becomes voidable."<sup>12</sup>
40. In its Decision 152 on Case 110/2005, the High Court of Justice ruled: "Whereas the facts demonstrate that the Nablus Court of First Instance released the objector, who is charged with a crime, unless he was detained or sentenced on the grounds of other charges, and whereas he paid the prescribed bail, and [whereas] the respondent (Nablus Governor) issued the decision under objection, including "to maintain public security and as a preventive measure in fear of acts of revenge, the citizen charged with armed robbery will continue to be detained by my order", the first respondent (Nablus Governor), who issued the decision under objection, has overstepped his mandate and powers. Furthermore, he has disrupted the decision of the court, which possesses the power and jurisdiction, breaching the principle of the separation of power and rule of law. Consequently, the decision under objection is defective, whereby the causes of objection apply thereto and render it baseless. For these

<sup>12</sup> Decision of the High Court of Justice No. 167 on Case 119/2005, rendered on 30 October 2005. Palestinian Legal and Judicial System (Al-Muqtafi), Institute of Law, Birzeit University.



reasons, the Court hereby decides to annul the decision under objection and release the applicant unless he is detained in due form.”

41. In the aforementioned decisions, the Court has established that the governor’s decision in both cases breached the right to personal freedom as provided by the Basic Law. In particular, Article 11 of the Law stresses that arrest or detention is only permitted by a judicial order. They also contravened the Penal Procedure Law, which puts forward rules and controls that ward off any derogation from the fundamental human rights enshrined in the Basic Law and international human rights conventions. According to Articles 29, 117 and 119 of the Penal Procedure Law, no person may be arrested or imprisoned except by order of the competent authority as designated by law. Police stations and Public Prosecution are not entitled to arrest or detain any person for more than 48 hours. Only courts have the jurisdiction over any detention that exceeds this time limit. The High Court also confirms the provisions of Article 120(4) of the Penal Procedure Law. Accordingly, the period of detention may not exceed six months; otherwise, the accused shall be released immediately, unless he is referred to the court that is competent to try him. A writ of detention may not be issued against any accused person in his absence unless the judge is convinced, on the basis of medical evidence, that the accused cannot be brought before him by reason of illness.
42. The Palestinian High Court of Justice considers that any arrest, custody or detention conducted by governors in cases other than flagrant crimes is commensurate to arbitrary detention, which is marred by the deficiency of the abuse of power. It contravenes the law and must be annulled. Hence, in Case 155/2005, the Court held that all administrative decisions, which pertain to personal freedom, are strongly subject to administrative justice control inasmuch as it is the protector of public freedoms. Applying this to the decision of the respondent (Jerusalem Governor), the Court holds that the “letter addressed by the respondent (Jerusalem Governor) to the Attorney General to the effect of detaining the applicant by his [the Governor’s] order is in breach of the law. It reflects the abuse of power, which removes it from the framework of the mandates and powers bestowed by the law and constrained by conditions and requirements that must be followed and observed. It derogates from the legal and constitutional provisions, which are prescribed by the Basic Law and associated with fundamental human rights and freedoms that must be duly respected. Such rights and freedoms are attached to the individual as his natural right. They are safeguarded and may not be violated. In sum, it derogates from the provisions of Article 10, 11,



12, 14, 15, and 30 of the Basic Law. It also violates the aforesaid legal provisions and contradicts the jurisdiction and power of the courts and Public Prosecution in any judicial proceeding, including arrest, custody, detention, or renewal of detention until the last proceeding of trial. The Court concludes that the decision on detention issued by the Jerusalem Governor against the applicant is inconsistent with the provisions of the Presidential Decree No. 22 of the 2003 on the Mandates of Governors. According to Article 7 of the Decree, the “governor shall perform the function of officers vested with judicial powers in relation to flagrant crimes. He shall notify the Public Prosecution of non-flagrant crimes, which he has access to.” Whereas the detention of the applicant by the respondent was illegal and challenged by the deficiency of the abuse of power, it must be annulled and considered of no effect.”

### **Al-Haq's Follow up on Cases of Governor-Ordered Detention**

43. In 2017, Al-Haq documented 50 cases of governor-ordered detention. These affected persons who were directly arrested by security agencies, particularly by the Joint Security Committee, General Intelligence and Preventive Security. Having requested governor orders to arrest them, security agencies held detained persons in security detention centres. Others continued to be detained by orders from governors after court decisions had been rendered to the effect of releasing them. These decisions were not enforced.
44. Sh. N., a resident of the Hebron governorate, reflects the most significant case. Contrary to the provisions of the law, the General Intelligence agency arrested Sh. N. without an arrest warrant. Four court decisions were entered to release him on bail, but were never enforced. On 30 May 2017, the first decision on his release was rendered by the Dura Conciliation Court in the Misdemeanour Case 1001/2017. On 13 June 2017, the same court issued the second decision in the Misdemeanour Case 100/2017. On 20 June 2017, it rendered the third decision in the Misdemeanour Case 106/2017. On 3 August 2017, the Jericho Conciliation Court entered the fourth decision on release in the Misdemeanour Case 267/2017. None of these pronouncements was enforced. After the fourth decision was made, an arrest warrant was issued by the Nablus Governor despite the fact that Sh. N. was a resident of the Hebron governorate and was first detained in the General Intelligence detention centre in Hebron. After the third court decision was rendered, he was relocated to the General Intelligence detention centre in Jericho. Later, he was detained by an



order from the Nablus Governor. Following Al-Haq contacts, the Nablus Governor suspended the arrest warrant. However, Sh. N. continued to be held by an order from the General Intelligence and was never released.

45. On 19 September 2017, the Preventive Security agency detained J. Sh., a 17-year-old boy from the Jenin governorate, disregarding recognised safeguards provided by the Law by Decree on Juvenile Protection of 2016, Child Law, and Penal Procedure Law. J. Sh. was held in the Preventive Security detention centre in the Jenin city, but was not brought before the Public Prosecution or court. The Juvenile Protection Counsellor at the Ministry of Social Development was not informed of the incident. J. Sh. was detained on the basis of a governor order. Al-Haq filed two petitions to the Attorney General, stating the J. Sh. had been subjected to arbitrary detention by an order from the Jenin Governor. Al-Haq also addressed two memos to the Preventive Security, one to Jenin Governor, and one to the Ministry of Social Development. Finally, the boy was released on 17 December 2017. He was detained on arbitrary grounds for 90 days without charge or trial.

### Findings and Recommendations

46. Governor-ordered detention infringes on the constitutional principles enshrined in the Palestinian Basic Law, particularly the right to personal freedom. It violates safeguards for arrest and detention as prescribed by the Palestinian Penal Procedure Law. Law enforcement officials are bound to adhere to these safeguards.
47. The Palestinian High Court of Justice has been consistent on establishing that governor-ordered detention is unconstitutional. It contravenes constitutional safeguards for arrest and detention, penal legitimacy, and presumption of innocence provided under the title “Public Rights and Freedoms” of the Basic Law. The Court also stresses that any regulation that contradicts the provisions of the Palestinian Basic Law is equally unconstitutional.
48. Governor-ordered detention violates the provisions of the ICCPR, which the State of Palestine acceded to without reservation. The ICCPR highlights that States parties should respect safeguards for arrest and detention, guarantees of a fair trial, and person’s right to appear before an independent, objective and impartial tribunal to decide on the lawfulness of their detention.



49. Governor-ordered detention is a crime that is characterised by the Palestinian Basic Law and the Penal Law in force. Reflecting deprivation of liberty in contrariety with the law, this crime requires that perpetrators be prosecuted and brought to justice.
50. In relation to safeguards for arrest and detention, the 1954 Law on Crime Prevention is in conflict with the provisions of the Palestinian Basic Law. It may not be in force in accordance with Article 119 of the Basic Law, which explicitly prescribes that all legal provisions that contradict the provisions of the Basic Law are repealed.
51. The 2003 Presidential Decree on the Mandates of Governors contravenes the provisions of the Penal Procedure Law, which provides that the capacity of officers vested with judicial powers is bestowed by law, rather than a decree. Within the legislative system, no laws confer this capacity on governors.
52. Governor-ordered detention transcends governor powers set by the relevant decree. Assuming these powers are permissible, governors are entitled to arrest persons in flagrant crimes in line with the criteria and controls applicable to officers tasked with judicial duties. In other crimes, governors need to notify competent bodies, namely the Public Prosecution and Judicial Authority.
53. In relation to the Law on Crime Prevention, the CAT recommendations on the third periodic report of Jordan must be implemented immediately. The Committee stressed that immediate measures should be taken to amend the Law with a view to bringing it into compliance with international human rights standards; alternatively, the State party should abolish the Law.



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