6-3-2022

The Normalization of the Exception: The Nexus of Emergency Powers and Criminal Justice in Colonial and Postcolonial Jamaica

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NORMALIZATION OF THE EXCEPTION: THE NEXUS OF EMERGENCY POWERS AND CRIMINAL JUSTICE IN COLONIAL AND POSTCOLONIAL JAMAICA

A dissertation submitted in partial fulfillment of the

requirements for the degree of

DOCTOR OF PHILOSOPHY

in

POLITICAL SCIENCE

by

Jermaine Andrew Roxroy Young

2022

To: Dean John F. Stack, Jr.
Steven J. Green School of International and Public Affairs

This dissertation, written by Jermaine Andrew Roxroy Young, and entitled Normalization of the Exception: The Nexus of Emergency Powers and Criminal Justice in Colonial and Postcolonial Jamaica, having been approved in respect to style and intellectual content, is referred to you for judgment.

We have read this dissertation and recommend that it be approved.

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Date of Defense: June 3, 2022

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Florida International University, 2022

DEDICATION

First and foremost, I dedicate this work to my mother who fathered me, Janet Walsh. Your hard work and sacrifices have left a deep impact on me. I am eternally grateful to have been blessed with a strong female figure like you in my life. To paraphrase Lorna Goodison's inspirational ode to her mother: To Janet, May I Inherit Half of Your Strength. I would also like to dedicate my dissertation to my grandfather, Ronald Egbert Young, who passed away in the second year of my doctoral program and before the completion of this project. You were always a source of inspiration and wisdom to a rebellious and wayward young boy in need of a father figure at the time.

ACKNOWLEDGMENTS

I would like to thank the chair of my dissertation committee, Dr. Clement Fatovic, for his stellar advise throughout this entire process. Your invaluable insights and critical comments were of utmost help in the completion of this dissertation project along with other important administrative processes. I would also like to extend profound gratitude to members of my committee: Dr. Alexander Barder, Dr. Percy Hintzen, and Dr. Barry Levitt. From the defense proposal to the present, you have provided sound theoretical and empirical inputs on how to improve my overall research project. The current project has also benefited tremendously from the financial assistance given to me via the Florida International University Dissertation Year Fellowship (DYF). Likewise, I am grateful again to Drs. Barder, Levitt, and Fatovic along with their respective letters of recommendation which allowed me to obtain this fellowship. Finally, the DYF provided me with the ability to continue to write and edit my dissertation with less financial and mental burdens.

I would also like to acknowledge the entire Politics and International Relations Department for their stellar work and guidance as it relates to administration (special gratitude to both Dr. Kevin Evans and Erika Posada) and teaching. It has been a pleasure to have taken sound empirical, methodological, and theoretical classes during my tenure in this eclectic and collegial department.

ABSTRACT OF THE DISSERTATION

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by

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Since the antiquity, the study of emergency powers has tended to revolve around the dichotomy between norm and exception, suggesting that governments follow established rules of law in ordinary circumstances and resort to extraordinary measures only in times of genuine emergency. My dissertation challenges this dichotomy by analyzing Jamaica's colonial and post-colonial experiences with emergency powers in order to provide a different story about the norm-exception binary. In fact, Jamaica's case shows there are no neat partitions between both spheres. Instead, what we see unfolding is the technical application of emergency provisions as legality, rule by law, rooted in continual legal violations and state violence for upholding the rule of law- substantive application and practices that reinforce civil liberties based on calculable, general, and prospective rules à la Locke.

The study used a qualitative case study methodology for highlighting how the exception as usually functioned as the norm. These consisted of colonial archives, first and second-hand narratives, texts of emergency legislations, Commissions of Enquiry

reports, newspaper articles, and other pertinent government publications (colonial and post-independence). Overall, the study traces episodes of martial law, States of Emergencies (SOEs), and special laws-cum-emergency powers like the notable Zones of Special Operations (ZOSOs) as techniques of government spanning the colonial to post-independence eras. It shows that such "emergency tools" involve practices arbitrary and unlawful mass extended detentions, extrajudicial killings, and renditions function as a form of derogation of fundamental rights of Jamaicans (primarily those from a lower socio-economic background) and state violence that echo the continuity of illiberal colonial practices. Essentially, these highlighted practices continually blur the lines between norm and exception, colonial, and post-colonial. Contrary to earlier theorizations, the dissertation demonstrates that the boundaries between norm and exception in Jamaica have eroded in ways that are inconsistent with the country's stated commitments to the rule of law and democratic values.

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ABBREVIATIONS AND ACRONYMS

EPA	Emergency Powers Act
EPR	Emergency Powers Regulations
GOJ	Government of Jamaica
SOCA	The Suppression of Crime Act (Special Provisions)
SOE	State of Emergency
ZOSO	Zone of Special Operations

PREFACE

Lord a mercy
All of a sudden everybody a gun man
State of emergency and a bag a tension
Politician doh have nuh development plan
That's why every community need a one don[1]
— Jamar Rolando "Chronixx" McNaughton

It is often said that "Desperate times call for desperate measures." Similarly, another (in)famous adage states "*neccesitas non habet legem"* —meaning "necessity hath no law."[2] In the case of Jamaica, these assertions can be connected with the most recent declarations and deployments of emergency powers as a criminal justice remedy. The country's homicide rate is one of the highest in the globe by any benchmark. Therefore, it might be necessary (as some would argue) that this apparent state of nature is matched with a Hobbesian sovereign who is able to guarantee civil peace and protect the corporeal integrity and mortality of ordinary Jamaicans by using whatever tools are available (legal, extralegal, or an admixture of both). The aforementioned logic is supported by the Latin American Public Opinion Project's (LAPOP) AmericasBarometer data which saw Jamaica being the top-ranked country for tolerance of a military coup as a response to high crime and corruption (Harriott et al. 2020, 10-11). This has opened the floodgates for the dreaded declaration of state of emergencies (SOEs) and other emergency-adjacent

[1] "Safe N Sound," YouTube video, 3:15, from an official music video of same name, uploaded by ChronixxMusic on March 12, 2021. Retrieved from https://www.youtube.com/watch?v=Om_HSaRJOHU. The Jamaican Creole (Patois) lyrics translate to the following: "Lord have mercy. Suddenly, everyone is a gunman. State of emergency and lots of tension. Politicians don't have any development plan. That's why every community needs a don/community leader."

[2] For a more detailed discussion of this adage and its application, see Giorgio Agamben, *State of Exception* trans. by Kevin Attell (Chicago: University of Chicago Press, 2005), 24-31.

legislations to take pole-position (their normalization) in the fight against crime in the 2010s.

The current study argues that the latest round of SOEs and other special laws-cum-emergency powers such as Zones of Special Operations (ZOSOs) are in fact a longstanding feature of Jamaican governance since the colonial period. Successive claims of emergencies have been generally deployed and designed to discipline and punish some citizens in an arbitrary manner, usually beyond the scope of the original crisis. This feature is synonymous with both colonial and post-independence Jamaica and can thus be seen as a commonly used technique of government, primarily for social control. Ultimately, it seems empirical to argue that the colonial era has influenced and continues to influence post-independence Jamaica's approach to declaration and management of crises.

A law enforcement analogy is worth recounting here to illustrate how emergency(ies) can be declared. Numerous persons would have seen law enforcement officers' service vehicles, ones decked out with conspicuous sirens and lights, evade traffic-jams by turning on said lights and sirens to indicate there is an emergency afoot. While there are occasions when the aforementioned is proven to be true, there are other instances where the police use such a strategy just for convenience as there is no emergency ahead. Therefore, from the aforementioned police analogy we see that the determination of an emergency is to some degree an agential and subjective matter since it depends on who makes the call. Consequently, Gross and Ní Aoláin (2006, 12) remind

us that “bright-line demarcations between normalcy and emergency are all too frequently untenable, and distinctions between the two are difficult, if not impossible.”

Similarly, it can be argued (and even expected) that governments all over engage in actions similar to police vehicles trying to evade dense traffic via declarations of emergencies. It is therefore conceptually and empirically valid to interrogate a number of governmental declarations of emergency in Jamaica, past and present, with an eye to challenging what can be termed the norm-exception model. This model, one centered on a binary way of thinking, suggests governments follow established rules of law in ordinary circumstances and resort to extraordinary measures only in times of genuine emergency—a framework that has structured generations of scholarship for studying and understanding emergency powers. However, this current work suggests that the aforementioned lines have been and continue to be blurred in Jamaica, especially due to its history as a colonial creation—one where the exception, meaning the abnormal or extra-ordinary has always been the rule. With that being said, I intend to trace and survey this binary as it relates to Jamaica’s experiences in declaring states of emergencies and using adjacent ordinary-cum-emergency legislations for governance, primarily the criminal justice arena. This intellectual endeavor occurs over a two-fold process: partly historical and partly contemporary.

Case Study and Process Tracing: Analyzing Declarations of Emergencies in Jamaica

The current case study interrogates the traditional theory (Classical Model) of emergency powers, especially one that is grounded on the assumed separation between lines of norm and exception. This is then complemented and critiqued by incorporating

important postcolonial scholarship that is applicable to challenging and critiquing this assumed neat binary, especially by highlighting how the lines between norm and exception have been blurred in colonial and postcolonial realities. Process tracing was chosen as the analytic tool to develop careful descriptive inferences from "diagnostic pieces of evidence" as part of a broader "temporal sequence of events" (Collier 2011, 824). It is thus an example of what can be called a within-case analysis due to the acquisition of evidence inside a "temporal, spatial, or topical domain defined as a case" (Bennett and Checkel 2015, 8). With that being said, process tracing allows for the thick description and scrutinization of declared emergencies, emergency powers laws, and adjacent ordinary-cum-emergency legislations along with their respective practices (especially ones that negate the norm-exception framework) to draw inferences about colonial and postcolonial Jamaica's emergency regimes as part of the criminal justice system. In order to complete this systemic examination of Jamaica's past and present instances of declarations of emergency, the study examined sources such as: archival materials, legal cases and statutes, parliamentary and Commissions of Enquiry reports, government data, newspapers, and secondary research.

The dissertation covers nearly two centuries (191 years to be exact) of declared emergencies over the course of Jamaica's colonial and postcolonial history. "The study of macro-as well as microlevel phenomena benefits from uses of process tracing" George and Bennett (2005, 214). Given the historical and contemporary trends that I trace and map out concerning the use of declared emergencies as a punitive criminal justice mechanism, process tracing allows for identifying long-term patterns of state violence that are consistently associated with Jamaica's use of declared emergencies across both

the colonial and postcolonial periods. I find that these instances of violence—and the rights violations that accompany them—are not in keeping with a strict theoretical understanding of norm versus exception. My aim here is to show that emergency powers have been consistently used across three main critical junctures in Jamaica in ways that defy traditional theoretical models. Ultimately, it seeks to establish a robust-enough correlation between colonialism and emergency powers as used for law enforcement (criminal justice purposes).

The first critical juncture examines the role of martial law as a prototypical emergency power for managing colonial Jamaica, beginning in the 19th century, specifically 1831 until the late 1930s. It therefore examines the uses of martial law across the following periods: slave society (1831-32), post-Emancipation (1865-66), and Crown Colony (1867-1939) years of Jamaican history. Furthermore, the adoption of wartime emergency statutes and the consolidation of them into the constitutionalized Emergency Powers Act 1938 (EPA) is of utmost relevance here in making descriptive inferences about the use of emergency powers that blur the lines between norm and exception.

The next major juncture is the early post-independence period of Jamaican history, specifically the mid-1970s (1974-1977). Here we see the local development and usage of several adjacent ordinary-cum-emergency legislations (dubbed "special laws") along with the colonially derived EPA 1938 for explicitly tackling crime. The colonial legacy of the emergency thus begins to reemerge as a technique of government, a legacy of colonial statecraft (juridico-political laws). This becomes an important argument for making a connection between the colonial past and post-independence present. The third and final critical period covers the 2010s which sees an explosive growth in the

normalization of emergency powers as the primary tool in the Jamaican state's criminal justice arsenal. During this period, we will also see the re-development and re-deployment of special laws like those used during the mid-1970s as being emblematic of this approach to tackling crime. Overall, the detailed narrative presented here allows us to reconsider how Jamaica got to this point of relying on emergency powers as the main go-to tool in its criminal justice arsenal and this study contends this outcome can be traced back to the colonial era to establish a reasonable correlate.

While process tracing represents a viable method for analyzing this broad swath of Jamaican history, there are some limitations which deserve mention and discussion here. Although process tracing provides a useful basis for highlighting causal inferences, its application to Jamaica here relies more on exploration of both the colonial and postcolonial emergency power uses for establishing a correlational narrative. Seeing as this is a complex longitudinal argument, the study can only deal with "provisional conclusions" as intervening factors have not been given sufficient consideration due to the exploratory application of process tracing here (George and Bennett 2005, 222). On the other hand, hypothesized causal mechanisms may be consistent with certain sets of process-tracing evidence thus leading to the following problem: assessing alternative and complementary explanations that can either be causal or spurious (George and Bennett 2005, 222). Nevertheless, these charges can be answered by widening the selection of countries to other Anglophone Caribbean islands and former entities of the British Empire (specifically Australasia, Sub-Saharan Africa, and South Asia) to hopefully solve the aforementioned limitations and develop a more causal chain in the hopes of providing viable explanations about how colonial and postcolonial varieties of emergency

declarations have functioned and continue as such, especially for challenging the norm-exception framework. With that being said, this study seeks to treat Jamaica (and other colonies in the future) as deviant cases in how norm-exception operated historically and in the present (Eckstein 1975; George 1979; Brady and Collier 2004; George and Bennett 2005, 215). Generally speaking, single country case studies are seen as not generalizable enough and this is an inherent limitation of this research approach (Landman 2008, 47). Nevertheless, the case of Jamaica here is used to express and identify it as a deviant case when it comes to understanding the norm-exception binary. Likewise, the number of critical junctures examined across both colonial and postcolonial periods has raised the number of observations for making reliable inferences about Jamaica's history and present uses of emergency powers as a within-case analysis (Landman 2008, 91).

Structure of the Dissertation

Considering what has been highlighted so far, the present study demonstrates the problematic nature of the norm-exception framework. It does this by arguing the following in the subsequent chapters. Chapter 1 provides a theoretical introduction and overview of the main protagonists of the norm-exception framework, proponents versus opponents of said binary. This section will focus in particular on the theories of Carl Schmitt, Clinton Rossiter, Walter Benjamin, Giorgio Agamben, and Nomi Lazar. It also seeks to incorporate postcolonial scholarship as an alternative for understanding a country like Jamaica's relationship with emergency powers, especially by infusing the arguments of Frantz Fanon and Achille Mbembe into this longstanding debate.

Chapter 2 explores Jamaica's colonial governance in finer details in order to trace its history of martial law as a potential starting point for understanding and making connections with the current state practices, especially as it relates to maintaining public safety and order. The use of emergency powers in post-independence Jamaica can be found in formative events such as the Sam Sharpe or Christmas Rebellion of 1831-32, the Morant Bay Rebellion of 1865, and both World Wars. They are worth exploring to develop a conceptual and empirical link between past and present, which represent a kind of continuation of colonial practices in terms of the adaptation of the Emergency Powers Act 1938 (EPA) into Jamaica's independent constitution. Finally, these colonial episodes are emblematic of the blurred lines between norm and exception since they rest on racialist claims that ensured that the latter was the ordinary course of life for the enslaved and colonized African and African-descended majority found in Jamaica.

As it relates to Chapter 3, early post-independent Jamaican legal developments and a yearlong SOE are of primary interest here. They reveal far more than what initially meets the eye. Since independence, Jamaica has declared approximately eight SOEs, with the majority of them (six) being used in the criminal justice system. The mid-1970s saw ordinary laws being infused with extraordinary features (warrantless searches and arrests of persons, cordons, and curfews) and powers for suppressing crime but this element rested more on discrimination and continuing colonial legacies. The Gun Court and Suppression of Crime Acts are empirical novelties that merit inclusion for updating and challenging the norm-exception framework. Similarly, the 1976-1977 SOE declared by the Michael Manley government to deal with political violence and notions of subversion is also a relevant episode in the wider thrust of this study.

Chapters 4 and 5 focus on how SOEs and ZOSOs have been periodically used in the 2010s as a major plank in the Jamaican criminal justice arsenal. Chapter 4 exclusively focuses on the 2010 Tivoli Incursion as an exemplar of how state violence manifests itself under a declared SOE, not unlike the colonial period leading to arbitrary arrests, extrajudicial deaths, and a number of other rights violations in a supposedly liberal and post-independence Jamaica. Chapter 5 analyzes the development, implementation, and seeming normalization of ZOSOs as a jurisgenerative and state-building emergency measure along with SOEs for fighting crime, primarily between the years of 2017-2020. The problematic areas of both emergency regimes have created a slew of rights violations that can be arguably connected back to colonial era maneuverings, especially negating the rule of law as a substantive moral ideal in favor of using formal law to rule in morally dubious ways. Finally, the conclusion reflects on the major episodes covered throughout the study and what they mean historically and contemporarily for analyzing and discussing emergency powers, specifically the idea of norm versus exception.

The following chapters represent Jamaica's contribution to the emergency powers scholarship. Despite the norm-exception framework's postulations, Jamaica's history with emergency demonstrates that in practice the lines are blurrier in practice. In fact, extraordinary powers were never solely designed and declared for so-called exceptional circumstances. Emergencies as codified laws are malleable and subject to the whims of governors to the detriment of the governed. Finally, the present work incorporates a blend of comparative politics, criminal justice, political theory, and public law for providing a new understanding of emergency powers and the politics behind it, colonial and contemporary.

CHAPTER I THEORETICAL CONSIDERATIONS ON EMERGENCY POWERS

In what ways does Jamaica's historical and current usage of emergency powers for law enforcement challenge our understandings of the simple dichotomy between norm and exception? Are we seeing evidence of a constitutional dictatorship, state of exception, or a blurry combination of both across colonial and postcolonial Jamaica? According to Rossiter (1948, 5), a constitutional dictatorship refers to a range of "emergency powers and procedures" existing intermittently. On the other hand, a state of exception, while difficult to precisely define and locate, denotes severe disturbances of any kind that require extraordinary sovereign measures that depart from ordinary legal norms (Schmitt 2005). Essentially, a state of exception relies less on legal norms and more on urgent sovereign decision-making untethered to existing norms for confronting these unpredictable and total situations which threaten the body politic.

With these observations and questions in mind, this study seeks to investigate the normalization of emergency powers in colonial and post-independence Jamaica for handling a range of criminal justice matters (from enslaved uprisings to gang violence). Answers to these questions will come from both primary and secondary data such as colonial archives, newspaper articles, crime statistics, emergency powers statutes, special laws, and governmental reports for documenting Jamaica's experience as a case study with the supposed "exception."

Norm-Exception Debate: A Brief Introduction

Since the 9/11 attacks there has been a revival of interest in, indeed a veritable scholarly cottage industry of sorts, what debatable emergency powers mean for our current and future juridico-political arrangements in terms of both theory and practice. This revival is still largely informed by a prevailing norm-exception dichotomy stretching all the way back to the ancient Romans and extending all the way up to the contemporary post-9/11 period, often by way of John Locke's theory of prerogative.[3] Its revival and subsequent debate have been centered primarily on a supposed neat dichotomy between *norm* and *exception* (one which can also be referred to along the following lines: ordinary *contra* extraordinary; normal-abnormal; legal-extralegal; constitutional-extra-constitutional *inter alia*). Both norm and exception essentially refer to two theoretically distinct ontological states. For Nomi Lazar (2006), this dichotomy has been at the forefront of both academic and popular debates regarding emergencies. In terms of the exception, Giorgio Agamben (2005, 2-3) notes that it has become "the dominant paradigm of government in contemporary politics," making it "a threshold of indeterminacy between democracy and absolutism." This study's examination Jamaica's past and present experiences with emergency powers are used to investigate how well the norm-exception binary holds up in practice.

[3] Locke (§160) states that, "This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, *is* called *Prerogative.*"

The norm refers to situations that "are an empirical regularity in the natural world or in the society" (Ferejohn and Pasquino 2004, 221). In this sense, nation-states are supposed to adhere to some normal/routine operations for governance, especially if they are democratic and constitutional ones committed to the rule of law ideal. While there is no broadly accepted formal definition of the term exception in political theory or law, an exception[4] may be defined as "categorically distinct from a "normal" situation…triggered by an extreme event that is highly disruptive or threatening to the established order" (Fatovic 2019, 5). This idea traces its genesis to the Roman Dictatorship, which exemplifies what we can therefore term the Classical Model of emergency powers.

The Classical Model has dominated and informed the thinking and actions of states up to and including the War on Terror (WOT) in the United States and elsewhere. However, the lines between norm and exception are much blurrier in practice than they are in theory when we examine both historical and contemporary emergency powers more specifically. With that being said, this dichotomous framework of norm versus exception is challenged even further when examining Jamaica's colonial and post-independent governments' actions, especially the latter's consistent use of emergency powers for solving criminal justice problems. In essence, the supposed exception is now a technique (the unprecedented generalization and thrust of the security paradigm) of government in Jamaica (Agamben 2005, 14).

[4] Also see the highly influential definition given here by Schmitt. See Carl Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. and edited by George Schwaab (Chicago: University of Chicago Press, 2000) p. 6 where he says: "The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law."

Empirically, it is the aim of this study to show how the lines between norm and exception are increasingly being blurred in Jamaica as part of what is arguably a larger global trend despite the continued hold of the Classical Model emergency powers scholarship. This will be achieved by tracing the country's colonial history with a view towards understanding how emergency government practices used in the pre-liberal past are, more or less, still influencing its supposedly liberal present. Therefore, formative events such as the Christmas Rebellion of 1831-1832, The Morant Bay Rebellion of 1865, and finally both World Wars are important markers in tracking the deployment and development of emergency powers in colonial Jamaica. With a firm eye on the present, the study will then transition to examine the continuities of emergency power in post-independence Jamaica by examining events of the mid-1970s, specifically the domestic development of local special laws-cum-emergency powers such as the Gun Court and the Suppression of Crime Act (Special Provisions) of 1974 combined with 1976-1977 year-long State of Emergency (SOE). The study will then make a jump to the 2010s, specifically the Tivoli Gardens Incursion and 2017- 2021, as an illustration of how emergency government practices in the form of SOEs and the development of Zones of Special Operations (ZOSOs) are increasingly being normalized and used in the vanguard for combating ordinary criminal justice matters. Essentially, emergency powers have become the norm due to their commonplace deployment in Jamaica and the aforementioned episodes are empirically substantive for challenging the norm-exception framework.

From a theoretical standpoint, the study seeks to challenge the archetypal Classical (Roman-inspired) Model of emergency powers made famous by the

controversial German 20th century legal and political thinker, Carl Schmitt, and would-be "Crown Jurist"[5] of the Third Reich. In Schmitt we find an intellectual nemesis *par excellence* whose critiques of liberalism and parliamentary democracy still resonate across both the Left and Right.[6] His Manichean view of the emergency (i.e., norm *contra* exception) continues to reverberate in this long debate and is a contextualizing factor for analyzing Jamaica's current exceptional framework for crime-fighting, especially since he relies on a more classical norm-exception lens.

Agamben's work, which views the post-9/11 world as one increasingly being blurred and defined by the exception, presents a timely challenge to Schmitt's work and the Classical Model understood broadly. His work along with other thinkers such as Walter Benjamin and Nomi Lazar provide a more critical challenge towards the Classical Model. Governance in this sense becomes a "technique" for solving banal problems. Furthermore, it is this conceptual framework that holds potential for interrogating and explaining the juridico-political background of Jamaica's use of SOEs to fight crime. The institutional legacies of colonialism make the picture of Jamaica's emergency practices a bit more straightforward, and this will add some context and even update Agamben's theoretical assumptions. Finally, it also enables the study to critically highlight tensions between the Jamaican government's anti-crime objectives via the adoption and implementation of emergency measures for defending the constitutional rights of citizens,

[5] Gopal Balakrishnan, The Enemy: An Intellectual Portrait of Carl Schmitt, (London: Verso, 2000), 182.

[6] See Tracy B. Strong, foreword to *Political Theology: Four Chapters on the Concept of Sovereignty*, by Carl Schmitt, vii-xxxv. Translated and edited by George Schwaab. Chicago: University of Chicago Press, 2005.

upholding the rule of law *inter alia* when in fact there are instances and practices that frequently violate such espoused ideals.

Despite the aforementioned critical challenges of the Classical Model, the impact and legacy of colonialism are given scant consideration in their works. Therefore, postcolonial theory provides a useful point of departure from the sometimes suspect normative and empirical Eurocentric postulations that either inform or critique the Classical Model. By considering how the histories of colonialism, imperialism, racism, and slavery are interconnected with the state of exception, it allows us to re-conceptualize the facile norm-exception binary. It does this by showcasing how colonialism has shaped historical and contemporary claims of emergencies in Jamaica, which if neglected allows us to miss key moments on the following: (1) the definitions of normal versus exceptional and (2) how the norm gets re-defined using the exception. Overall, I seek to challenge both of the aforementioned schools of thought with postcolonial theory as it relates to how the emergency/exception model has been understood in Jamaica.

The theoretical considerations here have three (3) main objectives: (1) to challenge Classical norm-exception thinking by highlighting existing tensions within prominent scholarship; (2) to use Jamaica's experiences as a reference point to critically evaluate scholars such as Benjamin, Lazar, and Agamben who offer a more critical tale of said binary thinking; (3) and to highlight the utility of using postcolonial scholars such as Fanon and Mbembe for complicating and updating our understanding of norm and exception by revealing the arbitrary nature of power during the colonial period which continues to influence the postcolonial period. By briefly engaging with such theorists, the study highlights the necessity of broadening the empirical and theoretical horizons for

understanding emergency powers beyond European concerns by examining the colony as a state exception.

Due to an ever-expanding list of "crises" affecting nation-states in the 20th and 21st centuries, the politics of emergency powers warrants continual empirical and normative investigations from different areas of the globe. The critical examination of Jamaica forces us to reconsider the Classical Model's definition and understanding of what constitutes and justifies emergency action. Jamaica's use of emergency powers to fight crime raises questions surrounding our understandings about the temporality and spatiality of emergencies. This is done with a view of showing how increasingly indistinct and problematic the lines between norm versus exception are. Furthermore, we need to keep in mind whether these lines are inherently blurry. Similarly, we need to also be cognizant that said lines can be strategically fabricated by governments interested in using crises for their benefits, specifically as a technique of governance. Finally, and most importantly, this study hopes to contribute to the broad literature on emergency powers, rule of law, and Anglophone Caribbean politics in order to improve our understanding of how governments have colonial and postcolonial features that are inherently anti-democratic.

Norm-Exception Debate: Euro-American Thoughts

The reflections of a number of thinkers, American and European, have been quite influential in scholarship on emergency powers. As such they continue to inform the way scholars conceptualize and speak of the emergency/exception (Schmitt 2005; Schmitt 2014; Rossiter, 1948; Benjamin 2019; Agamben, 1998; Lazar, 2009). Essentially, there are two strands of this Transatlantic (or Euro-American) tradition, broadly speaking.

While there are countless other thinkers, past and present,[7] that have contemplated and debated this framework, the current work will engage with the following scholars as they are intellectually relevant with the work being pursued here.

One group of scholars has endorsed the norm-exception binary, which suggests that governments follow established rules of law in ordinary circumstances but resort to extraordinary measures times of emergency, strictly defined or not (Schmitt 2005; Schmitt 2014; Rossiter, 1948). Another group of scholars, which has been much more pronounced in the wake of the post-9/11 revival, insists on a more nuanced perspective. They contend that the lines between the norm and exception are actually far less distinct than the traditional approach has suggested and thus believe that the lines are skewed too much towards exceptionalism vis-à-vis normality (Benjamin 2019; Agamben, 1998; Lazar, 2009). Carl Schmitt and Clinton Rossiter are illustrative of the first group, while Walter Benjamin, Giorgio Agamben, and Nomi Lazar represent the latter. The aim here is to briefly highlight and engage with major ideas of their respective works in order to potentially see where Jamaica's experiences fit within these scholarly camps' theorizations about the state of emergency/exception, particularly this longstanding norm-exception binary.

Schmitt and Rossiter are from distinct schools of political thought in terms of confronting the specter of an emergency. The former represents a perspective more amenable to absolutism while the latter endorses a more liberal democratic model as we

[7] The following works are also highly influential within the field as well. See Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006);

see below in their contrasting postulations for achieving state preservation. Although from different schools of political thought, they can nevertheless be ultimately connected together via their endorsement of the Classical Model. Schmitt's sovereign decisionist interpretation is the *sine qua non* of emergency government under the Classical Model's norm-exception approach. For him, the *Ausnahmezustand* (German term for state of exception) has no preceding legal basis or norm on which to rely on (Schmitt 2005). Instead, and contrary to the avowed principles of liberalism,[8] the state has to employ necessary actions under the direction of a Hobbesian sovereign in responding to the contingencies of the political world, which is beset by flux, as Machiavelli warned in *The Prince*.

For Rossiter, constitutional (commissarial) dictatorships are the answer to Schmitt's contention that liberal democracies become paralyzed in the face of genuine existential threats (as exemplified by the experiences of the failed Weimar Republic). A constitutional dictatorship allows for self-defense of an existing constitutional polity by temporarily stepping outside the strict boundaries of the legal order to preserve the state Using the cases of four large democracies, namely Britain, France, Germany, and the United States, Rossiter shows how constitutional dictatorial methods are sometimes employed to protect and safeguard existing liberties in times of crises (war, rebellion, and economic problems). Likewise, the power of the state is *concentrated, expanded,* and *liberated* in constitutional dictatorship (Rossiter 1948, 288). Power becomes

[8] Arguably the father of liberalism, John Locke, also theorized that violence was not mutually exclusive to his political theory. For example, Locke (1960, 375) argues for prerogative as a means of handling the "many accidents...wherein a strict and rigid observation of the Laws may do harm."

concentrated in the hands of the executive; power is *expanded* to allow for more arbitrary control into areas where it already exists (taxation, criminal justice, etc.,) and those where its power was forbidden such as civil and economic liberties; and finally, power is *liberated* from the normal constitutional and legal constraints (Rossiter 1948, 288-290).

Despite their contrasting political and ideological commitments, both thinkers draw their institutional theorizations and conclusions from a similar conceptual spring, i.e., from the norm-exception binary—meaning ordinary laws are used during ordinary circumstances and exceptional ones deployed in exceptional or extraordinary times. Based on Jamaica's colonial and post-independence histories, we will see examples of executive power being more akin to Schmitt's decisionist and sovereign dictatorship than that of the constitutional/liberal variant where the executive should be ideally constrained by the separation of powers, the rule of law, and other legal-institutional constraints. In this sense, Jamaica's sovereign, whether designated as either a Governor-General or Prime Minister, "is he who decides on the exception" (Schmitt 2005, 1).

Nevertheless, Rossiter's idea about constitutional dictatorship is also useful for understanding Jamaica's post-independent reliance on SOEs and other emergency-like measures for combating crime and violence. It is plausible to believe that the current maneuverings of successive Jamaican prime ministers bears relevance to Rossiter's warnings about the dangers of constitutional dictatorships. These include: (1) the risk of temporal constitutional dictatorship being turned into a permanent one; (2) being deployed to serve reactionary forces and preserve power for privileged groups; and (3) the ultimate infusion of temporary dictatorial methods into the permanent working structure of government and society (Rossiter 1948, 294-295). Ultimately, while both

scholarly works are relevant theories for analyzing Jamaica, they do not quite cover the gamut of its historical development which is heavily defined by British colonialism. In summary, there is always more to be discovered about emergency powers and their operations.

Norm-Exception Debate: Transatlantic Critiques

Turning to Walter Benjamin and Giorgio Agamben, we encounter arguably some of the most significant pushback against norm-exception binary in the emergency powers scholarship. Benjamin's critical approach, one where the exceptional has always been intertwined with the normal state of affairs for those caught in the web of oppression, is certainly noteworthy here. Consider his famous words: "The tradition of the oppressed teaches us that the 'state of emergency' in which we live is not the exception but the rule" (Benjamin 2019, 200). However, we might pause and ask ourselves who is Benjamin referring to as the oppressed in his famous eighth thesis? By that I am trying to ascertain whether or not Benjamin had a particular group of people in mind, seeing he was Jewish and a Marxist of sorts in an increasingly anti-Semitic and fascistic Germany.[9] In that sense, can we critically adopt his works, specifically his *Critique of Violence* and *Theses on the Philosophy of History*, to highlight how racialized structures[10] formed a core part of the colonial state of exception which can transition into the postcolonial era.

[9] Benjamin, no stranger to oppression, especially that associated with the Third Reich, eventually committed suicide on the Franco-Spanish border rather than become a victim of the Nazis. See the discussion of this event by Michael Lowy and Walter Benjamin, trans. Chris Turner, *Fire Alarm: Reading Walter Benjamin's 'On the Concept of History* (London: Verso Books, 2005), p. 17.

[10] See Ines Valdez, Mat Coleman, and Amna Akbar, "Law Police Violence, and Race: Grounding and Embodying the State of Exception," *Theory & Event* 23 no. 4, (October 2020): 902-934.

Benjamin's "oppression" thesis, if we may call it that, while short on specific details, certainly warrants attention here. It has been argued that Benjamin (given his Marxist dispositions)[11] was more concerned with labor as the oppressed class rather than race for his account of the blurred lines between normal and exceptional violence (Valdez, Coleman, & Akbar 2020, 912). Nevertheless, the oppressed from a colonial perspective must be analyzed from an intersectional perspective—meaning how race, class, gender, and other characteristics correspond with one another to create power and disadvantage.[12] This intersectionality views race and class as a key cornerstone of colonial hierarchies which suggests an overlap rather than mutual exclusivity (Ledgister 1998). Furthermore, when we engage with Fanon below, we will have additional insights into how race and class aid this formation of a colonial personhood. Overall, race and class are mutually constitutive in the colonial hierarchy as blacks (free or enslaved) were usually rooted at the bottom of the pyramid (politically and socio-economically) thus rendering them as the oppressed in this schema.

In his *Theses on the Philosophy of History,* he argues and challenges the cozy and historical progressive view of history, which viewed Fascism as an aberration, in order to show a more complex chronological outlook—especially one where oppression had been the norm (not exception) in class-based capitalist societies (Löwy & Benjamin 2005, 58-

[11] See the following for an overview of Marx's and Marxist Eurocentric tendencies: J.M. Blaut, "Marxism and Eurocentric Diffusionism," in *The Political Economy of Imperialism: Critical Appraisals*, ed. Ronald H. Chilcote, (New York: Rowman & Littlefield Publishers, 2000) pp. 127-140.

[12] For more on this definition and its application, see Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHICAGO LEGAL F. 139 (1989). Also see more contemporary musings on said topic in Kimberlé Crenshaw, *On Intersectionality: Essential Writings*, (New York: New Press, 2014).

60). He further notes that we must "arrive at a concept of history which corresponds to" oppression and subsequently asks for "the introduction of a real state of emergency" (Benjamin 2019, 200). By my reckoning, Jamaica's colonial period corresponds with this critical conception of history (with the exception as the norm) as the Caribbean was a vital site in the early stages of a global extractive form of capitalism,[13] especially its sugar plantation and slave-based components, and thus represents an apt example of the oppression that Benjamin seeks to highlight.

Benjamin's critique of law and violence contains a valuable insight about the inherent dual functions which emerges out of such an interplay. He argues that violence is formative, whereby it both initiates law (law-preserving violence) and maintains law (lawmaking violence). He delimits his critical perspective on the relationship between law and violence, "For the sake of simplicity, to contemporary European conditions"(Benjamin 1986, 280). He therefore focuses extensively on how organized labor and modern European states are entities legally entitled to use violence via law. It is in his discussion of the police as a modern state institution that he shows how both lawmaking and law-preserving violence are bound together. In his view the police are not unprejudiced enforcers of the law, but in fact "are allowed to rampage all the more blindly in the most vulnerable areas…" (Benjamin 1986, 286).

[13] For a more robust discussion of this thought, please see the following influential work: Eric Williams, *Capitalism and Slavery,* (London: Andre Deutsch, 1964), especially chapters 3 and 4 which document the Caribbean's importance (exports and imports) to Britain's global economic status. Also see Hilary Beckles, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (Kingston: University of the West Indies Press, 2013), p. 91. He argues that Barbados in the seventeenth century "was worth more to England than all the American colonies combined," and by the 1770s, British West Indian plantations were collectively worth equivalent of £98 billion (2010 value in £).

Although some scholars (Valdez, Coleman and Akbar 2020, 911) view Benjamin's account of law and violence as quite clarifying, especially as it relates to the historical and "normative character of the state of exception" and its targeting of certain vulnerable groups, there is still a lack of specificity and engagement with how this occurs in non-European spaces. In fact it is Arendt (1973, 216) who points us to examine how colonial bureaucracy, especially the quintessential bureaucrat, achieves this feat via impermanent and "changing decrees" that gain the force of law to continue and maintain colonial expansion. Consequently, Benjamin forecloses the plight of the colonies which have European liberal positive laws, especially one based on racial violence and terror, imposed on them for "civilizing" and governing such spaces.[14] This oversight creates an unnecessary conceptual hurdle for developing a more intricate discussion of law's morally ambiguous relationship with violence as it relates to the colonial emergency. This Eurocentric approach, willful or not, brings into focus the fact that the relationship between law and violence must be broadened to examine other pertinent historical contexts as well, in this case colonialism, in order to correct his oversights.

Overall, while Benjamin's critical insights on the role of violence vis-à-vis law along with the "tradition of the oppressed" are quite useful, it unwittingly ignores other oppressed groups caught up in the state of exception (the colonized and racialized Other in the case of Jamaica). This suggests that we have to widen the theoretical net to places

[14] Even a proponent of the norm-exception framework like Schmitt is aware of this discrepancy. A closer reading of Schmitt suggests he is acutely aware of the relationship between the emergency and colonialism. See his discussion of how English law clearly distinguished between homeland (dominions) and colonies (non-dominions) in Carl Schmitt, *The Nomos of the Earth* (New York: Telos Press, 2006), p. 98: "The diversity of colonial possessions and the distinction between dominions and non-dominions kept alive the English sense for specific spatial orders and variations of territorial status."

like Jamaica that were ignored in order to obtain further critical insights about the practical colonial and even postcolonial character of the supposed state of exception. Benjamin's (2019, 200) placement of European historico-philosophical legal concerns as analogous to the "tradition of the oppressed" misplaces the European proletariat/working class as the ideal or sole "emergency situation" while negating colonialism's mistreatment of the racialized Other. Therefore, it is certainly time to ensure that colonialism's "state of emergency" (specifically Jamaica here) is evidence of Benjamin's "exception being the rule" thesis.

Agamben's work on the state of exception during the aftermath of September 11 and the inaugural War on Terror (WOT) also have conceptual utility for interrogating Jamaica's past and present concerns. Nevertheless, his analysis misses the mark and thus can be conceived of as "ahistorical and illocalized"[15] due to the lack of concrete engagement with practices of the so-called state of exception from a colonial perspective. As some commentators put it, Agamben declines "to specify the *logos*, mechanics or targets of violence in the state of exception" (Valdez, Coleman and Akbar 2020, 902). With that being said, Agamben's theorizing can be corrected by locating and specifying how the state of exception functioned as a zone of indistinction between norm and exception for colonies like Jamaica. For example, episodes of colonial martial law were geared towards instilling fear of white minority state power as a tool of government over the Afro-descended majority. Simply put, he doesn't engage much with how racialized

[15] For full discussion, see Michael Head, *Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt* (Abingdon: Taylor and Francis 2017), p. 129.

violence operates outside of the Holocaust and this makes his theoretical viewpoints empirically incomplete.

Agamben's writings, ones influenced by Schmitt and Benjamin's own,[16] gives us further clues on how colonialism is empirically incomplete in an attempt to locate various Transatlantic developments related to the state of exception. What evidence can be provided to support such a claim? First of all, he cites Republican Rome's employment of the institution of *iustitium*[17], which means "standstill or suspension of law," as the modern precursor to the state of exception/*Ausnahmezustand* (Agamben 2005, 41). Secondly, he provides compelling and insightful Western European legal examples of emergency governments, namely the French *état de siège/*state of siege, British martial law, and the infamous Article 48 of the Weimar Republic. However, we never see any details, empirical or theoretical, as to how such powers are deployed in colonial spaces as a "technique of government" as he likes to call the state of exception. "In sum, Agamben

[16] See Agamben's *State of Exception* chapter 4, entitled, "Gigantomachy Concerning a Void," which covers this debate between Benjamin and Schmitt. Also see McLoughlin, Daniel. "The Fiction of Sovereignty and the Real State of Exception: Giorgio Agamben's Critique of Carl Schmitt." *Law, Culture and the Humanities* 12, no. 3 (October 2016): 509–28. https://doi.org/10.1177/1743872112469863.

[17] *Ibid*, chapter 3, "Iustitium" for further details. For example on page 41, he defines the institution as:

> The term iustitium—which is constructed exactly like solstitium—literally means "standstill" or "suspension of the law": *quando ius stat*, as the grammarians explained etymologically, *sicut solstitium dicitur* (iustitium means "when the law stands still, just as [the sun does in] the solstice"); or, in the words of Aulus Gellius, *iuris quasi interstitio quaedam et cessatio* (as if it were an interval and a sort of cessation of law). The term implied, then, a suspension not simply of the administration of justice but of the law as such. The meaning of this paradoxical legal institution—which consists solely in the production of a juridical void—is what we must examine here from both a philosophico-political standpoint and from the perspective of the systematics of public law.

is decidedly muted when it comes to the localized, temporal, and embodied character of the state of exception (Valdez, Coleman and Akbar 2020, 905).

While these varying forms of emergency powers are influential for understanding the concerns of Jamaica, they are all used quite uncritically to set the stage for the *Ausnahmezustand* to emerge and focus solely on European concerns. They are thus devoid of broader colonial and imperial applications for examining how blurred the lines between norm and exception have been and continue to be for non-European populations across the globe. Subsequently, Head (2017, 129) critiques Agamben's postmodernist approach to emergency powers, which he derides as ahistorical due to its exclusion of socio-economic concerns and class content.[18]

Agamben's *Homo Sacer*, the precursor to *State of Exception,* cites the concentration camp as a site of total inhumanity, one which is not some lost historical anomaly but a contemporary and ongoing political space. Similar to Benjamin, he theorizes about "European conditions" in *Homo Sacer* in order to develop a normative theory of Western sovereignty. Sovereignty is thereby linked to the state of exception to reveal the historical and contemporary tensions between *zoē* (bare life) versus *bios* (political life), especially as it relates to the latter's power for deciding on life and/or death.

[18] See Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte," in the *Marx-Engels Reader,* edited by Robert Tucker (New York: W.W. Norton & Company, 1978), p. 594-617. Marx notes how bourgeois reactionary political power used the *état de siège/*state of siege clauses from the French Revolution of 1789 to defeat and suppress the proletariat during the subsequent revolutionary events of 1848. Also, Rossiter (1948, 295) makes a similar remark to Marx in *Constitutional Dictatorship* about the civil rights being suspended for supposed internal crises but being a ploy for the "maintenance of some privileged group in power."

He notes that the Holocaust epitomized how legal violence can be deployed against the Other to strip them of juridico-political rights and citizenship by putting them in the camp. Consequently, the camp represents bare life as it became "the most absolute biopolitical space ever to have been realized…" (Agamben 1998, 171). However, some commentators rightfully note that: "This focus, while important, occludes other genealogies of racialized state power that manifests the intimate entwinement between law and violence" (Valdez, Coleman and Akbar 2020, 902). Essentially, there are other machinations of the "camp" such as the colony which have to be considered in developing a broader theory about the state of exception.

"What matters here is that in both cases, a state of emergency linked to a colonial war is extended to an entire civil population" (Agamben 1998, 166). With this statement, Agamben clearly acknowledges the colonial roots of this inhumane institution and practice by citing the Cuban and South African colonial experiences[19] as launching pads for camps via declared states of exceptions and martial law (Agamben 1998, 166). However, throughout his consideration of the camp as a contemporary political space, he still manages to concentrate his theorizing on European conditions (by examining the German law of *Schutzhaft*—protective custody and extra-legal rounding up of Jews and political opponents—and the subsequent Jewish internment in the *lagers).* Therefore, he

[19] Agamben (1998, 166) states the following: "Historians debate whether the first camps to appear were the *campos de concentraciones* created by the Spanish in Cuba in 1896 to suppress the popular insurrection of the colony, or the "concentration camps" into which the English herded the Boers toward the start of the century." For a more comprehensive account, see Louis Perez Jr., *Cuba Between the Empires, 1878-1902* (University of Pittsburgh Press, 1983) about General Valeriano Weyler's *reconcentrado* total war policy in Cuba to delineate the combatant populace from the noncombatant one by ordering rural dwellers to relocate to specific fortified towns (*reconcentrados).*

neglects Germany's "other" concentration camps as part of its colonial and imperial legacy in Namibia (then called German South West Africa) during the early 1900s.[20] As one writer succinctly puts it: "Yet Agamben never adequately explains the relationship between these two events: the colonial normalization of the state of emergency/exception and this particular ontological structure of the Nazi camp" (Barder 2015, 59-60).

The treatment of the Other, especially ones outside of metropolitan Europe, is one usually based on violent subjugation in the form of conquest and colonial administration. Michel Foucault (2003, 103) notes that certain tools of violence used in overseas colonial administration, i.e., declared states of exception with genocidal effects, are gradually incorporated back into the metropole/colonizing states' juridico-political structures in a so-called "boomerang effect."[21] Agamben misses an analytical opportunity to engage with how racism (alterity/Othering) and colonialism became an "emergency explanation" according to Arendt (1973, 185) for European imperialism via Germany's declared exception in Namibia, which would eventually "boomerang" back to affect its own Jewish population under the Third Reich. In other words, one's race can determine one's exposure to a state of exception or not. Therefore, when colonial entities such as Jamaica

[20] There have been repeated discussions and negotiations of late between the German and Namibian governments about the former's genocide of the Herero and Nama peoples between 1904 and 1908. See the following: "Germany colonial-era genocide reparations offer not enough-Namibia vice president," *Reuters*, June 5, 2021, by Nyashu Nyaungwa. Retrieved from: https://www.reuters.com/world/africa/germany-colonial-era-genocide-reparations-offer-not-enough-namibia-vice-2021-06-04/. Also please see, George Steinmetz and Julia Hell, "The Visual Archive of Colonialism: Germany and Namibia," *Public Culture* 18, no.1: 147-183.

[21] This idea was first propagated by Aimé Césaire in his work *Discourse on Colonialism.* For a fuller discussion, please see Aimé Césaire A, *Discourse on Colonialism.* (New York: Monthly Review Press, 2000) p. 36 & 41. Also see, Alexander D. Barder, *Empire Within: International Hierarchy and Its Imperial Laboratories of Governance*. (Oxon: Taylor & Francis, 2015), p. 72.

and others are not empirically considered in critiquing the norm-exception binary (one colored by violence and racism), we lose clarity about how the state of exception functioned as a broader technique of government.

"*The camp is the space that is opened when the state of exception begins to become the rule"* (Agamben 1998, 168-169). While this maxim is carefully applied to Nazi Germany's infamous Holocaust concentration camps, there is an oversight when dealing with its colonial exploits, which could have served as a useful analytical site for further exploring the so-called "zone of indistinction between outside and inside, exception and rule, licit and illicit," as Agamben (1998, 170) puts it. A revision is thus needed. If we want to showcase how the exception functions as the norm, then Europe cannot serve as its sole analytical epicenter. Instead, we have to analyze her colonial exploits in order to broaden how we view this maxim.

As it relates to a more modern liberal analysis of norm-exception thinking, Nomi Lazar's work proves valuable but also falters along the way. Lazar (2006, 246) argues that the norm-exception debate is problematic as it is "self-undermining and dangerous" for both scholarship and popular discourses about how liberal democracies should manage crises. She further argues there are continuities between emergencies and periods of normalcy that challenge the glib classical norm-emergency dichotomy because law still informs the declaration of emergencies, their definitions, the vast powers afforded to the state, and their duration (Lazar 2009). Ultimately, her work seeks to challenge and escape the exceptionalism framework of classical scholars by proposing a

neo-Lockean variant[22] that fuses pragmatic and empirical (experiential) ethics (as she terms it) —as a democratic way of confronting the emergency.

Nevertheless, Lazar's work seems problematic due to her reliance on neo-Lockean liberal ethics to overcome exceptionalism. Essentially, she "explores the resources of liberal democratic theory for meeting the challenge of emergency without jettisoning liberal values" (Lazar 2009, 53). However, this position is one grounded in a European liberalism which was inapplicable to colonial possessions historically speaking. Furthermore, this position also ignores the way relationships were initially defined between Europe (core/metropole) and her colonies (periphery) across Africa, Asia, and the Americas—which allowed for a split in legal identity between the metropole and the colony based on racial identity (Hussain 2003, 111). Therefore, the development and application of neo-Lockean liberal ethics is antithetical in terms of how colonial societies were developed and managed since the sword in conjunction with law were usually deployed to gain compliance and govern effectively. Ultimately, Lazar's position is untenable for exploring and understanding the emergency conundrum of colonial and postcolonial societies, especially in the former where liberal rights were initially conferred on Europeans solely.[23]

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[22] Lazar terms this as a "flexible liberal" approach, one which places emphasis on pragmatism and political experiences, especially one mixed with continuity of principles and accountability, to confront emergency situations that affect the body politic. See Nomi Claire Lazar, *States of Emergency in Liberal Democracies.* (Cambridge: Cambridge University Press, 2009), p. 50.

[23] See Margaret Kohn and Kelly McBride, *Political Theories of Decolonization Postcolonialism and the Problem of Foundations.* (Oxford: Oxford University Press, 2011), p.79. They read Agamben's work as follows: "For Agamben, martial law and other exceptional measures reveal the Janus face of sovereignty: the power to declare the state of exception is the same power that invests individuals as worthy of rights."

Essentially, Lazar's normative commitments misleads her to think that a liberal juridico-political framework renounces the norm-exception framework. Jamaica's experience with martial law, especially the Morant Bay Rebellion of 1865, will show quite the contrary. Liberalism's lip-service to pluralist ideals in theory, one which endorsed legal and institutional protections for difference (racial), were quite absent in colonial practices. Thus, it is naïve to think that liberalism's ethical approach to emergencies, especially in a colony like Jamaica, substantially differs from the republican and decisionist (absolutist) variants endorsed by Machiavelli, Rousseau, and Schmitt, whose respective positions on emergency ethics she roundly critiques. Therefore, we can justifiably conclude that Lazar's liberal variant to the norm-exception approach still does not fully capture and theoretically account for Jamaica's historical and contemporary emergency regimes. A valuable postcolonial critique of Lazar can be summed up like this:

> The state of exception was not really an exception because it created the conditions that made rule possible. This position differs markedly from the liberal view of the state of exception, which has typically focused on the legitimacy of the *exception* without questioning the legitimacy of the underlying rule. (Kohn and McBride 2011, 96)

The ideas of Benjamin, Agamben, and Lazar are indeed theoretically and empirically useful for applying and refining my own thoughts regarding Jamaica's emergency powers history. Benjamin suggests to us that oppression and state violence have been the rule instead of the exception. From Agamben we learn that the assumed neat lines between norm and exception can be viewed as indistinct, which at times allows for the emergency to re-structure normalcy. Lazar (2009, 4) suggests to us that this binary theorization is "empirically and ethically suspect" and that grounding it on an

exceptionalism framework limits our understanding of how emergencies actually work, which allows for expressed continuities between both periods of normality and extraordinariness. Nonetheless, while the aforementioned group challenges norm-exception assumptions (to their credit), there is still a considerable dearth of colonial analyses and references that each thinker elides or fails to engage with at times. This matters as we lose critical empirical and theoretical insights from colonialism for inserting and updating the Classical Model's guiding assumptions. This oversight allows for the experiences of Europe to become the norm while relegating how exceptionality became standardized in the colony. By bringing the colonies into the empirical and theoretical fold we are not only challenging the norm-exception framework, but we are also questioning (il)liberal democracy and the rule of law vis-à-vis colonial practices.

The theoretical landscape of the Classical Model and even those who oppose said assumptions are predominantly based on Eurocentric (mainly American and European) theorizations and experiences with the state of exception. Conversely, this state of affairs needs to be challenged as a way of broadening the conceptual tools available for studying and understanding how states of emergencies differ in theory and practice, across different cases. The primary intellectual gain here allows for increased contextual specificity (both agreement and disagreement) for making inferences about the norm-exception dichotomy by peeling away its rigidity and showing how indistinct the presupposed neat lines are in reality. Therefore, I propose expanding the theoretical lens of norm-exception by highlighting Jamaica's experiences with emergency powers in order to broaden our juridico-political understandings of the realities embedded within the colony and beyond as it relates to claims of emergencies.

In closing, while Benjamin, Agamben, and Lazar offer profound insights regarding how we may begin to challenge classical norm-exception thinking, their Eurocentric approaches (normative and empirical) still fail to account for how emergency powers were used to uphold colonial rule. Although geographically small, Jamaica's importance to understanding emergency powers (past and present) should not be understated or overlooked. The instances of the exception functioning and redefining the norm can be theoretically reflected on by looking at evidence from both the colonial (Sam Sharpe and Morant Bay incidents) and post-independent periods (Gun Court, Suppression of the Crime Act, States of Emergencies, and Zones of Special Operations). Therefore, the current study aims to rectify this lacuna by showing intersections between norm and exception in colonial and postcolonial Jamaica (a legacy of the former of sorts).

Postcolonial Critical Thoughts: Beyond Norm vs Exception

Postcolonial studies offer this project an opportunity to enlarge the theoretical landscape, which allows us to go beyond norm-exception's binary thinking and ultimately critique it. It is the stance of this study that while some aspects of Jamaica's experiences do in fact adhere to the Classical Model's theorization, a lacuna still exists for understanding and examining how the lines of norm and exception operated in Jamaica's case. Therefore, the thoughts of two prominent postcolonial scholars, Frantz Fanon and Achille Mbembe, will be explored and synthesized to provide a more contextual and nuanced overview of how emergency powers operated as a tool of colonialism along with its legacy. Postcolonial scholarship offers us insights into how continuities (not assumed radical breaks with the past) in law and politics impact so-

called postcolonial societies such as Jamaica's. For our purposes, we can term such continuities as "colonial emergency legacies." However, before jumping into the various critiques about the norm-exception framework from this perspective, it is of utmost importance to briefly define and explain what postcolonialism and postcolonial theory are.

Postcolonial theory[24] is a highly contested and complicated school of thought which encompasses a number of academic disciplines. As a multidisciplinary endeavor, it can be described as:

> …a body of thought primarily concerned with accounting for the political, aesthetic, economic, historical, and social impact of European colonial rule around the world in the 18th through the 20th century. Postcolonial theory takes many different shapes and interventions, but all share a fundamental claim: that the world we inhabit is impossible to understand except in relationship to the history of imperialism and colonial rule. (Elam 2019)

Furthermore, a postcolonial critique (one adopted from Marxism but eventually transformed into its own purpose) espouses a critical normative stance for opposing and actively[25] intervening in historical and contemporary forms of oppression and domination (Young 2016, 11). Based on this definition, we can therefore use this critical tool to assess the impact of colonial rule in Jamaica's past and present (ab)uses of emergency powers.

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[24] See Robert J.C. Young, *Postcolonialism: An Historical Introduction.* (Chichester: Wiley and Sons 2016), p. 64. He states postcolonial theory is not a strict one per se, but it has developed "a set of conceptual resources" to examine arts, culture, economics, literature, law, politics, and a whole host of other disciplines. For our purposes here it can be best viewed as a school of thought.

[25] *Ibid*, 18. Postcolonial theory is also heavily influenced by anti-colonial activism, theory, and the scholarly activist writings from the French anticolonial voices such as those of Jean-Paul Sartre and Frantz Fanon.

Additionally, from a specific political science perspective, postcolonialism is best described as a "broad term" dealing with critiques of colonialism, national liberation movements, and enduring struggles with legacies of colonialism—which does not only refer to the formal abolition of colonialism but also to the world which it has produced in its wake (Kohn and McBride 2011, 8). In this sense, there can be no neat divide between colonial and postcolonial periods, as the former continues to influence the latter. This influence for our purposes is related to the role of emergency powers as a tool of governance. Therefore, a theoretical re-engagement with how colonial laws and practices (in the form of the state of exception) has shaped and continues to structure Jamaica's juridico-political powers. In this sense, examining a portion of its criminal justice response–one centered on a norm-exception criteria and resort to claims of emergencies–becomes a worthwhile intellectual enterprise. To paraphrase from Elam (2019), contemporary Jamaica is impossible to understand without consulting its colonial history and rule which was grounded in emergency powers as the rule, not the exception.

Besides chronological definitions, the term postcolonial itself can be problematic in strictly defining what or who are its concerns. It generally reflects on the following range of processes/situations, including but not limited to: (1) the emergence of the nation-state after colonialism but situated in a globalized economic hierarchy; (2) a dialectic between decolonization and the realization of state sovereignty; (3) the search for a national homegrown culture that revises and replaces the colonial identities and ideologies; (4) and finally specific historical changes that have arisen in the former colonial powers themselves (Young 2016, 57). Essentially, to be postcolonial (identity-wise) means being subjected to everchanging definitions of personhood.

One might ask the following: How does law, by way of emergency powers, figure into this postcolonial analytical framework? In consulting postcolonial theory, we can reveal something dubious and sinister about law (normal, exceptional, and liminal variants) in the past and present realities of Jamaica. In this sense, postcolonial studies allow for us to derive a new and improved understanding of the state of exception/emergency and move beyond its glib Eurocentrism that is tied to norm-exception thinking. This is especially true as it relates to a postcolonial framing and discussion of Jamaica's post-independent declared state of exception laws and practices (the normalized ones) for criminal justice.

Fanon: Emergency and the "Wretched of the Earth"

Martinican-born, French-trained psychiatrist and anticolonial activist, revolutionary, and scholar in service to Algerian Independence War, Frantz Fanon's life can hardly be considered ordinary. The name Fanon is not one that would be usually associated with emergency powers, but as an anticolonial activist and scholar his critical acumen can be correlated as being a pivotal spokesperson in "the tradition of the oppressed" (Benjamin 2019, 200). Bhabha (1986, xi) sums up Fanon's anticolonial *raison d'être* as being connected with this "tradition," which is ultimately tied to a "language of revolutionary awareness" for violent decolonization. Therefore, we can interrogate and apply his theorizations on colonialism as the exception functioning as the norm for the colonized (de facto and de jure), right up until Samuel Huntington's second and even third waves of democracy.

While he does not make explicit references to the state of exception in his works, Fanon's vivid description of the colony–which he describes in Manichean terms as a system molded and maintained through violence– provides an enticing dialectic between colonizer and colonized. It is in this violent colonial dichotomous existence then that we can arguably locate the proverbial state of exception, although Fanon does not theorize it as such. Instead, it was a violent tool that colonial governments used extensively on a quotidian basis to gain control over and compliance from the minds and bodies of the colonized. The colonial state of exception was really an omnipresent reality for the colonized. Essentially, for him the state of exception could be seen as the norm.

What does Fanon bring to the table for improving our understanding of the colony as a state of exception that aforementioned proponents and critics of the Classical approach have seemingly neglected? His description of the daily[26] (cultural, epistemic, physical, and psychological) violence inflicted onto natives (colonized) by the settlers (colonizer) provides a completely different story about the workings of norm-exception, without calling it as such. It depicts how exceptional violence is routinized as a core element of colonial governance. In other words, Fanon frames colonial violence for maintaining authority and control, one of a juridical and arbitrary nature, as the norm for the oppressed under colonialism versus the exception as the Classical Model would dictate by solely examining European conditions. It has been established that the colonial state of exception has been neglected by several Transatlantic scholars critical of the

[26] See Patrick Williams and Laura Chrisman (editors). *Colonial Discourse and Postcolonial Theory: A Reader*. (Oxon: Routledge, 2013), p.10. They state that "Benjamin's iconoclastic, imagistic approach to history, his notions of its discontinuities and fragments, also overlap significantly with Frantz Fanon's emphasis on the fragmentary and image-based history of the colonized."

Classical Model, namely Agamben, Benjamin, and Lazar. However, by reading Jamaica's colonial history of martial law along with its contemporary reality of declared states of emergencies (SOEs) and Zones of Special Operations (ZOSOs) through a Fanonian lens, we are able to discern and identify the role of violence, operating within the rhetorical framework of law and order, as the primary tool in maintaining the aforementioned "tradition."

The antagonistic relationship between the colonizer and colonized is best summed up by Fanon (2005, 2) in stark terms: "Their first confrontation was colored by violence and their cohabitation – or rather the exploitation of the colonized by the colonizer – continued at the point of the bayonet and under cannon fire." Using Jamaica as an example, we therefore learn to view the confrontation between the colonized and the colonizer not as an exceptional moment during the Sam Sharpe and Morant Bay uprisings, but arguably the daily existence for this Schmittian friend-enemy pairing since they had come in contact with each other. In other words, state-sponsored violence is not exclusively applied to extraordinary situations (or ones designated as such) but serves as a daily tool of colonial administration. Although the colonized are desirous of freedom and sovereignty, the colonizer needs to maintain the exploitative status quo by restricting such thoughts and praxis as much as possible. They therefore invoke colonial "necessity" to combat the native's yearning for liberty. It is this elastic definition of "necessity," under the guise of law and order—but one structured by violence, which made martial law and other early forms of imported emergency powers function as ideal mechanisms for controlling and subduing colonized Jamaicans. Ultimately, even necessity is unilaterally defined and centered on suiting the colonizers interests.

Fanon's engagement with the spatial boundaries of the colony as part of the broader state of exception deserves discussion here. He says this about colonial spatiality and its governance:

> The colonized world is…divided in two. The dividing line, the border, is represented by the barracks and the police stations. In the colonies, the official, legitimate agent, the spokesperson for the colonizer and the regime of oppression, is the police officer or the soldier. (Fanon 2005, 3)

Fanon's portrayal of colonial violence provides us an opportunity to apply his thoughts on how law enforcement was used to implement and reinforce this bifurcated reality, one grounded in arbitrary violence and not the rule of law as proponents of liberalism such as Rossiter and Lazar would theorize. He emphatically states:

> In colonial regions, however, the proximity and frequent, direct intervention by the police and the military ensure the colonized are kept under close scrutiny, and contained by rifle butts and napalm. We have seen how the government's agent uses a language of pure violence. The agent does not alleviate oppression or mask domination. He displays and demonstrates them with the clear conscience of the law enforcer and brings violence into the homes and minds of colonized subject. (Fanon 2005, 4)

As one who does not mince words, Fanon frames colonial violence as a correlate of law enforcement. Therefore, colonial violence is bizarrely not the negation of law but also an expression of it for dealing with such populations. Henceforth, we cannot accept theoretical considerations which are devoid of engaging with the colonial oppressed and the quotidian violence that defined such circumstances. As it relates to Fanon's understanding of colonial violence, we get a glimpse of how the oppressed lived in a general and routine state of exception in the colony. While Jamaica's own colonial experiences are not the sum total of colonialism, it is worthwhile to note how violence is

not divorced from law but becomes an accompanying force for fulfilling its mission in the most normal of situations.

Furthermore, it is also pertinent to examine how race becomes a key constitutive feature in developing the spatial boundaries of the colonial state of exception. “Looking at the immediacies of the colonial context, it is clear that what divides this world is first and foremost, what species, what race one belongs to” (Fanon 2005, 5). Although a staunch critic of Fanon’s zealous appeal for violence in decolonization, even Arendt (1973, 137) highlights the role race plays in bureaucracy and imperialism in shaping how said law is developed via mutable decrees. This is the basis of arbitrary colonial governance. She termed this as the pernicious “rule of Nobody.” In sum, colonial and imperial bureaucracies thus lead to an early form of totalitarianism that gets implemented and refined in the colonies for export right back to Europe.

Racism (by design) thus emerges as a definitive and distinctive element in the colonial state of exception, which served the white minority European interests in places such as Jamaica compared to the African-born or descended majority. It served as a marker, a dividing line of sorts, as to who was allowed to be sovereign or share in the spoils of sovereignty. Charles Mills (1997, 55) states we can describe this as “the divide between persons, and subpersons, *Untermenschen.*” The subperson’s natural and civil rights are negated in the colonial state of exception while those classified as “persons” are reaffirmed. Therefore, those that fall outside of then Western notions of personhood are confined to both a state of exception and exclusion from the colonial body-politic simultaneously. Race then constructs those who are subjected to exceptional governance (usually persons of African descent in Jamaica’s case) versus those who have recourse to

civil jurisdiction/normality (usually Englishmen and their descendants).[27] In this schema, race is an expression of rights and power (political, socio-economic, and juridical), with an emphasis on the latter here. Therefore, it would stand to reason that colonial Jamaica reflects this compartmentalized racial dynamic which Fanon explicitly refers to.

Mbembe: *Commandement* and the Postcolony

While Fanon has provided an initial entry for understanding the emergency juridico-political structure of the colony, which can be used to invert the norm-exception binary and those it affects (primarily the colonized), we are still held captive to a dichotomous method of examining dominance and power relations. Therefore, Mbembe (1992) notes we must go beyond mere binaries to understand the continuity and intersection between the colony and what he calls "postcolony." Accordingly, the "postcolony" is conceived as recently decolonized societies–at least in the formal sense of the word–that are still held captive to the previous mode of domination and violence which defined colonialism. They can be defined by what he calls their "chaotic plurality" but paradoxically also by "internal coherence," which ultimately culminates in the creation of a "distinctive regime of violence" (Mbembe 1992, 2). Interestingly, he seems quite adept in identifying how the postcolony (mainly in sub-Saharan Africa and the Francophone Caribbean contexts) operates with what he calls *commandement*. Mbembe (2001, 134) sees *commandement* as encompassing an "authoritarian modality *par*

[27] Mbembe (2001, 29-30) argues that under Napoleon's colonial *ancien régime* "the colonizers alone enjoyed what passed for civil and political liberties." This created a colonial distinction between "citizens" and "subjects" in the Francophone colonial world, a schema that can be arguably extrapolated to British colonial holdings in the Caribbean and beyond.

excellence" grounded in a colonial sovereignty which "embraces the images and structures of power and coercion, the instruments and agents of their enactment…" For our purposes, Mbembe's theoretical insights will be applied to Jamaica's own colonial and post-independence use of *commandement* as a more functional expression of how the exception gets routinized in the colony and postcolony.

A key question that consistently emerges in both classical and postcolonial scholarship is: What is the approximate location of the state of exception? Mbembe (2003, 22), like Fanon, identifies it as being acutely present in the colonial/plantation system and apartheid. For him, the colony as a state of exception represents a space where sovereignty is based primarily on the exercise of power outside the law (*ab legibus solutus)*.[28] He further states: "The most original feature of this terror formation is its concatenation of biopower, the state of exception, and the state of siege. Crucial to this concatenation is, once again, race" (Mbembe 2003, 22). For him, the primacy of the European juridical order or *Jus publicum Europaeum* becomes crucial to understanding how biopower,[29] race, and the state of exception align in the colony. Firstly, *Jus publicum* postulated a legal equality of states in terms of the *right to wage war* to kill or make

[28] Mbembe (2003, 23) puts it like this: "…in modern philosophical thought and European political practice and imaginary, the colony represents the site where sovereignty consists fundamentally in the exercise of a power outside the law *(ab legibus solutus)* and where "peace" is more likely to take on the face of a "war without end."

[29] A termed coined by Michel Foucault. Biopower is a technique of political power that is geared towards caring for and managing human bodies and populations (human life). See Michel Foucault, trans. Robert Hurley, *The History of Sexuality, Volume I: An Introduction,* (Random House: New York, 1978), p. 141. Speaking about the right and power over both life and death, he states: "The adjustment of the accumulation of men to that of capital, the joining of the growth of human groups to the expansion of productive forces and the differential allocation of profit, were made possible in part by the exercise of bio-power in its many forms and modes of application. The investment of the body, its valorization, and the distributive management of its forces were at the time indispensable."

peace as a core function of the state. Secondly, it divided the globe into areas ripe for colonial appropriation[30] versus Europe where *Jus publicum* was the norm and this division created so-called "civilized"[31] states versus colonies as frontiers inhabited by "savages," thus being *terra nullius* or "nobody's land" (Mbembe 2003, 23-24). This formulation leads to the following conclusion:

> In sum, colonies are zones in which war and disorder, internal and external figures of the political, stand side by side or alternate with each other. As such, the colonies are the location par excellence where the controls and guarantees of judicial order can be suspended—the zone where the violence of the state of exception is deemed to operate in the service of "civilization." (Mbembe 2003, 24)

Ultimately, it is the suspension of law and employment of arbitrary violence via *Jus Publicum's* Othering that characterizes the state of exception as being tantamount to a colony and vice versa.

In the end, despite early liberal claims about the rule of law, it can be evidently shown in Jamaica's case that the state of exception (as a "terror formation") was one of,

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[30] This idea has been promulgated in modern political theory since its inception. See Thomas Hobbes, ed. Richard Tuck, *Leviathan: Revised Student Edition* (Cambridge: Cambridge University Press, 1996), ch.13 p.89. He characterizes the natives of America as "savages" living in a "brutish manner" who exist in a state of war. In terms of distinguishing between public and private property, John Locke provides a stronger argument for seizing land in the Americas for supporting his labor theory of value. He states: "For I aske whether in the wild woods and uncultivated vast of America left to Nature, without any improvement, tillage or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniences as ten acres of equally fertile land doe in Devonshire where they are well cultivated?" See John Locke, ed. Peter Laslett, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), p. 294 (§37). These foundational views are, in my opinion, key to understanding the concept of *terra nullius*/empty lands thesis. For more on this angle, see Cole Harris, "How Did Colonialism Dispossess? Comments from an Edge of Empire?" *Annals of the Association of American Geographers* 94, no. 1 (March 2004): 171.

[31] See *supra* note 10, p. 86. Schmitt states the following about *Jus publicum Europaeum* and its synonymity with "civilization": From the 16th to the 20th century, European international law considered Christian nations to be the creators and representatives of order applicable to the whole earth. The term 'European' meant the normal status that set the standard for the non-European part of the earth. *Civilization* was synonymous with *European* civilization."

if not, the primary tools for civilizing and governing the colony and postcolony via *commandement.* Similar to Fanon, Mbembe also highlights the importance of race in designating who could be governed and placed under a state of exception, which in this case predominantly resonates with the African diaspora (Anglophone or Francophone). He thus states:

> For a native (or a protégé) cannot be a subject of law. Consigned unilaterally to a sort of minority without foreseeable end, he/she cannot be a subject of politics, a citizen. Since the notion of citizen overlaps that of nationality, the colonized, being excluded from the vote, is not being simply consigned to the fringes of the nation, but is virtually a stranger in his/her own home." (Mbembe 2001, 35)

In this sense, and similar to Fanon's earlier logic, rights and recourse to normal governance are once again racialized in the colonial schema to the benefit of Europeans and to the detriment of Africans and their descendants (along with countless other indigenous non-White populations globally).

We have often been told that the rule of law along with pluralism are some of the fundamental cornerstones of Western liberal democracy. However, what if these foundations does not fully or always extend to colonial and even postcolonial settings? What if the notion of liberal democracy is itself fraught with inconsistencies, ones which we have witnessed in the colony, thus making it a contested term for a country like Jamaica? Such questions are at the heart of why *commandement* has to be used to interrogate Jamaica's past and present relationship with emergency powers in order to show how the norm-exception approach is at times inapplicable for understanding state power and dominance in the Global South. According to Mbembe, *commandement,* as opposed to the liberal model of state sovereignty, rests on three forms of violence. Firstly,

there is founding violence which involves "not only the right of conquest but all the prerogatives flowing from that right" (Mbembe 2001, 25). Secondly, there is a legitimating violence (produced before and after conquest) which sought to justify the colonial mission and order that allows colonial powers to convert "founding violence into authorizing authority" (Mbembe 2001, 25). Thirdly, and finally, there is permanent violence which ensures the constituted colonial authority is maintained, spread, and solidified on a repetitive basis—"in the most banal and ordinary situations" (Mbembe 2001, 25). It is in such "ordinary" situations then that we should look to evaluate the norm-exception binary, especially for unearthing its more quotidian practices framed as exceptions to the rule. From the aforementioned, we get a sense that colonial state sovereignty becomes a key conduit for violence in the relationship between the governors (colonizer) versus the governed (colonized), with the latter being both the object and subject of *commandement.*

To further interrogate *commandement*, it is imperative to highlight its four main properties. Mbembe (2001, 29) notes that *commandement* is founded on a *régime d'exception*—one which involves a departure from the common law in the colonies (a single law for all) to a situation where companies and individuals (specifically entities like the East India Company, British Colonial Office, and privateers), could exercise a form of sovereignty subsidized by royal power. This *règime* immediately creates a split between norm and exception, with the former applicable to Europe and the latter to her colonies thereby allowing elites (companies or individuals) to treat colonial spaces as their personal fiefdoms. Secondly, it involved a "*regime of privileges and immunities*" which could be used to strengthen the dominance and power of the colonizer through

laws and regulations related to currency, rents, taxation, and military, based on the needs of the colonizer[32] (Mbembe 2001, 30). This system of privilege, according to Mbembe, always allowed for benefits to be accrued at someone else's expense (usually the colonized).

Commandement's third characteristic, according to Mbembe (2001, 31), was the "*lack of distinction between ruling and civilizing."* By this he means European colonial powers seriously took up the mantle of Rudyard Kipling's now infamous "white man's burden" as a civilizing mission, which allowed them a sort of self-justification for exercising *commandement* over native populations.[33] This was usually achieved by way of routinized, not exceptional, force and violence to gain compliance.[34] Fourthly, and finally, *commandement* deals with *circularity* and this allowed for colonial sovereignty (its respective knowledge-power and respective governance techniques) to be rooted in "absolute submission"–one devoid of and disinterested in the public good. Evidently, these strands put together, as will be discussed further below, are useful in applying Mbembe's thoughts to Jamaica's own colonial and postcolonial experiences with emergency powers.

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[32] Mbembe further adds that: "The laws might be modified by regulations, or by special provisions made by those authorities in the colony on whom the king or queen conferred the right to make laws. Justice might be summary and expeditious—never expensive."

[33] J.S. Mill's idea of "benevolent despotism" also rings true here. He states: "Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end." John Stuart Mill, Mark Philp, and Frederick Rosen (ed.), *On Liberty, Utilitarianism and Other Essays*, (Oxford: Oxford University Press, 2015), p.13.

[34] Mbembe further adds: "*Commandement* itself was simultaneously a tone, an accoutrement, and an attitude. Power was reduced to the right to demand, to force, to ban, to compel, to authorize, to punish, to reward, to be obeyed—in short, to enjoin and to direct. The key characteristic of colonial rule was thus to issue orders and have them carried out."

Mbembe's (2001) core argument that the exclusive reliance on the aforementioned *régime d'exception* as part of *commandement* becomes pivotal in understanding how colonial power and rationality transcends one period to another. From this he concludes that postcolonial African regimes[35] have not developed new forms of government *tabula rasa,* but have in fact depended on several "cultures," one of which is *"colonial rationality"* to dictate and determine contemporary conditions and techniques for ruling (Mbembe 2001, 24-25). This reinforces the view that liberal democracies (along with their claims to follow the rule of law) were never liberal to begin with during the colonial period and thus this feature might have continued well into the postcolonial era.[36] In this sense, Baxi (2008, 541-543) intriguingly argues that "colonialism and constitutionalism were always strangers…Postcolonial law registers *breaks* as well as *continuities.*" Mbembe (1992, 3) further notes that, "In the postcolony, the *commandement* seeks to institutionalize itself, in order to achieve legitimation and hegemony [*recherche hégémonique*] …" Subsequently, from this standpoint, postcolonial legality (and by extension the postcolonial state) for some countries is thus a dialectic between repression and insurrection[37] (Baxi 2008).

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[35] For our purposes we can similarly conclude that this phenomenon to which Mbembe alludes to also arguably extends to other colonized parts of the world, primarily the Caribbean and South Asia when we are talking about British colonialism and its management of said areas via emergency powers.

[36] See Margaret Kohn and Kelly McBride, *Political Theories of Decolonization: Postcolonialism and the Problem of Foundations* (New York: Oxford University Press, 2011), p. 96, who state: "Ngugi and Mbembe provide thoughtful diagnostics, but what cure, if any, do they point toward? It is tempting to conclude something like the following: despite its pretenses, the colonial state was never liberal, which made it very difficult to create a liberal postcolonial state."

[37] See Nadi Edwards, "States of Emergency: Reggae Representations of the Jamaican Nation-State," *Social and Economic Studies* 47 no. 4, (March 1998): 21-32. Her argument is rooted in how the reggae genre, largely a musical expression from the lower classes, presents the post-colonial Jamaican nation-state as a routinized SOE, based on oppression whereby citizenship, rights, class *inter alia* contradict the elite & middle-class political (liberal and democratic) constructions of said nation. This SOE is rooted

In summary, *commandement* immediately begins to peel away at the façade of liberal democracy by highlighting its inherent authoritarian characteristics and techniques of force, not only in colonial administration, but also in so-called postcolonial liberal democracies such as Jamaica—which has been defined (and continues to be so defined) by claims of emergency. The latter situation is therefore representative of Mbembe's term of the "postcolony" instead of "postcolonial." Instead, he shows the colony was rooted in violence and how this is inherited in the postcolony. Fundamentally, it thus negates any argument based on constitutionality and legality due to its assumption that the absolute and arbitrary deployment of power are hallmarks of a number of postcolonial leaders, governments, and states. Indeed, there a liberal proponents like Lazar who seem to believe that the underlying structures (accountability, rule of law, transparency, *inter alia)* of liberal democracy are quite intact. Therefore, notions of absolutist or republican oriented notions of exceptionality are necessarily problematic as they are more prone to abuse than a liberal model. However, a thinker like Mbembe wants us to disregard the democratic label and instead focus on the actual practices of the colonial *commandement* framework as a routinized form of law attached to violence and vice versa. Finally, as some commentators put it, postcolonial skepticism about emergency powers and the

in maintaining colonial hierarchies and the term "Babylon" is thus synonymous with the Jamaican state, one where the police and military are its representatives who reinforce the colonial status quo by abusing ordinary citizens' rights. Overall, she suggests that reggae music suggests there is no radical break between the colonial and postcolonial state due to artistes stance taken by Rastafarian artistes and their songs about continued oppression in new forms. See the following description from p.29: "The Mighty Diamonds' *'Another Day, Another Raid'* captures the reality of paramilitary policing which denies justice to the poor, and subjects them to 'sometimes bullets, sometimes baton blows.' Bob Marley queries, in *'Rebel Music/3 O'clock Roadblock'*, the denial of freedom to poor people who are unable to 'roam this open country' without having to endure the indignities of police roadblocks and police searches."

liberal rule of law discourse is rooted in how "…force…usually masquerades as law" (Kohn and McBride 2011, 97)

In conclusion, the aforementioned thoughts, from the Classical Model (and its critics) to postcolonial theory, are all substantive for analyzing and highlighting Jamaica's experiences with crisis government. Frankly speaking, Jamaica's history and present experiences with emergency government is no one-size-fits-all affair. Instead, the respective thoughts above have validity for framing and analyzing how different claims of emergencies have unfolded in the island's history. Nevertheless, it will be shown that the hold of the Classical Model is slowly losing its significance as it relates to how emergency powers have been historically and contemporarily understood when it comes to analyzing Jamaica. The following four (4) chapters bear witness to this endeavor by examining how blurred historically and contemporary declarations of emergencies and their concomitant powers are. In summary, it may be wise to turn a proverbial new page and look to postcolonial scholarship as a viable analytical tool for comprehending and explaining the conceptual and empirical histories behind the state of exception of both the colony and postcolony.

CHAPTER II COLONIAL DECLARATIONS OF EMERGENCY (1831-1938)

> "Martial Law" in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England. We have nothing equivalent to what is called in France the 'Declaration of the State of Siege,' under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army (*autorité militaire).* This is an unmistakable proof of the permanent supremacy of the law under our constitution."[38]

In trying to reconstruct and describe an account of how emergency powers have been deployed in the past and connecting it to the Jamaican state's contemporary practices, it is of utmost import to examine how they were used in slave rebellions and other colonial insurrections. Such events have political value for extracting, examining, and re-interpreting declarations of emergency as part of the broader path to critiquing the Classical Model based on norm-exception. Scholars have argued that martial law was frequently deployed throughout the British Empire for reinforcing racial hierarchies, political experimentation, and combating growing black and brown nationalism (Hussain 2003; Neocleous 2007; Reynolds 2017).

Major Anglophone Caribbean episodes of martial law include, but are not limited to: Barbados in 1805 and 1816; Demerara in 1823 (now part of modern-day Guyana); Jamaica in 1831–32 and 1865; and St. Vincent in 1863 (Hussain 2003, 108). Some commentators also note the striking disparity in its usage in the British homeland vis-à-vis her colonies. For example, Gross and Ní Aoláin (2006, 182) remark that: "While

[38] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution,* 8th ed. (London: Macmillan, 1924), 283-4.

martial law had been unused in Britain since 1800, the practice of exercising martial law powers to ensure law and order was a familiar part of the British colonial experience" Therefore, one could reasonably make the case that martial law was an important imperial "technique" of government in the Caribbean à la Agamben or even more akin to Mbembe's idea about *commandement*. Overall, the claims of emergency highlighted here provide an interesting angle for re-analyzing and re-tracing our steps towards analyzing and critiquing the deployment of contemporaneous emergency powers in modern-day Jamaica.

The Sam Sharpe Rebellion: 1831-1832

Jamaica's history with emergency declarations extends all the way to the Maroon Wars[39] of the late 17th and early 18th centuries, although they will not be the focus of analysis here. While Caribbean rebellions are often seen as episodes of the enslaved populace's resistance towards the plantocracy's authority and power, they also represent an opportunity for the ruling class to galvanize and re-assert its dominance via declarations of emergency. In Jamaica's particular case, the Sam Sharpe/Christmas Rebellion[40] of 1831-1832 represented the aforementioned opportunity via the deployment of martial law Furthermore, they represent a good historical opportunity to highlight and

[39] For a more comprehensive discussion, see works by Bev Carey, *The Maroon Story: The Authentic and Original History of the Maroons in the History of Jamaica 1490–1880* (Kingston: Agouti Press, 1997), 285-314; Orlando Patterson, *"Slavery and Slave Revolts: A Sociohistorical Analysis of the First Maroon War, 1665–1740"*, in *Maroon Societies: Rebel Slave Communities in the Americas*, ed. Richard Price (Garden City: Anchor Books, 1973), 416 & 434.

[40] Also termed the Baptist War by some scholars.

frame the politics of emergency powers, particularly when we try to highlight how the lines between norm and exception are blurred.

Jamaica's 1831 enslaved rebellion remains arguably the largest that the British West Indies had witnessed. According to Brother Jacob Zorn's (a Moravian missionary) diary there were approximately 30,000 enslaved persons in open rebellion across several western parishes (quoted in Dunn 2014, 344). Reckford (1968, 108) notes that classical ingredients for this rebellion included: rumors of impending freedom, economic distress, circulation of a "revolutionary" Christian Baptist philosophy which advocated spiritual equality of all men, and finally the white Baptist missionaries themselves who were also seen as allies. Sam Sharpe, the key figure for the insurrection, was an ambitious and literate enslaved Jamaican of the Baptist faith who genuinely believed that the slaves were entitled to freedom based on his Biblical readings which denoted the natural equality of men (Reckford 1968, 115). Effectively, religion became a conduit for the slaves to press their case for political freedom.

Amidst the aforementioned powder keg, the uprising exploded on Tuesday, December 27th in the western parish of St. James, with the torching of the Kensington estate (Reckford 1968; Dunn 2014). The proverbial die had been cast and the uprising spread death and destruction of property[41] (mainly sugar estates) to other western

[41] See Reckford, "The Jamaica Slave Rebellion of 1831", 120, footnote 38 for the following details. Parliamentary Papers., 1831-2, vol. xlvii, no. 561. Sum total of losses in the rebellion in Jamaican currency:

St. James: £606,250
Hanover: £425,818
Westmoreland: £47,092
St. Elizabeth: £22,146
Trelawny: £4,960
Manchester: £46,270
Portland: £772

parishes[42] such as Hanover, St. Elizabeth, Trelawny and Westmoreland. The rebellion, according to Reckford (1968), consisted of classical forms of protest action inclusive of the following: armed rebels, labor withdrawal, property destruction (mainly white slaveowners), and continued docility by some enslaved persons to established estate routines.

The colonial administrators responded with alacrity and vigor to crush the growing insurrection, and this led to a declaration of martial law on December 31st, 1831 (Bleby 1853; Reckford 1968; Dunn 2014). The declaration[43] was made by the then Governor, the Earl of Belmore (acting as the Captain-General), who instructed Sir Willoughby Cotton[44] (Major-General) to carry out his commands on the island to quell the unrest (Clode 1869, 490). A Wesleyan missionary by the name of Henry Bleby provides a very detailed first-hand account (as he was recruited as part of the local militia in Hanover parish) of the insurrection as well as the resultant practices and powers (abuses) of martial law. A combination of both the regular military and militias were deployed to stop the burgeoning rebellion.

Focusing on military strength and tactics, both primary and secondary accounts of the insurrection duly note that the colonial forces were far superior. For example, Reckford (1968, 117) notes that the Black Regiment formed the military backbone of the

St. Thomas in the East: £1,280

[42] These 4 parishes along with St. James form the Cornwall County in Jamaica.

[43] See Appendix A for full text of the declaration. Taken from Charles Mathew Clode, *The Military Forces of the Crown: Their Administration and Government*, (London: John Murray, 1869), 490.

[44] Served as the Commander-in-Chief of the responding colonial military troops, regular or militia.

rebels, which amounted to around 150 soldiers with just 50 guns among them. Furthermore, there was a lack of co-operation and strategic planning between different rebel groups and leaders spread out across Western Jamaica. Such a disparity led to the following conclusion by an active militia combatant:

> This was not a difficult matter, where they had only a disorganized and…an unarmed mob of negroes to contend with. There was no appearance of discipline among the blacks; and the only weapon which most of them could command was a cutlass, one of the implements of their daily toil…The attack on Montpelier was the nearest approach to a battle that occurred during the insurrection. (Bleby 1853, 17)

Essentially, the rebel slaves were outmatched in the departments that mattered the most if their revolt was to be successful and this led to their subsequent capitulation by the first week of January. This early defeat thus sets the stage for detailed and serious abuses of power, during and after martial law, to be inflicted upon the slave population and even their supposed white Baptist allies, as will be explored further below. Such actions immediately draw our attention to the supposed antithetical boundaries between normalcy versus exception. This will soon be challenged and shown to be facile in the colonial context.

While the revolt was suppressed within a few days, the ensuing martial law practices contained numerous atrocities and violations which have been documented but unfortunately remained under-analyzed, especially as it relates to emergency powers. It must be noted that Sir Willoughby Cotton, the appointed Major-General, initially sought to use clemency as a tool for swaying the rebels instead of deploying draconian measures, as it would be more "effectual" despite the declaration of martial law (Bleby 1853, 15). In this sense, even claims of emergency sometimes abide by normal rules of governance

as Lazar (2009) notes. Nevertheless, Bleby, while serving in the militia made the stark observation of this promise being broken mostly by junior officers who, instead of mercy, swiftly meted out death to the slaves who had either accepted Cotton's offer or initially stayed loyal. "In one case, a subaltern officer of militia went to an estate about an hour after the general had left it, and, without trial or form of trial, shot to death a man whom the commander-in-chief himself had pardoned" (Bleby 1853, 17).

The previous extrajudicial killing was just one amongst many that led Bleby to conclude that while the rebellion proper was subdued within only a few days white terror became the *modus operandi* for dealing with black slave population, rebels or not. "And dreadful was the retaliation inflicted upon misguided negroes…Their flight was regarded as sufficient proof of guilt, and they were shot at and often shot down. Thus scores, and probably hundreds, of innocent beings of both sexes fell before the muskets of the militia" (Bleby 1853, 20). Such scenes led him to highlight a Mr. Beaumont's (a militia officer) stinging rebuke of other militia leaders for their perceived excesses and brutality. He states:

> We killed no old men, no old women. We murdered no children. We told no Bobadil lies. We brought-in 1500 deluded slaves without killing one. To show the real service we did *without boasting*, I shall contrast it with the supposed services of some militia officers, which have been paraded through the newspapers. (Bleby 1853, 23)

The aforementioned atrocities served only to prolong the claims of emergency whereby farcical justice could be applied retroactively to absolve some militia officers of their criminal and reprobate actions. Mr. Beaumont's revelation here also indicates some degree of separation between normal and extraordinary militia service, with the latter

coming to dominate proceedings for simply rounding up rebels who were innocent, unarmed, or poorly armed to begin with.

Coexisting with the militia's murderous project was the Courts Martial/military courts which offered no respite for the defeated black population (Bleby 1853, 21). Hastily constructed and adjudicated by militia men, they were categorized as "equally ruthless", and prisoners were frequently executed for trivial offenses (Reckford 1963, 121-122). "It did not require very conclusive evidence to secure the conviction of the accused slaves" which lead to even an intervention and protest by a militia officer at one of these "trials" (Bleby 1853, 27-28). Furthermore, a total of 626[45] slaves were tried before such courts with 312 of them being executed on controversial grounds (Reckford 1968, 122). However, Bleby (1853) notes that a factual account of the number of slaves killed might be unattainable due to the plantocracy's disregard for providing such data to the British government and governor at the time. In this schema, it is not hard to surmise that such arbitrary and contentious judicial practices were normalized under the guise of legality primarily as a form of retaliation and to ensure future deterrence. Therefore, this echoes Foucault's (1995, 49) that: "The public execution did not re-establish justice; it activated power."

It is important to note that white Baptist missionaries on the island were also impacted by martial law violations due to their perceived allyship with slave populace. For example, a memorial penned by the Baptist Missionaries in Jamaica[46] and addressed

[45] See Appendix B for table outlining the executions.

[46] Baptist Missionaries in Jamaica, *Facts and Documents Connected With The Late Insurrection In Jamaica And The Violations Of Civil and Religious Liberty Arising Out Of It,* (London: Teape and Son Printers, April 19th, 1832), hereinafter called *Facts and Documents.*

to Governor Earl Belmore, highlighted the destruction of several chapels and private residences belonging to this denomination by both magistrates and militia officers. Reckford (1968) also notes that local whites charged the missionaries for the insurrection thus consequentially leading to the destruction of some of their chapels. Finally, Bleby (1853, 139-141) notes that a major pro-slavery local newspaper, *The Courant,* promoted virulence and persecution towards the missionaries they dubbed "sectarian preachers," primarily Baptists and Methodists. Even in the colony as a racialized space, assertions of emergency could affect whites who could now be cast as the "enemy" in Schmittian conceptions of the political.

The momentous events of the Christmas insurrection and the brutal deployment of martial law were of utmost import in the ultimate Emancipation Declaration in 1834. The missionaries observed multiple civil and legal violations that were enacted under martial law thus contravening the legal code at the time for disciplining and governing slaves. For example, in *Facts and Documents* the Baptists' condemned and highlighted that several clauses, specifically 136[47] of the Consolidated Slave Law of 1831, were violated as it relates to punishment and execution of slaves. The following extract provides an interesting overview:

> In the new Slave Law there are particular regulations for the trial by Jury of slaves for *rebellion, arson;* and there is also a clause to the effect that the slave law *shall not be suspended during* Martial law. Notwithstanding this, during the late business they were tried by *Military Courts,* shot, hanged, flogged, in the most summary manner. (22-23)

[47] Clause 136 states: *"That the operation of this act, or any part thereof, shall not be suspended by Martial Law, any law, usage, or custome, to the contrary thereof in anywise notwithstanding."*

Backed by the "opinion of an intelligent legal friend," the missionaries further argued that Martial Law was only applicable to military personnel only and not the general populace, whether slave or missionary (23).

The brutal suppression and acts of vengeance, with a stamp of legality, that occurred under the approximately month-long martial law affected not only slaves, but missionaries and free men as earlier argued. A poignant example raised by *Facts and Documents* was that of a free (black) man named Mr. William Thompson was retroactively charged and tried under martial law under "the suspicion that he had been *preaching!"* to slaves in the preceding year (23). This incident is an affront to the rule of law if there ever was such a standard for non-whites in colonies like Jamaica. Furthermore, the missionaries were also brought upon and charged for preaching sedition before martial law. Reckford (1968, 124) also confirms that local whites "blamed" missionaries and saw them as being "complicit" with the slaves. Finally, the missionaries also confirmed Bleby's earlier critique of the arbitrary nature of the Court Martial, which they note "is indescribable—the defense is so hindered that it is almost useless to make the attempt…it is well described as an apology for a trial" (23). It is under the aforementioned violations that Henry Waymouth, as Chairman of the Baptist deputation, calls for "the immediate and complete extinction of slavery" (24).

Declarations of emergency are supposed to have temporal limitations for facilitating a return to the status quo. However, practice and theory are oftentimes divorced whereby claims of emergency end up operating as the norm instead of the exception, thus contravening the supposed timebound nature of such events. In this sense, the Sam Sharpe Rebellion is no different. Martial law was formally repealed on February

8th, 1832, and for many this was a missed opportunity to shed more blood (Bleby 1853). For example, a militia officer and House of Assembly member "most sincerely wished that *the rebellion* and *martial law* had continued for ten days longer than it did, in order that the several gaols might have been swept of all their prisoners!" (Bleby 1853, 33). Finally, Bleby's (1853) critique here underscores the cause and effect for the temporal violation:

> There is no doubt that the insurrection was prolonged…by the groundless fears and terrors of militia-officers; and there can be as little doubt, that it was further protracted by their wanton excesses and cruelties afterwards. They showed too little energy at the beginning, and far too much at the end. (22)

In summary, exceeding the temporal limitations of martial law provided an opportunity for the plantocracy's vested interest of re-imposing its authority and power via legalized terror and violence.

Nevertheless, the wish for the prolonging the supposed exception was accomplished via "party law" —partially civil and military court systems, thus "another system of carnage commenced" (Bleby 1853, 35). Party law allowed the governor to summon militia parties for duty in times of rebellion.[48] Furthermore, a Mr. Phillipo, a Jamaican barrister during this insurrection, explained that slaves were not executed under martial law per se but under local statutes called "Party" Acts which allowed militia to form parties to track and destroy runaway or rebellious slaves.[49] This peculiar and murky

[48] The Governor of Jamaica, Earl of Belmore to Viscount Goderich Despatch No.1 entitled, "*Jamaica: Slave Insurrection," February 10, 1832.* Belmore speaks specifically to Party Law being a legal statute in the form of 48th of Geo, 3, c.4. He states: "Whereas the Act commonly called Party Law, vests in me sufficient authority to seize and punish those who in defiance of the law still conceal themselves in woods and fastnesses; I do hereby declare martial law to cease…"

[49] See Alexander Cockburn, *Charge of the Lord Chief Justice of England to the Grand Jury at the Central Criminal Court, in the Case of The Queen Against Nelson and Brand* (London: William Ridgway, 1867), 82-84. Phillippo's argument on party law were echoed by Sir David Dundas, Judge Advocate

statute further exemplifies the problem with neat distinctions between laws for normality and crises due to the fact that it is not even martial law that is solely attributable for the slaughter but this so-called Party Law which creates this legal black hole to violate what little "protections" the enslaved could find under local slave laws. In order to provide a stamp of legitimacy, the civil Slave Courts conducted trials predominantly by jury, but the plantocracy served as both judges and jurors (Bleby 1853, 33). Ostensibly, Party Law afforded both the militia and the local planter class wide latitude for arbitrarily dealing with the slaves as they saw fit in a sovereign display of power. Thus, they became judge, jury, and executioner under party law.

While Reckford (1968) does not specifically mention this legal idiosyncrasy, there is mention that the Slave Courts continued where the Courts Martial had left off in terms of arbitrary executions and this can be further validated by examining the executions under each judicial body as tabulated for.[50] In order to provide a stamp of legitimacy, the civil Slave Courts performed jury trials predominantly, but one where the plantocracy served as judges, jurors, and executioners (Bleby 1853, 33). Overall, it is clearly evident that the lines between norm and exception in this particular setting appear rather indistinct whereby the supposed emergency, which had been defeated by the first week of January 1832, was essentially prolonged to promote revenge and terrorize the

General, before the Ceylon Committee. Also see *Acts of assembly passed in the island of Jamaica; from 1681, to 1737, inclusive* (London: John Baskett, 1738), 95. While it is described as "obsolete" in this index of laws, it is entitled as: "An Act for the more effectual raiding Parties to pursue and destroy rebellious and runaway Slaves." No.98, 1702.

[50] See Appendix B for these figures.

enslaved populace[51] by the white colonial authorities. Therefore, there are no neat separations as often theorized in the Classical Model's understanding of emergency claims and there is ample evidence to suggest that both norm and exception can blur each other in colonial Jamaica, as seen in this specific rebellion.

In terms of race, the declaration of martial law for this specific rebellion becomes complicated when considering the norm-exception binary. Simply put, both blacks and whites at the time were perpetrators and victims of martial law violations thus challenging Mbembe's thesis that race becomes a key feature in the state of exception in the colony. For example, the Maroons[52]- a group of former runaway African slaves that had won their freedom on the island via guerilla warfare against the British-were called up and deployed to help the colonial authorities restore the status quo. Therefore, the colony was not a pure racialized state of exception where blacks suffered solely at the hands of white colonists, but one in which negotiated settlements[53] also allowed for the

[51] Earl Belmore, (Enclosure 6, in No. 1.), February 5, 1832, states: "And whereas great numbers of slaves have been killed in futile attempts to contend with His Majesty's troops and the militia of this island; and many more, being convicted of rebellion, have suffered death. And whereas in the operations against the rebels, the troops employed have met with the most trifling loss, I deem the occasion suitable for impressing on the minds of the slaves generally their utter incapability of withstanding the constituted authorities…"

[52] Patterson, *Slavery and Slave Revolts,* 410-420, notes that they Maroons had been sub-contracted to serve as a military force in service to the British as well as return runaway slaves. This was a key part of the truce signed with the British in order for them to win their "freedom." The text of this treaty can be found here: https://cyber.harvard.edu/eon/marroon/treaty.html.

[53] For a more robust discussion, see the works of Kathleen Wilson, "The Performance of Freedom: Maroons and the Colonial Order in Eighteenth-Century Jamaica and the Atlantic Sound," *The William and Mary Quarterly*, 66, no. 3 (January 2009): 45-86 and Daphne Smith, *Bodies in Dissent: Spectacular Performances of Race and Freedom,* 1850-1910 (Durham, N.C., 2006), 7. Both works make the argument that colonial world was not as Manichean as commonly thought; it was not solely black versus white. However, slavery and freedom led to alliances that negate race as the primary descriptor of distinction. Therefore, the Maroons are able to navigate the Jamaican colonial space by engaging in both acts of performative freedom and accommodation via the truces signed with the British in the 18th century.

Maroons to commit atrocities on their fellow "black brothers" in declarations of emergencies for reaffirming white power as the status quo.

Colonial claims of emergencies tend to elide a key feature of their praxis, i.e., manhunting. Chamayou (2012) critical claims about cynegetic (hunting) power is of utmost importance here for analyzing instances of how martial law and claims of emergency more broadly can engage in such practices. For example, Bleby's direct participation in the militia during martial law provides us with a useful account of how manhunts occur, further complicating a purely racialized state of exception in the colony. He notes the following:

> The Maroons, also, were employed to hunt the fugitives; and how many were brutally slaughtered by these demi-savages, never has been known, and never will be…This was nothing less than putting a premium upon murder; and I have not the slightest doubt that scores of slaves innocent of all participation in the revolt were shot by the Maroons, for no other purpose, than to obtain their ears *for sale.* (20-21)

Overall, martial law and claims of emergency have more complexities than initially theorized under the Classical model's norm-exception binary whereby neat distinctions can elide the multifaceted nature of how power operates and is wielded in "emergencies" towards their ultimate ends, whatever they maybe. Similarly, this specific episode also upholds and undercuts simultaneously the racial element that postcolonial scholarship thinks is an important marker of the colonial state of exception. Simply put, both blacks and whites could be victims as well as perpetrators of violence. However, the score overwhelmingly still sees the enslaved black population being disproportionately tried and executed. Using the Sam Sharpe Rebellion here begins to unveil a long set of extralegal practices that blur the supposed lines between norm and exception in Jamaica.

Revisiting the Jamaica Affair of 1865

Nearly a generation after the formal Emancipation of slavery in 1834 in Jamaica, martial law would make another bloody appearance via the Morant Bay Insurrection/Rebellion or the Jamaica Affair as it is sometimes called in scholarly works. The political question of Jamaica was already under consideration immediately after formal Emancipation, especially one regarding representation,[54] and as such continued well into this generation. This particular declaration of emergency in Jamaica had repercussions beyond the island where the outbreak occurred. From official British government reports to historical, military, and jurisprudence literature, the events of 1865 have left an indelible mark on this world. To this end, much ink has been devoted to this infamous episode of martial law in the British Empire. However, the current project seeks to re-engage with this episode by highlighting its most egregious violations which are of important juridico-political value for exposing the limits of the Classical Model which allows for the potential loss of vital analytical insights by solely focusing on binary (norm versus exception) interpretations of past and present claims of emergency by various

[54] See the following from "Memorandum on the Course to Be Taken with the West Indian Assemblies," in *Extracts from the colonial office in Jamaica*, (January 19, 1839) p.64a*:* "The first inquiry which presents itself, is, what field or basis for a really representative system is to be found in the West Indian communities...? Let the Society of Jamaica be taken for an example—320,000 black people just emancipated, still in the depths of ignorance and by their African temperament highly excitable; about 28,000 people partly coloured, partly black whose freedom is of earlier date than that of the emancipated class, of whom many may have property, but so few are decently educated that it was thought by the Governor that their own friends would not wish to see the Assembly chiefly composed of them; and lastly, 9000 whites possessed by all the passions and inveterate prejudices growing out of the slave system…The obvious truth is that every attempt at a representative system in such a community must result in oligarchy. Such the Assembly of Jamaica always has been, now is, and will inevitably continue to be until the mass of the population shall have been educated and raised in the scale of society."

governments. The timely reconsideration of this incident along with its respective cases (answers and questions) are important for fully understanding the use of martial as part of the British colonial experience.

In a nutshell, the case will be made here again that the norm-exception framework is not easily applicable for interpreting and understanding the events of the Morant Bay Rebellion. Neat accounts of the events surrounding its outbreak and martial law response are quite simplistic and downplay the significance of a more complicated claim of emergency than what initially meets the eye, a point even emphasized by some primary and secondary accounts back then. While black Jamaicans had received formal emancipation nearly 30 years prior, their lives were nonetheless miserable as free people. In theory they were granted similar rights and guarantees of white British subjects, but in practice this ideal was rarely guaranteed. The unequal socio-economic structure of Jamaica's plantation society led to free black Jamaicans having several grouses as it relates to land access, rents, the judicial system, wages, and general hostility towards the white ruling class who more or less maintained the authoritarian status quo that existed before under slavery (Parliamentary Papers 1866; Gorrie 1867; Bleby 1868; Clode 1869; Heuman 1994; Hussain 2003).

The successful insurrection in St. Domingue, modern-day Haiti, also provided little solace for the governing white minority. This made them equally suspicious and loathsome towards the free black populace who they assumed wanted to overthrow them as well (Heuman 1994). Of equal importance, Bleby (1868) notes that two years prior to the fateful events of Morant Bay, the same area was nearly placed under martial law due

to Wesleyan Methodist Publication.[55] There was also the public dissemination of a letter in 1865 that was critical of Governor Edward John Eyre's stewardship of the island by Dr. E.B. Underhill, Secretary of the Baptist Missionary Society in England (Bakan 1990, 70-75). Subsequently to this there were a range of islandwide meetings, organized by members of the middle class, to discuss the state of affairs of the colony known as the Underhill meetings (Heuman 1994, 45-48). These events in question and later incidents were not to Governor Eyre's liking and the events of Morant Bay is arguably an outcome of this agitation.

The aforementioned cauldron was eventually ignited on October 11, 1865, when a riot or protest outside the Morant Bay courthouse, led by a local black Baptist preacher, Paul Bogle, turned ugly and resulted in the deaths and wounding of several local officials, militia members, and ordinary civilians (Parliamentary Papers 1866). This would be the precursor to a month-long declaration of martial law which led to a number of legal atrocities and violations in the name of restoring law and order. These specific violations will form the main overview and discussion in terms of their juridico-political value for analyzing and critiquing notions of norm and exception here instead of a blow-by-blow historical account of the rebellion.

The actions of Bogle and his followers convinced Governor Eyre that a larger "rebellion" was afoot, one that could possibly destroy British and white dominion over Jamaica. Although Bleby (1868) disputes the designation of a rebellion in favor of riot,

[55] In the July and August numbers of the *Wesleyan Methodist Magazine* of 1863 caused widespread panic throughout Jamaica. The "trifling incident," as Bleby (1868, 5) puts it, stemmed from a Methodist Society found in the belongings of a deceased slave bearing the following: "The kingdom of heaven suffereth violence, and the violent take it by force."

Eyre immediately convened a Council of War as required by the local statute (9 Vict., c. 35) to declare martial law. According to the statute, martial law could only "be declared or imposed but by the opinion and advice of a Council of War, as aforesaid; and at the end of thirty days from the time of such Martial Law being declared, it shall *ipso facto* determine" (quoted in Clode 1869, 491). As such, Eyre and the Council of War thought it expedient to declare martial law in Surrey County, excluding Kingston, on October 13, 1865.[56] This fateful decision would lead to a most violent suppression in colonial Jamaica's history resulting in 439 official deaths, approximately 600 floggings,[57] and 1000 houses being torched (Parliamentary Papers 1866). Within this wave of violence, there are key legal violations which are of utmost import for analyzing the theoretical boundaries of law versus actual practices during declared emergencies. These practices ultimately challenge the norm-exception debate by showing the gulf between theory and practice, especially one derived from a colonial context.

Martial law- "hell-like saturnalia"[58]

In terms of violations, Eyre's claims of emergency via the events on October 11th in Morant Bay have been questioned by John Gorrie—a barrister retained by the Jamaica Committee. Firstly, it has been argued that Eyre could have deployed at least 20 soldiers

[56] See Appendix C for copy of Proclamation.

[57] Even the report noted how futile it was to ascertain the actual number and it stated that: "With respect to the number of persons who were flogged, it is impossible to state it with any degree of accuracy" (25).

[58] "The hell-like saturnalia of martial law." This was a comment made by Mr. Roundell, Secretary to the Royal Commission to Jamaica.

on horseback on the 11th to check the rioters instead resorting to the use of a naval vessel on the 12th (Bleby 1868, 48; Gorrie 1869, 20). This would have been the normal response to a riot. Bleby (1868) also notes that a petition sent by Bogle and his group to Eyre was indicative of judicial restitution for the black populace, not sedition. In this sense, Eyre did not initially invoke claims of "emergency and necessity" despite his knowledge of the festering events via inflated dispatches with Custos of St. Thomas-in-the-East.

Secondly, Gorrie (1867) and Bleby (1868) note that whilst some officials were killed in the riot, Eyre[59] deliberately concocted and exaggerated the manner of their deaths whereby none were mutilated and deprived of their tongues and entrails. This false depiction of barbarity by Eyre can be seen as a pretext for using emergency declarations to violently delegitimize, suppress, and subdue black political aspirations. Bleby (1868, 46) also opines that it was the aggression of the local authorities as well as the reading of the Riot Act which aggravated the crowd and "upon them justly rests the responsibility of the outbreak." Thirdly, the deployment of martial law for Eyre's claims of emergency have been questioned by Gorrie (1867) on its *prima facie* legality whereby it was originally intended for militia discipline under the ancient statute of 33rd Charles II., cap. 21, of 1681.[60] Furthermore, Gorrie (1867) highlights that Eyre, as commander-in-chief,

[59] Parliamentary Papers. 1866. *Papers Relating to the Disturbances in Jamaica, Part I.* London: Harrison and Sons. Eyre to Cardwell, 20/10/1865, no.251. The depiction by Eyre of a Reverend V. Herschell having his "tongue cut out whilst still alive, and an attempt...made to skin him." Other stories of mutilation are dispatched to the Secretary of the Colonies in order to justify the resort to martial law and the veracity of them have been disputed.

[60] The statute further reads: "That then it shall and may be lawful for the said commander-in-chief to command the persons of any of His Majesty's liege subjects, as also their negroes, horses, and cattle for all such service as may be for the public defence, and to pull down houses, cut down timber, command ships and boats, and generally to act and do with full power

did not follow all the statutory requirements inclusive of drafting and disseminating the regulations for subaltern officers on how martial law was to be administered. Finally, Gorrie notes that civil courts should have continued their functions even under martial law based on 11 Vict. c. 7, statute.

Turning to the administration of martial law, numerous violations have been cited in terms of the following: temporal duration, excessive punishments motivated by racial animus, renditions, summary executions, perfunctory courts martial, internment of political prisoners *inter alia.* For instance, while the British government were thankful for Governor Eyre and the military's efforts in suppressing the rebellion, it also critiqued several aspects of maladministration which served as legalized terror The following aptly reflects this sentiment:

> That by the continuance of martial law in its full force to the extreme limit of its statutory operation the people were deprived for a longer than the necessary period of the great constitutional privileges by which the security of life and property is provided for. Lastly. That the punishments inflicted were excessive. (1.) That the punishment of death was unnecessarily frequent. (2.) That the floggings were reckless, and at Bath positively barbarous. (3.) That the burning of 1,000 houses was wanton and cruel. (Jamaica Royal Commission 1866, 41)

Such statements are significant in understanding how egregious the violations were under a claim of emergency and how said claim can become a dangerous pretext for arbitrary violence. It essentially provides an initial foray for how the exception can become/shape the norm in practice in comparison to the supposed neat lines of the norm-exception approach.

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and authority all such things as he and the said council of war may think necessary and expedient for His Majesty's service and defence of the island." (4)

The duration of martial law on the island was deemed as problematic. The Commissioners in their report noted that many innocent persons suffered under the ensuing martial law who were neither directly nor indirectly involved (Jamaica Royal Commission 1866). Noting the inherent evils of martial law, they further argued since the riot had been effectively and unofficially suppressed *circa* October 23rd that "whether martial law might not have been terminated at an earlier period than the expiration of the 30 days allowed by the statute" (Parliamentary Papers 1866, 39). Since the riot was officially subdued by October 30 according to Eyre, they then concluded that; "From this day at any rate there could have been no necessity for that promptitude in the execution of the law which almost precluded a calm inquiry into each man's guilt or innocence" (Parliamentary Papers 1866, 40). Overall, similar to the events of 1831, the riot was effectively crushed within a week or so, but martial law continued its full course until November 13th giving Governor Eyre and the white governing class ample time for widescale repression and retribution on political enemies and the black population in Surrey and beyond. This temporal extension to an outside observer could arguably serve as some legitimate basis for the exception structuring normality *ex post facto* for the island back then. It ultimately serves governing interests and their assumed powers under martial law to maintain the new normal where the exception is now the rule.

George William Gordon: Cause Célébre

The peculiar case of George William Gordon, a local biracial legislator and businessman of the Baptist persuasion, who was popular amongst the black populace due to his expressed sympathies for them deserves explicit analysis here. He became a *cause célèbre* due to the outlandish nature of the violations which took place during his arrest,

trial, and subsequent execution. Gordon had been critical of Eyre's governorship (ever since the Underhill meetings) and had politico-religious connections with Bogle, thus leading the Governor to characterize him as a ringleader. In his dispatches during the start of the insurrection, Eyre[61] wrote that Gordon "had not only been mixed up the matter but was himself through his own misrepresentation and seditious language addressed to the ignorant black people, the chief cause and origin of the whole rebellion." However, he was not present in Morant Bay on the start of the rebellion or any subsequent days. Furthermore, Eyre noted that there were differences of opinion in whether or not to apprehend Gordon, which some thought would enflame the "rebellion" even more. But Eyre disagreed and argued that "the chief instigator of all the evils should not go unpunished…I at once took upon myself the responsibility of its capture."[62] Finally, Gordon was an *ex officio* member of the Council of War due to him being a representative in the House of Assembly, but it was thought impolitic for him to be summoned due to the nature of ongoing events.

After learning that a warrant was out for his arrest, Gordon presented himself to the military authorities in Kingston-a town absent martial law-on October 17th and was promptly arrested. However, if he had hoped for a fair trial under ordinary laws[63] this

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[61] Parliamentary Papers. 1866. *Papers Relating to the Disturbances in Jamaica, Part I.* London: Harrison and Sons. Despatch Eyre to Cardwell, 20/10/1865, no. 251.

[62] *Ibid.*

[63] A solicitor and acquaintance of Gordon, Mr. William Wemyss Anderson had assured him in a letter that his perceived crimes were committed before martial law. Furthermore, "I advise you to plead: — 1st. That on the account you are amenable only to the ordinary civil and criminal courts of the country, and 2nd. That only is crime which is prompted by criminal intention, and that you, having no such intention, are not criminally liable for the consequences, however disastrous these, unhappily, may have been" (quoted in Gorrie, *Illustrations of Martial Law in Jamaica,* 1867, 41).

would be quickly dashed as Eyre immediately shipped him over to Morant Bay, the epicenter of martial law's jurisdiction, for trial (Parliamentary Papers 1866; Gorrie 1867; Heuman 1994; Hussain 2003). In modern-day parlance, Gordon's arrest and transference would be synonymous with an extraordinary rendition[64] (Taggart 2006; Dyzenhaus 2009). Gordon was subsequently charged with "High Treason and Complicity with Parties in Rebellion" (Parliamentary Papers 1866, 36; Gorrie 1867; Heuman 1994; Hussain 2003, 111). Nevertheless, he was quickly tried and sentenced to death by an inchoate court martial with some very junior and inexperienced officers (Heuman 1994; Hussain 2003). His hanging occurred on October 23rd.

In reviewing Gordon's case, British commissioners, legal scholars, and historians have highlighted several serious judicial irregularities. For example, Gorrie (1869, 44) notes that the original president of the court martial, Colonel A.H. Lewis, was known to Mr. Gordon and seen as an ally to him in the House of Assembly. However, he was subsequently removed in favor of a "young and inexperienced officer" who would've provided a more advantageous ruling for the colonial authorities. In the aftermath, the Lord Chief Justice, Alexander Cockburn, came to the following conclusion about Gordon:

> All I can say is, that if, on martial law being proclaimed, a man can lawfully be thus tried, condemned, and sacrificed, such a state of things is a scandal and a reproach to the institutions of this great and free country; and as a minister of justice, profoundly imbued with a sense of what is due to the first and greatest of earthly obligations, I enter my solemn and emphatic protest against the lives of men being thus dealt with in time to come. (Cockburn 1867, 165)

[64] See *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 3 WLR 1249,1298, per Lord Hope of Craighead. It is argued here that the practice has been in England since the 17th century and is therefore not a new phenomenon since gaining infamy in the post-9/11 War on Terror.

Heuman (1994) further notes that Gordon was denied the services of a solicitor for the trial but was allowed to cross-examine witnesses against him. Also, the evidence presented against Gordon has been deemed circumstantial at best (Heuman 1994; Hussain 2003). Another mockery of justice saw the presentation and acceptance of inadmissible evidence to the court martial, the type which would have been rejected in both English civil and military courts, a point made by the Royal Commissioners sent to Jamaica, and thus concluded that: "The evidence, oral and documentary, appears to us to be wholly insufficient to establish the charge up on which the prisoner took his trial" (Parliamentary Papers (1866, 37). This led the commissioners to logically conclude that:

> Although, therefore, it appears exceedingly probable that Mr. Gordon, by his words and writings, produced a material effect on the minds of Bogle and his followers, and did much to produce that state of excitement and discontent in different parts of the Island, which rendered the spread of the insurrection exceedingly probable, yet we cannot see, in the evidence which has been adduced, any sufficient proof either of his complicity in the outbreak at Morant Bay or of his having been a party to a general conspiracy against the Government. (Parliamentary Papers 1866, 38)

Hussain (2003) argues that Gordon's trial represents a significant bypass in procedural legality, one that could not be associated with the English doctrine of necessity. He further notes that the justification of martial law required the so-called rebels to essentially become "soldiers" in the eyes of the colonial authorities, thus foreclosing a civil and legal channel for judging their actions. In other words, this denied them legal rights as British subjects and further denotes the important formulation of race in explicating colonial conceptions of necessity, one which leads to the wholesale erasure of legal identities via claims of emergency and leads to reinforcing the fundamental divisions of metropole versus colony; white versus black (Hussain 2003). Commenting

on W. F. Finlason's strident defense[65] of former Governor Eyre's actions, Hussain (2003, 113) notes that, "At each step of his argument, it is race that undermines the legal identity between metropole and colony." This distinction leads him to coin the term "jurisprudence of emergency" as a marker of how colonial rule of law was practiced and divorced from liberal theory, not only in Jamaica but also one comparable to India's Amritsar Massacre. Overall, S's case represents a clear miscarriage of justice as Governor used a sovereign declaration of emergency to get rid of a political enemy while also reinforcing the lacuna between de facto and de jure constitutional identities of black and brown colonial subjects versus Caucasian ones in the motherland.

The events of Morant Bay reverberated not only in Jamaica but in Great Britain as well. A legal battle ensued between the aforementioned Jamaica Committee and Governor Eyre Defense and Aid Committee for the perceived violations which occurred under the stewardship of the ex-governor. The former group comprised renowned public figures such as John Stuart Mill, Charles Buxton, John Bright, Charles Darwin *inter alia* while the latter counted Thomas Carlyle and Charles Dickens among its ranks. This clash was deemed to be the most significant and sustained deliberations about the meaning of law during the Victorian Era (Taggart 2006, 1006). For Mill (1873, 292), "The question was whether the British dependencies, and…Great Britain itself, were to be under the government of law, or of military licence."

[65] See William Francis Finlason, The *History of the Jamaica Case: Being an Account, Founded Upon Official Documents, of the Rebellion of the Negroes in Jamaica, the Causes which Led to It, and the Measures Taken for Its Suppression* .... (London: Chapman and Hall, 1868). Finlason provided a prolific critique and retort of Lord Chief Justice Cockburn's attempt to persuade the jury to find "a true bill" of charge against Eyre.

As it relates to legality of Eyre's martial law proclamation and subsequent events at Morant Bay, there are two positions as it relates to this. Firstly, Lord Cockburn (1867) in *Regina vs. Nelson and Brand,* established that Jamaica as a settled colony meant that all its inhabitants were entitled to similar rights and liberties as Englishmen under common law. His clarification of Jamaica's legal status thus leads him to affirm that since the "Petition of the Right[66] would prevent the exercise of martial law by virtue of the prerogative in England, it must of necessity do so in Jamaica" as well (Cockburn 1867, 66). Using his charge to the grand jury here, we see that the learned judge essentially affirmed that English common law should have been applied to Gordon (and many others who were summarily executed) likewise and this made his trial and execution by military tribunal illegal.

Secondly, Finlason's support for Eyre in this matter sought to paint martial law as will of raw sovereign power based on necessity as well as disavowing Cockburn's extension of English rights and liberties unto persons of African descent. For him,

> martial law, is in short, the suspension of all but the will of the military commanders intrusted with its execution, to be exercised according to their judgement, the exigencies of the moment and the usage so the service, with no fixed and settled rules or laws, no definite practice, and not bound even by the rules of military law. (Finlayson 1866, 107)

[66] Established by an Act of Parliament in 3rd of Charles I, 1628. Elizabeth Read Foster (1974), "Petitions and the Petition of Right," in *Journal of British Studies* 14 (1), pp. 21-45 states that Englishmen were coerced into granting loans to the crown; imprisoned without just cause; unlawfully tried by martial law during peacetime; and forced to accommodate the king's soldiers into their homes. 'All these actions contravened the rights and liberties of the kingdom, should cease" (p.21). The Petition of Right essentially affirmed English civil rights and liberties under law while negating instances of arbitrary exercise of sovereign power violating *habeas corpus.*

Cockburn (1867, 23) critiqued such views as being "arbitrary, despotic, and capricious" with there being no support for such doctrines that are "mischievous" and "detestable." Building on the two positions here, Dyzenhaus (2009) argues, in his review of the Jamaica Affair, that the two positions expressed by both men are tantamount two cycles of legality, virtuous and formal. A virtuous cycle represents substantive rule of law concerns whilst the formal one deals "with the mere appearance, or even the pretense of legality" (Dyzenhaus 2009, 61). This he terms a "compulsion of legality", i.e., attempts by the state to justify all its acts with some legal authorization and cover (Dyzenhaus 2009). The latter cycle here is emblematic of the rule *by* law, a well-known legal approach in the colonial world.

Dyzenhaus argues that the lack of successful prosecution of Eyre and other colonial military officials resonates with Finlason's formal account and defense of martial law is based on a sham which they tried to legitimize. Furthermore, he states:

> …while the Finlasons of the legal world think that the role law plays in situations such as the Jamaica affair is to create an absence of law under the concept of necessity, they still do not suppose that the space of martial law is a total black hole. Rather, they conceive of that space as one created, perhaps even in some sense bounded, by law. And, as I have tried to show, in participating even in this way in maintaining the legal frame, they make it possible for other participants to set in motion the virtuous cycle of legal. (Dyzenhaus 2009, 61)

Essentially, actions and arguments about using Finlason's account of emergency powers in defense of Eyre and the sum total of his government's actions against the Jamaican black peasantry in 1865 depend on this sham based on a "compulsion of legality. However, Cockburn's attempts in delivering his charge to the jury to find a "true bill" against Nelson and Brand represents a virtuous cycle, one which tried to ensure judicial independence in order to discipline political power.

However, in the end, the Committee was unsuccessful in its efforts towards charging and prosecuting Eyre. Nevertheless, they had gotten Lord Chief Justice "delivering his celebrated charge, which settled the law of question in favour of liberty, as far as it is in the power of a judge's charge to settle it" (Mill 1873, 298). Mill further argues that: "It was clear that to bring English functionaries to the bar of a criminal court for abuses of power committed against negroes and mulattoes was not a popular proceeding with the English middle classes." Conversely, Taggart (2006) notes that the Committee was a bit biased in its selection of Gordon's case as the *cause célébre* due to his racial background and socio-economic status instead of focusing on Samuel Clarke, a black activist, whose experience with martial law parallels that of the former.[67] Finally, Mill's own record on colonialism and imperialism suggests that he was far more concerned in containing the local upheavals in the British Isles instead of the concerns of Blacks in the Caribbean.

Comprehensive Abuses under Martial Law

Under martial law, the arbitrary detainment of political prisoners was a favored technique of Governor Eyre. The colonial authorities used it specifically to target suspected "friends" and "associates" of the late Mr. Gordon who had expressed dissent towards the government as well. The cases of Sidney Levien and Dr. Robert Bruce are of utmost importance for discussion here since both had political connections to Gordon. Both men, the former Jewish and the latter Scottish, were illegally arrested and removed

[67] For a more detailed overview, see S. Wilmot, 'The Politics of Samuel Clarke: Black Political Martyr in Jamaica 1851-1865' (1996) 19 *Jamaican Historical Review* 17.

from places not under martial law, similar to Gordon, and were further held for 60 days without charge (Heuman 1994, 153).

Heuman (1994) notes that Eyre used martial law as a pretext to silence one of his harshest critics, Mr. Levien, who was the editor of *County Union*. Although eventually released, they were once again re-arrested and tried before a "special commission" under the charges of conspiring with Bogle and Gordon to "foment rebellion," whereby Levien was found guilty of libel and sentenced to 12 months in jail (Heuman 1994, 154). Overall, it is important to note that these legal violations via emergency claims were a part of Eyre's response against political enemies, even ones had nothing concretely to do with the supposed rebellion itself. The riot at Morant Bay was just a camouflage for him to dismantle political opponents strategically and systematically via the legalized repressive measures found in martial law, especially since these actions went above and beyond the original claim of emergency.

Summary executions were also as prominent in 1865 as they were in the Sam Sharpe Rebellion, especially those that reflected a racial animus. There are detailed primary and secondary accounts of how a number of ordinary persons, predominantly black, were brutally killed and punished during the military suppression without any form of trial to probe their guilt or innocence. "Yet even in the context of martial law, it was obvious that legal niceties were not being observed" (Heuman 1994, 116-17). Military directives also provide much information on such practices. For instance, Brigadier-General Nelson gave the following order to a Captain Hole: "Prisoners are not to be brought in unless leaders of rebels, those found in arms to be shot on the spot"

(Parliamentary Papers 1866, 1124). Another communication from Lieutenant-Colonel Elkington to Colonel Thomas Hobbs discouraged taking detainees:

> Hole is doing splendid service with his men all about 'Manchioneal,' and shooting every black man who cannot account for himself. (60 on line of march.) Nelson at Port Antonio hanging like fun, by Court-martial. I hope you will not send in any prisoners; civil law can do nothing…Do punish the blackguards well. (Parliamentary Papers 1866, 1120)

Another letter that was furnished as official evidence before the Jamaica Royal Commission of Inquiry, written by a Captain Henry Ford[68] (Morant Bay Volunteers), provides further evidence on the immense violence deployed under the aegis of martial law. It states:

> They shot about160 people on their march from Port Antonio to Manchioneal; hanged seven in Manchioneal; met three on their way here. This is a picture of martial law; the soldiers enjoy it, the inhabitants have to dread it; if they run at their approach they are shot for running away. (Parliamentary Papers 1866, 399)

Furthermore, a number of rapes, appropriation of properties, summary executions of the elderly and sick along with forced labor were also reported and adopted by the Royal Commission of Inquiry (Bleby 1868; Heuman 1994). These are poignant evidence of how the normalization of the exception can create an indeterminate space which allows for plain-view legal violations for remedying an ongoing crisis. To paraphrase from above, civil (ordinary) laws can do nothing as it is exception that is now the rule in 1865 Jamaica.

Continuing in the same vein, brutal and excessive floggings were commonplace for both the guilty and innocent. It was especially a favored torture technique for

[68] This letter was written to Ford's sister, Cordelia, and it had other contents pertaining to martial law practices inclusive of the following: courts martial, appropriation of properties, executions, flogging, and troop movements (quartering).

illegally extracting favorable (and illegally obtained) evidence for the courts martial during the overall suppression. For example, the Provost-Marshal, a Mr. Gordon Ramsay was notorious for his arbitrary and wanton use of flogging to elicit "information" about the rebellion without any charge or trial (Gorrie 1867; Heuman 1994). This practice was leveled at both ordinary folk and persons of social standing (justices of the peace and local magistrates also came under his wrath at times) in areas under the jurisdiction martial law. Eventually he had to be censured by General Nelson, who stated:

> The Provost Marshal appears to consider his powers more extensive than they are. He is simply intrusted with authority to inflict summary punishment on any individual whom he may detect in the commission of any offence against order and discipline…None know better than myself the necessity, under past circumstances, for speedy action by the Provost Marshal; these now are past. I therefore *peremptorily forbid any summary punishment* being inflicted *within* the camp henceforth... (Parliamentary Papers 1866, 1118)

For some though, this denunciation of the Provost Marshal came a little too late as they were already deceased or injured due to the wide latitude offered to him in dispensing his brand of 'justice" under martial law.

According to Robert Cover (1986, 1601), "Legal interpretation takes place in a field of pain and death." In this sense, the events of Morant Bay in 1865 provides a useful occasion for applying such profound words. Although martial law here can be thought of as a constitutional dictatorship in the *de jure* sense, it instead functioned more or less as the sovereign will of the Jamaican governor at the time. In his subsequent apologia against English criticisms of his bloody actions, Eyre boldly paints Jamaica as a colony under siege. He states:

> Long previous to the rebellion breaking out in Morant Bay, Government had good reason to believe that a spirit of disaffection and disloyalty pervaded very many of

> the parishes; and as far back as August last I had occasion to bring to your notice that I had been obliged to send down a ship of war to certain parts to watch events and be prepared for any emergency…Under these conditions, and knowing the insecure and unprotected state of the entire Colony, and the small force available for our defence in the event of any general rising taking place simultaneously, it became a matter of absolute necessity and self-defence, not only promptly to put down the outbreak, but by proclaiming martial law in the districts where it existed and contiguous thereto, to ensure that punishment inflicted should be summary and severe. *It was necessary to make an example which, by striking terror, might deter other districts from following the horrible example of St. Thomas-in-the-East.*[69]

Such words echo the incompatibility between norm-exception thinking. Martial law's strange "absence of statutory foresight" allowed for the massacre of slaves and free Jamaicans under a claim of emergency to restore normalcy. Martial law here allows for governors to bend circumstances and evidence in their favor to justify responses that resemble executive terror *en masse.* This is an apt example of Schmittian sovereign dictatorship operating under constitutional disguise here, which could be missed if we depended solely on applying the norm-exception approach from only a European perspective. In summary, if we fail to examine the real-world imposition of colonial martial law, a critique that can be leveled at Agamben's work,[70] we miss an opportunity to analyze the consequential death and pain associated with such events, especially aspects such as the aforementioned that blur norm-exception thinking.

The racial factor of martial law and claims of emergency again needs to be problematized. As seen before in the events of 1831, atrocities were not only the forte of white soldiers but black ones too belonging to the West India Regiment and the Maroons'

[69] Despatch no. 321, 8 Dec. 1865, from the Governor to the Secretary of States, C.O. 137/3976. Emphasis added.

[70] See *infra* note 180.

as a paramilitary force. Again, this complicates colonial conceptions of the state of exception being a purely racialized phenomenon where blacks are under a white state of siege as theorized by Fanon and Mbembe. In this sense, there were negotiated settlements which enabled groups such as the Maroons to have sovereign power over life and death—necropolitics—by being closely aligned to colonial state power and security. The Maroons were the ones who eventually caught Bogle and turned him over for execution. They also participated in a number of summary killings against ordinary and sometimes innocent Black Jamaicans, with one commentator stating that they aroused sheer terror" (Heuman 1994, 128). Furthermore, Heuman (1994) notes that despite white fears of Jamaica becoming Haiti most members of the black and brown population remained loyal. Whites who were deemed to be critical of Eyre and his government also found themselves under the castigation of martial law. For example, white Protestant missionaries, primarily Baptists, were once again persecuted and seen as deviants. In terms of race, the declaration of martial law for this specific rebellion again becomes complicated when considering the norm-exception binary as it isn't simply a matter of black versus white in some cases.

Martial Law and Crown Colony: Institutional Consequences of Morant Bay

Eyre's actions to destroy the Old Representative System, which established legislative pre-eminence over the Governor (executive),[71] in favor of Crown Colony

[71] See Lloyd Barnett, *The Constitutional Law of Jamaica*, London: London School of Economics and Political Science (1977), pp. 2-9 about the evolution of executive power in Jamaica. He notes that this pre-eminence and independence of the legislature effectively allowed for the local wealthy white plantocracy (and to a lesser extent the rising biracial middle class) populace to function autonomously of direct British control (prerogative was thus restricted) especially in the lawmaking and financial affairs of the colony. This was due to Jamaica's position as a settled colony thus making English inhabitants there having similar rights as those in England.

government is the epitome of a sovereign dictatorship–which is exemplified through his own actions in the aftermath of the disturbances at Morant Bay. If, as Schmitt suggests, sovereign dictatorships are grounded in decisionism, then Governor surely acted and decided on what the exceptional case was. It has been widely noted that Eyre had a conflictual relationship with the local Assembly, especially with the so-called "town party" that represented the rising biracial middle class interests, which led him to favor abolishing the legislative body (Barnett 2006). Therefore, it has been suggested by Eyre himself that Morant Bay was a catalyst for dissolving the local House of Assembly.

Eyre's utilization of martial law also had the effect of creating institutional change via the dissolution of the local Assembly and the injection of direct rule from Great Britain under the Crown Colony system. In this new institutional model, the governor would rule with a Council of *ex officio* and nominated (Sires 1957). Eyre wrote the following to the Secretary of State for the Colonies, Sir Edward Cardwell:

> …there is nothing like striking while the iron is hot, and if we are to get a change of constitution through Assembly itself, now is the time to do it when everybody is in a state of the greatest alarm and apprehensive and looks up to the Government for everything…The Legislature is now sitting and I have seized the opportunity to try and get rid of the assembly. (quoted in Gocking 1960, 129)

In this sense, a constructed emergency can be a ploy for achieving much larger political goals of governments using such extraordinary powers, primarily for consolidating power and effecting constitutional change for direct British rule. As such, Jamaican local self-government became obsolete after Eyre's decisive move and was only resurrected in the 1940s. Heuman (1994, 158) argues that Eyre's actions to disband the local assembly

greatly diminished any hopes for the local brown and black populace to gain political representation and some semblance of power. Similarly, Sires (1957, 119) states that: "Some hoped that the change would prevent any growth of the political powers of the Negro population, whose freeholds had come to be very numerous; others that it would result in an easing of racial tensions." Overall, this action represents a major constitutional and institutional coup for the British in the administration of distant colonial lands and subjects via Eyre's declaration of martial law and as such constructed crises have fruitful political benefits.

Eyre's use of martial law therefore created an avenue for Britain to limit the island's political autonomy and increase a more direct power over the island by 1866.[72] But before this occurred, Eyre used patriotic rhetoric to pass through constitutional changes with the help of a heavily criticized local Assembly. These changes provided extensive powers to the Governor for detaining persons without trial[73] and for declaring martial law[74] (Barnett 1977, 9). These most favorable changes shifted the balance of power from the legislature to the executive. This would ultimately lead to the dissolution of the local autonomous Assembly after nearly 200 years. As this example shows, the temporal end of a declaration of emergency doesn't always lead to a return to the *status quo ante,* as the Classical Model suggests, but instead can lead to a re-definition of the

[72] *Ibid,* p. 9. Barnett highlights that two laws were introduced that led to the demise of the local Jamaican Assembly. They were 29 Vict. c. 12 and 29 Vict. c. 24. Part of the first act states: "from and after coming into operation of this Act the present Legislative Council and House of Assembly, and all and every Functions and Privileges of these two Bodies respectively shall cease and determine absolutely." For further information see the cumulative statute entitled The Jamaica Act, 1866, 29 & 30 Vict. c. 12. in Appendix D.

[73] See 29 Vict. c. 2. (Ja.).

[74] See 29 Vict. c. 3. (Ja.).

norm in favor of policies and practices that continue or perpetuate what was supposed to be exceptional. In this sense, the new Crown Colony of Government which replaced the Old Representative system "was no more than a form of benevolent despotism" (Barnett 1977, 10). Although the latter was by no means perfect, it still allowed for small black landholders and the rising biracial middle class to make inroads into the political system. Paradoxically, though, the exception functioned as the norm after 1865 (for the large and majority disenfranchised black population at least) and continued unabated until the major labor disturbances of the 1930s. These deliberate changes in governance structure effectively ensured that political representation and the franchise remained out of reach for the vast majority (the formerly enslaved black population) until 1944 and thus acted as the colonial norm.

Morant Bay: Going Beyond Norm-Exception Thinking

In analyzing the Jamaica Affair through a postcolonial lens, it becomes evident to see the logic of colonial claims of emergency, ones that are evidently grounded in the reality of racial subjugation. Eyre and the colonial authorities were integral in defining and creating notions of "armed rebellion" to frighten the general populace in order to assume extraordinary powers under martial law for a repressing a most ordinary, but black instigated riot. White suspicions towards the island's black populace enabled the colonial authorities to fabricate an enemy with very little evidence for persecution even outside the spatial and temporal bounds of declared martial law, which parallels some of the contemporary practices and elastic definitions in the War on Terror. Thus, the aforementioned stories are significant reminders of how limiting the norm-exception binary, save colonialism, can be.

A Benjaminian reading of martial law sees it as a form of mythical violence, that is the manifestation of godly violence, for structuring the colony whereby both slaves and freedmen of African descent in Jamaica were reminded of the fate they could suffer if they challenged the status quo. This formulation leads Hussain (2003, 124) to state the following:

> Martial law seeks to effect not just the restoration of order but the restoration of the general authority of the state. In doing so, it takes advantage of the absence of normative constraints on power not just to punish *more*—which it may or may not do—but to punish out of a different logic.

Therefore, the brutal deaths, beatings, detentions, and destruction of property were poignant warnings of martial law's destructive ability–as state violence *in toto*–to both loyal and potentially disloyal subjects Her Majesty's colonial Jamaican government. Ultimately, martial law's wielders inflict punishment using the logic of power and not legality, even though governors like Eyre indemnified their actions *ex post facto* to create legitimacy for injurious state violence.

The colony gets even more interesting when we interrogate violence as the norm, given the overlaps between both oppressor and oppressed. The colonizer is envied by the colonized for their political and socio-economic sovereignty. Morant Bay thus becomes an expression of this dynamic. Fanon (2005, 5) states, "The colonist is aware of this… and constantly on his guard, realizes bitterly that: 'They want to take our place.' And it's true there is not one colonized subject who at least once a day does not dream of taking the place of the colonist." Therefore, the colonizer knows that the same violence inflicted towards the subjugated can one day (at any time) backfire. The colonizer therefore fears retributive violence. This longstanding fear, one which Eyre disclosed about Jamaica

becoming the next "Hayti," becomes weaponized as a legal justification for claims of emergency (martial law) to surpass even the quotidian examples of pure violence. Fanon (2005, 6) further argues that colonial discourse, founded on Othering, is an illustration of "the totalitarian nature of colonial exploitation" whereby "the colonist turns the colonized into a kind of quintessence of evil." This (mis)perception of evil and inhumanity further reinforces the relevance of resorting to exceptional violence for dealing with colonial disturbances. Ultimately, such actions serve as a potential lesson and statement to the colonized about their place in the social hierarchy.

Overall, this points to a more complex picture which needs to be revisited and told, especially one that is grounded in both the colonial and post-colonial experiences of countries like Jamaica. This complexity emanates in both the legalized killings of several hundred black Jamaicans as well as the paradoxical conclusion drawn by the Royal Commission which affirmed that the state was correct (but also wrong in its execution of these extraordinary powers) to pursue martial law for preserving the status quo, even if devoid of *bellum.* Eyre's indemnification of retroactive actions and measures pursued under martial law legalized what was illegal, a phenomenon Head (2017) notes has been a commonplace part of Western liberal democracies and their wavering commitment to supposed rule of law norms. This colonial episode of a declared emergency in Jamaica has significance for challenging the norm-exception binary by providing concrete evidence on the blurred nature between the supposed neat lines of crisis and normality. Therefore, if we look closer at events like Morant Bay we are able to then posit a new formulation of the classical scholarship on norm-exception, one which is more akin to Benjamin's formulation that exception has always been the rule. Finally, it also echoes

some of the postcolonial thoughts that thinkers like Fanon and Mbembe are emphasizing; essentially the colony is a violent space and is governed using *commandement* as its beacon.

20th Century Colonial Disturbances and Reactions

Jamaica's early 20th century colonial experiences largely continued unchanged in terms of the socio-political and socio-economic structure of the island, primarily ones based on state violence, a disciplinary colonial regime, and "unequal citizenship" (Campbell 2020, 7). This could be seen in the continuation of the undemocratic Crown Colony system of government as the appointed council was wholly unrepresentative of the largely black majority. There was little or no space for discussion and deliberation about the political and socio-economic plights afflicting the black colonized majority. With such a hierarchical system in place it is not hard to imagine that there would be a continuation of disturbances and riots from the previous century which would lead to an analogous state response, especially one grounded in martial law. Therefore, emphasis will be placed on some formative events which highlight the continuation of declarations of martial law and emergencies in Jamaica during both World Wars and the formative Labor Movement of the late 1930s.

Repression under the pretense of law was an established feature of colonial governance in Jamaica and by extension the broader British West Indies. Essentially, it was the norm during ordinary times for Jamaica's racial majority of African ex-slave descendants. However, it is of utmost importance to examine past iterations of emergency powers and their operations during conventionally accepted times of crises such as wars and labor disturbances Therefore, it is important to identify the various declarations of

emergency which were implemented in Jamaica during both global wars. What emergency powers did the colonial governor possess and how were they exercised? Were there any major violations using such powers? Finally, violations or not, what do these events and the state's reaction tell us about the norm-exception dichotomy in early 20th century colonial Jamaica? These posed questions will be explored and answered below.

The "Great War" and Jamaica: Martial Law and Patriotism

The First World War saw the British Empire mobilizing and securing her overseas colonies throughout the Caribbean, Asia, and Africa in support of the total war effort against the Central Powers. The domestic experiences of Jamaica's role in this war effort meant that the populace had to get on board in a show of patriotism in presenting a united front against the Germans. How was this achieved, one might ask? Immediately after the British Empire had declared war on Imperial Germany, Jamaica proclaimed martial law on August 5, 1914. The proclamation and Regulations were published the following day by Governor W.H. Manning and the Acting Colonial Secretary, Robert Johnstone. It read:

> Whereas a state of war exists between us and the German Empire. And whereas cases may arise in which ordinary law may be found to make inadequate provision for the due conduct of hostilities against the enemy, and for the maintenance of the security of this our island of Jamaica. Now therefore, we, by virtue of the powers and authority in use vested, do hereby proclaim and make known that from and after the date of this Proclamation the following Regulations under martial law shall be in force in this colony until otherwise ordered and proclaimed. And we do hereby require and direct that all persons in the said colony shall take notice and govern themselves accordingly. (*The Gleaner* 1914, 3)

The ensuing Regulations gave the Governor some of the following powers, including but not limited to, press censorship, price controls on food and other essential commodities,

restricting freedom of movement internally and externally, and deporting persons deemed to be undesirables *inter alia* (de Lisser 1917; Cundall 1925). Similarly, Howe (2002) notes that the aforementioned martial law powers were also adopted and deployed in other British West Indian colonies during the state of war.

The role of the supposedly independent press during the war period was akin to a government mouthpiece. Howe (2002, 16) notes that the black populace of several territories such as British Honduras, Grenada, Jamaica, and Trinidad & Tobago were of the view that this was a "white man's war" and thus therefore they (blacks) should not participate. However, the general Caribbean press was quite critical and dismissive of this position. For example, the *Jamaica Times*[75] argued that persons who spread such falsities should be harshly castigated under martial law for treason. In terms of freedom of speech and expression, de Lisser (1917) argued that during the war the government sought not to restrict the press in its coverage of the news, except those related to military matters, which had to be submitted to the Press Censor. In that sense, the Jamaican press was fully on-board with the war effort, and these were frequently echoed to portray a sense of patriotism (rally-round-the flag) as well as galvanize the support of the general populace towards the mother country's war efforts. The following quote exemplifies this position unequivocally:

> As for comment on local legislation affecting the war, or on the conduct of the military authorities and the local Government, that has been free and untrammeled, the sense of responsibility of the Press having been a sufficient guide to an institution which has never been accused of an anti-patriotic attitude. (de Lisser 1917, 128)

[75] 'Men who try to poison Recruiting', The *Jamaica Times*, November 20, 1915, p. 15.

The position espoused by the press and the aforementioned author, journalist by profession, during this episode of emergency rule echoes those of the Sam Sharpe and Morant Bay episodes as it sided with the colonial authorities use of repression to quell any sign of resistance, real or imagined, amongst the black population.

Compared to earlier iterations of emergency claims by colonial authorities, the Great War contained less egregious violations under martial law. Nonetheless, the documented ones are still noteworthy for a small island colony such as Jamaica that was evidently far away from the main theatres of war. They remain significant evidence of how the exception has been the rule for colonial administration. With that being said, the commencement of hostilities on the European continent immediately put Austrians and Germans in the crosshairs of local colonial authorities and were now thus given the "alien-enemy" moniker despite not engaging in military activities or espionage. Subsequently, anti-German sentiment and fears were ripe throughout Jamaica (Cundall 1925; Howe 2002). Howe (2002, 12) notes that over 700 "prisoners of war" were detained in Jamaica during the war, consisting mostly of Austrian and German seamen taken from ships within the Caribbean as well as local inhabitants of Teutonic descent. Some of them claimed that their treatment was quite appalling owing to them being ill-treated, improperly fed, and housed in sub-standard conditions (Howe 2002, 12).

Prison terms and deportations were the order of the day for Jamaican inhabitants deemed unpatriotic by the colonial government due to their affiliation or national descent. For example, the case of Edward Campbell, a black Jamaican, received some attention due to him receiving the first sentence under martial law on the island (6 months in prison) for "hiding" a German, Fritz Yahmke; an action which violated Regulation 3 of

the earlier proclamation.[76] Another case saw a prominent businessman of German descent, Mr. Louis Wessels, who was also scheduled for deportation. However, he sought assistance by appealing to the Secretary of State for the Colonies before this could come to fruition.[77] Furthermore, there were even calls for the deportation of German women in the local press whereby it was said: "Personally I do not wish to have anyone deported, but why deport German men and leave at liberty German women? Why not confine all persons born in Germany and treat those unsuspected with all kindness?"[78] Last but not least, Howe (2002, 10-11) also notes that even the mere suspicion of being unpatriotic could lead to an arrest, a fact which Englishman T. Colin Campbell[79] and his young son soon became acquainted with while voyaging to the island.

Overall, the aforementioned punitive sanctions are to be taken with a grain of salt in light of the fact that none of the aforementioned accused were involved or suspected of being an agent of an enemy's military operations. They were solely detained and punished by force instead of the rule of law which the British hold to be sacrosanct, at least in theory on the European continent. However, actions and deeds are oftentimes separate realms in the world of politics and law, especially where the colony is concerned. As such, the norm-exception distinction thus operates under a cloak-and-

[76] "FIRST SENTENCE IMPOSED UNDER MARTIAL LAW," *The Gleaner,* November 30, 1914, p. 13. Retrieved from https://access.newspaperarchive.com.rproxy.uwimona.edu.jm/jm/kingston/kingston/kingston-daily-gleaner/1914/11-30/page-13/martial-law

[77] "The Coming Departure of Mr. Louis Wessels From Jamaica," *The Gleaner,* October 20, 1914, p. 14.

[78] "The German Women," *The Gleaner,* November 19, 1914, p.13.

[79] C.O.137\712\50114 Campbell to the President of the Board of Trade, October 12, 1915.

dagger ethos in colonies like Jamaica, one where the assumed neat lines between both spheres can become quite blurred in the everyday practices of crisis government. It therefore stands to reason that colonial governments like the one we have mentioned above would seek to keep the act going to sustain the idea of an emergency in practice which would allow the use of extraordinary law to accomplish that which could not be condoned under normal recourse of civil law.

The Labor Movement: From Frome to World War 2

Cicero's maxim[80] "*Silent enim leges inter arma"* (In times of war, the law falls silent") continues to exemplify the significance of war as a basis for invoking emergency powers. For example, Rossiter (1948) uses the wartime experiences and governance of Germany, France, the U.K., and U.S. as key evidence for his thesis on "constitutional dictatorship." The experiences of the U. K's Caribbean colonies also provide an angle for examining Rossiter's claims about constitutional dictatorship–which was heavily influenced by the norm-exception approach.

During the 1930s, intertwined with the Great Depression, a series of labor revolts swept through the British West Indies, from Trinidad in the south to Jamaica in the northwest. In the latter island, it represented the most serious (pro)test to British colonial hegemony seen since the events of Morant Bay in 1865. These disturbances eventually led to the Report of the West India Royal Commission (1945)–otherwise called the Moyne Commission–which gave extensive details of the poor living and working

[80] See Marcus. Tullius Cicero. *The Orations of Marcus Tullius Cicero*, literally translated by C. D. Yonge, B. A. London. George Bell & Sons, York Street, Covent Garden. 1891. The original phrase has since been rephrased in the contemporary as *inter arma enim silent leges.*

conditions that were generally found throughout the British West Indies. These events of resistance were the zenith of a century's worth of socio-economic and political oppression which began after official emancipation in 1834.

Turning to Jamaica, the rigid colonial pyramid pinned those of African descent to the base of said society while ensuring destitution, lack of property, and education continued as the unabated norm for said group. This preclusion from social mobility for many black Jamaicans separated them from their colored and white neighbors "by the institutions of marriage and the church, by opportunities in education and in business, and restrained by law, force, and custom from organization for protest or revolt" (Phelps 1960, 417). This rigid social hierarchy was thus waiting to be challenged but it is the colonial state's reaction that will be paramount here for understanding the use of emergency powers in the face of resistance. It also shows that the legal architecture of the colony was geared towards protecting minority interests at the expense of majority ones, thus allowing the state to employ violent means for achieving this end. Law, especially of the martial and emergency variety here, serves as a tool of social control for managing such simmering socio-economic agitations.

The aforementioned Christmas Rebellion and Morant Bay riot were confronted by colonial state violence which suppressed such moments of resistance and thus the upheavals in Jamaica of 1938 were dealt with in similar fashion. Phelps (1960, 418) notes that there were similar patterns of unrest across the wider British West Indies whereby: "mob action, violence, bloodshed, and property damage, culminating in martial law or its equivalent, the arrest of ringleaders, and settlement on the basis of limited wage concessions and the promise of additional employment." In exploring the colonial

authorities reaction in Jamaica, a few major events have to be highlighted that were at the vanguard. Chief among them was the Frome riot and the general labor/trade union movement, in the latest round of resistance in the colony. However, it is of utmost import to highlight the usual resort to martial law as an Agambenian technique of colonial government here.

May-June 1938 was the acme of the Jamaican labor disturbances. Labor disputes, specifically about wages and working conditions, have always been a core factor in violent uprisings in Jamaica. Therefore, the disturbances at the Frome sugar factory on May 2, 1938, were representative of this continual struggle within colonial Jamaica. According to Post (1978), a misunderstanding over wages combined with an excess number of job-hunters in late April caused a riot which in turn led to a strike calling for increased wages for laborers and tradesmen. On May 2nd, the colonial state's usual repressive reaction led to the deployment of over hundred-armed police to protect the sugar industry's key factory (Post 1978). According to *The Gleaner*, the inevitable clash between protesters and the police resulted in the deaths of four civilians, two of whom were women (one who was five months pregnant), 9 were wounded including some police officers, and 89 were arrested.[81] In retaliation, approximately 80 acres of sugarcane were torched by the angry protesters.

The outbreak at Frome was the precursor for a more widespread labor rebellion on the island which saw a number of other workers joining the cause, namely:

[81] For more detailed information see, *The Report (with appendices of the Commission appointed to enquire into the Disturbances which occurred on Frome Estate in Westmoreland on 2nd May 1938*. It officially noted that 14 persons were wounded.

dockworkers, Public Works Department laborers, ex-servicemen from World War 1, banana, and sugarcane workers (Phelps 1960; Post 1969). This snowball effect would lead to further confrontations between the working class and the colonial state, primarily in the form of the police and military deployments, to quell the island wide revolt. Post (1978, 285) notes colonial state's reaction was the "typical one of an immediate resort to repression" as had been the case in previous episodes of riots and rebellions on the island. The repressive instrument came in the form of the passage of the Emergency Powers Law[82] on May 25th, 1938, by the local legislature, which gave the governor the power to declare a state of emergency (Phelps 1960; Post 1978). Furthermore, operating under supposed notions of law and order, another typical reaction was the state violence that were inherent in both police and military deployments. Both institutions operated with racism as their guiding philosophy whereby the humanity of colonial protesters or the "Negro Mob" was stripped, and compliance could only be achieved by force. Therefore, "…violence was used from the very beginning by the forces of law and order, and all the evidence points to the fact that it was this which provoked violence from the crowds in return" Post (1978, 285). This is an earlier observation that Bleby saw as the defining moment for the escalation of the Morant Bay riot as well. In this sense, the Jamaican colonial state reaction substantiates Walter Benjamin's thesis about the constitutive role that violence plays in preserving law, especially that of the police. Finally, it also validates Fanon's (2005, 3) description of the inherent violence which governs the Manichean colony, one that pits settler versus native, whereby the police and military

[82] See Appendix E for this law. See also, Jamaica, "The Laws of Jamaica, 1938" (Government Printing Office: Kingston 1939, 1-4). https://ecollections.law.fiu.edu/jamaica/93

represents the border between both while also being "the official, the legitimate agent, the spokesperson for the colonizer and the regime of repression…"

The aforementioned disturbances eventually came to conclusion with the usual Commission of Enquiry (COE) which was created to substantiate the colonial government's overall response even if they were critical of some aspects of the suppression. The Crown Forces, although small in numbers, were still able to overwhelm the protesting local workers with some help from a small set of British marines (Post 1978). When the dust settled, a total of 12 civilians had been killed, 32 were injured by bullets, and 139 suffered some other type of injury meanwhile the Crown Forces had no mortalities and had 109 injured members.[83] While the Commissioners praised the Crown Forces for the low death figures, it took note of some behaviors of the Special Constables, some of whom were Jamaicans of biracial descent (African and European). It noted that some criticism was "just" by expressing the following: "They numbered 4,729 of which 3,194 were called up for service…hastily enrolled as it for the emergency, there may have been some who were unfitted either by character or by temperament or by both for the position."[84] Although the official death count was small by historical Jamaican colonial standards, it remains obvious that the authorities saw it fit to deploy the usual

[83] *Report (with Appendices) of the Commission appointed to enquire into the Disturbances which occurred in Jamaica Between the 23rd May, and the 8th June 1938* (Kingston: Government Printing Office 1938), 1, quoted in Ken Post, *Arise Ye Starvelings: the Jamaican Labour Movement of 1938 and its Aftermath* (The Hague": Martinus Nijhoff, 1978), 286. This includes the original 4 deaths from Frome on May 2nd.

[84] *Ibid*, quoted in O.W. Phelps, Rise of the Labour Movement in Jamaica, *Social and Economic Studies,* 1960, 429.

disproportionate and violent measures under the guise of legality to maintain control of the island as an answer for the pressing socio-economic questions of the day.

Wartime Jamaican Government: The Case of Governor Richards

On the eve of World War 2, the colonial Jamaican authorities had managed to crush the massive labor protests. Nevertheless, they were still unable to fully extinguish the fires of a growing labor/trade union movement on the island. This movement would eventually start manifesting nationalist political sentiments which were critical in securing Jamaica's path to self-government and eventually independence in 1962. Nevertheless, the fledgling labor movement unnerved the colonial government, and this led to the usual resort to repressive emergency mechanisms which have characterized the island's history.

The actions of Governor Arthur Richards demand some attention in recreating the how claims of emergency and their concomitant powers operated within colonial Jamaica. The sudden passing of the former governor, Sir Edward Denham, during the disturbances allowed for the entry of Richards, who was described as "strong" and "usual type of appointment by the Colonial Office following serious disorders" (Phelps 1960, 430). Under his watch, the trade union movement and its leaders were closely surveilled, and this led to a string of violations in the wartime period.

For example, the Governor Richards declared an island wide state of emergency[85] in light of a national general strike that was implemented by Alexander Bustamante, a local trade union boss and eventual first Prime Minister of Jamaica in 1962 (Phelps

[85] "State of Emergency Declared," *The Gleaner*, February 15, 1939, 1.

1960). Using the aforementioned Emergency Powers Law of 1938, Richards sought to ban all meetings and marches while refusing to negotiate with the unions unless the strike was called off—a fight he eventually won as they caved to his demands four days later (Phelps 1960). Nevertheless, this would be the first of many fights between the labor movement and the governor, with him usually having the upper hand via his use of emergency statutes that lead to the prohibition of public meetings, extended detentions, and censorship/silencing of critics among other deprivations of civil liberties.

Just as World War 1 had come to Jamaica via declarations of emergency, so too would the subsequent one manifest itself on the island as usual colonial repression, especially for thwarting the budding labor and nationalist political movements. Palmer (2014) notes that the Defense Regulations, developed in Great Britain and exported to the colonies *in toto*, saw Governor Richards liberally interpreting and enforcing said emergency provisions. The governor therefore immediately started a ban on a number of literatures that promoted "subversive" ideas such as socialism, workers, trade unions, and independence struggles. This was achieved via the passage of the Undesirable Publications Act in 1940 by the local Legislative Council (Palmer 2014, 233). Similar to governmental actions during the Great War, Richards also used the Regulations to detain and deport a number of Germans, a move which most Jamaicans supported at the time. However, when the Regulations turned inwards to repress ordinary Jamaicans, especially those involved in the two-fold labor and nationalist movements. Subsequently, a host of criticisms were levelled against the governor for his suppression of the civil liberties of British subjects.

By far the most controversial measure developed by Richards, with help from the local assembly, was the Public Meetings Law (No. 27) of 1939[86]–which had a sunset clause of a year (Phelps 1960; Palmer 2014, 237). Palmer (2014, 240) states that, "A colonial regime, increasingly intolerant of the motions from below, would use its power to suppress these assemblies, much to the chagrin of those persons who wanted to protect the civil liberties of all Jamaicans." It effectively empowered the governor to ban all forms of public gatherings from taking place on the island even though Jamaica was not in any immediate danger from subversion or direct attack from the Germans. Of course, this measure had a debilitating effect on the trade union and nationalist political activities which Richards equated to "subversion." Nevertheless, Palmer (2014, 241) notes that the governor's exercise of this law was not solely about law and order but to maintain the status quo by limiting discussions and gatherings about the "color question." This prominent question amongst the black majority led to the arrest and eventual mistrial of a Rastafarian orator, Altamont Reid, who was alleged to have been "inciting the crowd to racial strife and murder."

Critics of the law such as the defunct *Jamaica Standard*[87] noted it "*could* be used and might be used to check some militant persons acting within his ordinary legal rights…it illustrates a tendency to take advantage of public alarm to strengthen the executive power to an unnecessary degree" (quoted in Palmer 2014, 238). Mr. Adolphe

[86] See Appendix F for this law. See also, Jamaica, "The Laws of Jamaica, Passed in the Year, 1939" (Government Printing Office: Kingston 1940, 1-3). Retrieved from http://ufdcimages.uflib.ufl.edu/AA/00/06/38/24/00001/Laws%20of%20Jamaica%201939%20pdf%20Opt.pdf

[87] "This Latest Law," editorial, *Jamaica Standard*, June 23, 1939, copy located in CO 137/838/10.

Roberts, at a protest meeting, said that Jamaica was not in such a state of disarray or revolutionary violence which warranted such a law, as the island "is trying to solve its problems-its political and labour problems" while noting that the governor had adequate emergency powers, which were used earlier in February of 1939.[88] However, in sum, the critics were mistaken in their belief that normal rule of law procedures applied to colonial subjects during times of peace, much less in times of war.

The Public Meetings Law was also a topic of concern in the United Kingdom. Labour politician, Wilfred Paling, a Member of Parliament (MP) for Wentworth posed several questions to the Secretary of State for the Colonies, Malcolm MacDonald. For example, Paling wanted to know whether or not this law had been submitted to the Secretary for his approval and whether or not they considered other means of "controlling the hooligan and criminal element, on whose account the Governor stated the law was essential, before imposing repressing legislation on peaceful citizens seeking to ventilate their grievances in a legitimate and normal way…"[89] Paling further pointed out that the socioeconomic conditions had not changed much since the unrest of 1938. The Secretary responded saying: "The Public Meetings Bill was not submitted to me before being introduced in the Legislative Council, but I approved the principle of the legislation before it was introduced."[90] When further asked about temporal nature of the bill, Secretary MacDonald responded that, "I am still expecting the text of the Bill. My

[88] "Protest Public Meetings Law," *The Gleaner*, July 7, 1939, 1, 6.

[89] *Parliamentary Debates*, Commons, 5th series (1909-80). Also cited as H.C. Deb 19 July 1939 vol 350 cc390-1

[90] *Ibid.*

impression is that it is not a temporary measure, but I should like to have notice before giving a confident answer."[91] The fact that this measure had support from the highest echelons of government is testament to the resort to claims of emergency not as the exception, but the rule for the colonies as both the Governor Richards and the Secretary demonstrate here.

Colonial claims of emergency are generally elastic and subject to interpretation, a power that Richards did not hesitate to use against his opponents. The emergency wartime measures combined with his distaste of criticism and advocacy for Jamaican self-government allowed Richards to "preside over a nascent police state" (Palmer 2014, 242). A most egregious example of the conceptual and practical elasticity of Richard's interpretation of the Defense Regulations was the arrest and unsuccessful prosecution of four men, prominent government critics, who were walking down a street—a move the authorities deemed a "procession."[92] The Magistrate said that, in dismissing the government's charge, four men walking down a road did not reasonably constitute a procession.

Richards would also enact personal vendettas in his campaign of repression against members of the press. For example, both the editor of the pro-labor and publisher of the *Jamaica Weekly,* Stennett Kerr Coombs and Hugh C. Buchanan respectively, were arrested and charged with seditious libel over the publication of an article depicting the government's use of martial law against protesters in the parish of St. James (Palmer

[91] *Ibid.*

[92] Hart and Others Dismissed under Defense Regulations," *The Gleaner*, December 16, 1940, 1.

2014, 243). They were later sentenced to 6 months in prison.[93] The conviction was even celebrated by the conservative *Gleaner* newspaper which thus broke ranks with the democratic ideal of journalistic freedom. It stated that both men had written unsubstantiated claims and that they needed to be made an example of so that mob disruption of the peace and order would not go unpunished.

The Gleaner's staff would also have its turn when G. St. C. Scotter, an English-born journalist, became the first casualty in Richard's dragnet even though he was in support of the general war effort (Palmer 2014, 256). Nevertheless, in exercising his civil liberties as a journalist he expressed some pessismism about an Allied victory and this made Richards's concerned that his attitude might have a harmful impact on the war effort in Jamaica, especially troop recruitment (Palmer 2014, 256). Palmer (2014, 237) describes Richards as an "equal opportunity persecutor" for interning Scotter in May 1940. This particular case shows that friends can become enemies when they lack total dedication to a task or effort proposed by the sovereign powers that be. Such a scenario therefore requires ordinary actions (like freedom of speech) to be deemed as extraordinary threats to the body-politic in order to create an environment of oppressive conformity (which can be achieved by executive detention schemes like Richards' own here).

Richards' tenure as governor was defined by a number of detentions, primarily of labor leaders. Prominent cases include: Alexander Bustamante,[94] Wilfred Domingo,

[93] "Buchanan and Coombs Sent to Prison," *The Gleaner*, October 25, 1938, 1, 7.

[94] Other followers such as W.A. Williams, an organizer for the Bustamante Industrial Trade Union (BITU) and Samuel C. Marquis of the People's National Party (PNP) were also detained in this crackdown.

Richard Hart, Kenneth and Frank Hill, Arthur Henry *inter alia*. The aforementioned group were major players in Jamaica's burgeoning labor/trade union movement. The relevant facts behind their individual detentions raise more questions than answers and they further denote the arbitrary deployment by Richards of the Regulations against his foes.

Bustamante's internment was one of, if not, the most prominent under Richards' deployment of the Regulations. Arguably the most prominent labor leader at the time, Bustamante had been a thorn in Richard's early stewardship over the island. As outlined before, Bustamante had led the unsuccessful island wide strike of 1939 and thus was viewed by the authorities as a threat to the stability of the island. Subsequently, Governor Richards had him arrested on September 8, 1940, for making an "inflammatory speech"[95] the day prior, one where he had threatened to initiate another dock worker strike in the port of Kingston-similar to that of 1938 (Phelps 1960, 447). Bustamante was interned for 17 months, without any charge or trial being brought against him (Phelps 1960; Palmer 2014). Phelps (1960, 447) says that "circumstantial evidence is strong that the Governor had run out patience with him and his union." With the ongoing war raging across the Atlantic and the considerable latitude afforded to a colonial governor by way of

[95] "BUSTAMANTE PLACED UNDER DETENTION," *The Gleaner*, September 9, 1940, 3. Further the Governor's announcement reads as follows: WHEREAS I am satisfied with respect to Alexander Bustamante that with a view to preventing him acting in any manner prejudicial to public safety it is necessary to make an Order directing that the said Alexander Bustamante be detained. Now under the powers conferred on me by Regulation 18 (i) of the Jamaica Defence Regulations 1939, and every other power thereunto me enabling, I do hereby order that the said Alexander Bustamante be detained in such place and under such conditions as I may from time to time determine so long as this Order remains in force. (Signed) A.F. Richards

Regulation 18 (i), Richards seized the moment to punish Bustamante by way of this extended detention thus curbing some of his troubles with the labor movement.

Next on the indefinite detention list was Wilfred Domingo.[96] Characterized as a nationalist and a supporter of Jamaican self-government, Domingo was arrested before docking on June 17, 1941, and immediately placed in the official internment camp until his eventual release on February 19, 1943 (Palmer 2014). The official reason for his detention under Regulation 18b was due to actions which are "prejudicial to the public safety or defence, or in the preparation of instigation of such acts. Evidence is available which indicates that Mr. Domingo has engaged in defeatist and anti-war propaganda."[97] Both the American and Jamaican governments were said to have been monitoring Domingo's "activities," which chiefly saw him denouncing Western imperialism, racism, and the establishment of American base in Jamaica. These actions made Edgar J. Hoover, the founding Director of the Federal Bureau of Investigation (FBI), to accuse him of being a communist (Palmer 2014, 257). Although he had been supportive of Britain's war effort against the Nazis, the fact that he had socialist literature and made acquaintances with such persons confirmed his guilt further in the governor's eyes. Hugh H. Watson, the American consul general, in his report[98] to Washington noted that that none of those interned:

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[96] For an overview of his political life and work in both Jamaica and the United States, see Margaret Stevens "The Early Political History of Wilfred A. Domingo, 1919-39", in *Caribbean Political Activism: Essays in Honour of Richard Hart,* edited by Rupert Lewis (2012). Kingston: Ian Randle, p.118-143.

[97] "Domingo Detained for Duration," *The Gleaner*, October 8, 1941, 1.

[98] "Political Developments in Jamaica," July 16, 1941, *Central Decimal File,* 1940–1944, Box 5062, NA-DS.

> so far as is known, is in any way pro-German; probably none of them is anti-British in the broad sense of the term; all of them are bitter critics of the present Government of Jamaica…The Government is using a power given for a specific purpose under the Defense Regulations to accomplish ends for which it was never intended and which could not be accomplished under civil law. (quoted in Palmer 2014, 261)

The manipulation of the wartime emergency by Richards had the desired effect in curtailing self-government advocacy and shows that which is unachievable under civil law can be achieved via claims of emergency. Therefore, harassing and locking up political enemies can be achieved through the application of wartime measures like the Regulations to suppress nationalist and labor sentiments (ones equated as treasonous in the colonial world) under the disguise of "public safety and order".

The combined internment of Hart, the Hill brothers, and Henry (locally dubbed the Four-H's) represents another prominent detention orders issued by Richards. As leaders of the Jamaica Government Railway Employees Union and the local inchoate center-left People's National Party (PNP), they were deemed threats against the colonial status quo. Richards used the Regulations related to protecting "essential services and supplies" as a way of directly targeting and detaining[99] the aforementioned group on November 4, 1942 (Palmer 2014, 268). Furthermore, several affiliated activists[100] of this detained group also found themselves in trouble with the authorities and their movements, interactions with the public, and political work were thus restricted by the

[99] "4 Labour Union Officials Detained," *The Daily Gleaner*, November 4, 1942, 1; "PNP Statement on Detention Order," DG, November 4, 1942, 1.

[100] The respective names are Samuel Hinds, W.A. McBean, Walter C. Bethune, Roy Woodham, Richard Fox, Cecil Nelson an Osmond Pryce. See Colin Palmer *Freedoms' Children: The 1938 Labor Rebellion and the Birth of Modern Jamaica* (Chapel Hill: University of North Carolina Press 2014), 270.

governor (Phelps 1960). The Four-H's were ultimately released[101] 4 ½ months later on March 18, 1943, at the governor's command as well as "pressure" from the Colonial Office[102] in London (Palmer 2014, 272). While their internment was comparatively short, the arbitrary exercise of emergency power by Richards yet again shows how the resort to claims of emergency operated like a well-oiled machine for colonial governance in Jamaica. Richards' actions here signify the importance of showing how colonial perspectives are important for critiquing the norm-exception approach—one where the lines are inherently indistinct to begin with.

Shortly after Richard's recall to London, the colonial regime would continue its use of emergency powers to attack the intelligentsia of the island, who were more or less connected with the emergent nationalist movement. The new governor, John Huggins, was described as "more tolerant of criticism" than his predecessor. However, the case of Roger Mais shows a striking continuity in deploying emergency measures as a colonial technique of government to contain certain civil liberties, primarily free speech (Palmer 2014, 273). Locally distinguished in the humanities, Mais worked also as a columnist for the *Public Opinion* in which he wrote an article titled, "Now We Know", in 1944.[103] This would land him in trouble with the authorities due to his stinging critiques of imperialism, Winston Churchill's treatment of the colonies, and the lack of Jamaican self-

[101] "K. And F. Hill, R. Hart and A. Henry Left Detention Camp Yesterday: Issue Statements," *The Daily Gleaner,* March 19, 1943, p.3.

[102] See Colonial Office Minutes, February 2, 1943, and February 18, 1943, CO 137/854/16. Richards was described "has always… the most reluctant of all Colonial Governors to show liberality in relaxing detention orders."

[103] See Appendix G for this excerpt.

government by way of a new constitution. He was arrested, charged, and sentenced to six months in prison for seditious libel for breaching Regulation 18(b) while City Printery Ltd. was fined £200 for publishing the offensive work (Palmer 2014, 277). According to Palmer's view, Mais opposition to imperialism of all kinds was deemed:

> a subversive act at a time when serious cracks were appearing in the British imperial wall in India and nationalists were ubiquitous in many of the other colonies. Jamaica was no exception, and Mais was one of those who promoted a self-governing island. (Palmer 2014, 276)

Dissent against Empire and local colonial rule were to be stamped out, even if it meant using supposedly extraordinary powers to limit ordinary uses of freedom of expression, arguably a cherished freedom of liberal democracy. Essentially, the blur between norm and exception sees ordinary activities such as freedom of movement and expression being constructed as "threats" against the colonial state thus necessitating some employment of abnormal powers to curtail and stamp out such activities. In brief, what we see transpiring amounts to the standardized colonial rule *by* law approach, that is law as an instrument of government action instead of the more continental and metropolitan rule *of* law variant—that emphasizes substantive commitments to legality (clear and general rules) linked to some standards of justice and morality (Tamanaha 2004, 91). The former approach has been described as the "thinnest" formal version of legality compared to "thicker" and more substantive versions, labeled here in ascending order, such as: (1) formal legality; (2) democratic legality; (3) individual rights; (4) right of dignity and justice; and (6) social welfare (Tamanaha 2004, 91-113).

The aforementioned violations in during the period of the 1930s-40s were not aberrations in colonial Jamaica. Instead, they constituted a key technique for governing

the island while reinforcing Foucauldian notions of power, whereby power reconstitutes and re-activates itself in disciplining and punishing those who need such correction. They are related to Agamben's notion that claims of emergencies function as a "technique of government. Furthermore, one can apply Fanon's logic and Mbembe's concept of *commandement* to how these different episodes are all inter-related and how violence is an ever-present reality for the colonized. Preliminarily, the aforementioned thus shows that the norm-exception framework, with the emphasis on the latter, in the colonial sense becomes a glib proposition, one that is not supported empirically or theoretically as shown in Jamaica's case.

The numerous detentions highlighted are representative of the British Empire's paradigmatic approach for governing their Anglophone Caribbean outposts under *de jure* authoritarian rules to proscribe the burgeoning labor and nationalist expressions of sovereignty. As seen in the case of Jamaica, the deployment of emergency measures was designed to violently arrest the growing "radical nationalism" of black and brown colonials thus adding further credibility to Reynolds (2010) argument that the "law and order" narrative was simply a pretext for emergency governance. To maintain "stability" and British hegemony within Jamaica, it was imperative that emergency rule lead the way.

In terms of challenging the norm-exception, 20th century colonial Jamaica demonstrates that underlying labor, racial, and socio-economic prejudices served as the primary vehicle for perpetuating British power over black and brown Jamaicans. In that sense, it represents the normal course of life for ordinary Jamaicans and for the colonial government as well. Wars are generally seen as emergencies which warrant the

deployment of extraordinary powers. However, the geographic location of Jamaica presents a conundrum in this norm-exception logic whereby most of the action was across the Atlantic and the deployment of emergency powers were used as a tool to coercively drum up local support and maintain hegemony. Any critique of the war effort was therefore seen as a threat to the Britain's hegemony thereby justifying the use of extraordinary powers to combat the powerful force of ordinary free speech and other civil liberties which were misaligned to said war.

Finally, in terms of the local labor movement, the imposition of emergency measures on the leadership of the trade unions serves as a poignant reminder about the economic SOE for larger governance goals. Marx (1978) saw the state of siege for what it was; a violent bourgeois reactionary instrument for subduing the Second Republic's June Days labor uprisings of 1848. Scheuerman (2000) notes that emergency economic powers have been frequently deployed in response to the labor movement as part of the crisis-ridden nature of modern capitalist economies. Similarly, Head (2017) notes that throughout history emergency rule has been used by the ruling class to crush servile revolts in Rome and working-class and socialist discontent in both the U.K. and Weimar Germany respectively. The evidence from Jamaica seems to follow this particular logic whereby the local trade union movement, with its working class membership and middle-class leadership arguably sought to challenge direct British rule of the island. However, the British had other ideas and any form of self-government had to be on their terms and not those of colonials, thus requiring the utilization of emergency government as the normalized "public safety and order" response to growing local recalcitrance.

CHAPTER III EARLY POST-INDEPENDENCE DECLARATIONS OF EMERGENCIES: THE MID-1970S

State of emergency
State of emergency
State of emergency
State of emergency
Emergency
Ready, aim, fire
From Brixton to Cape Town

State of emergency
Never seen such urgency
State of emergency
Never seen such urgency[104]
—— Steel Pulse

This chapter explores some of the major episodes of post-independence declarations of emergency in Jamaica that have had a definitive impact on the political and legal landscapes of the island. It achieves this by looking at the longevity of the 1938 Emergency Powers Act (EPA) which has been the main vehicle for subsequent declarations of SOEs and other post-independence legal developments which have been incorporated as official emergency measures but substantively form part of an overarching and expanding criminal justice system. The chapter continues with the mid-1970s, where I specifically examine some very peculiar legal developments (unofficial emergency statutes), mainly the Gun Court and Suppression of Crime Acts, and the year-long state of emergency (SOE) from 1976 to 1977 issued under the Michael Manley government to deal with political violence and claims of subversion.

[104] Steel Pulse, "State of Emergency," State of Emergency, MCA Records, 1988.

The ensuing state excesses led to claims of extrajudicial killings and other egregious violations of citizens' constitutional rights. While the Jamaican state has paid lip service to rule of law ideals and citizens' constitutional rights as a liberal democracy, the aforementioned episodes of declaration of emergencies challenge such assertions by showing contradictory state security practices which finds common ground with Hussain's (2003) colonial rule of law thesis. While he chooses to examine the events at Morant Bay in 1865, this work seeks to trace and re-analyze more contemporary (post-Independence) Jamaican deployments of this so-called colonial rule of law.

By tracing and reviewing these instances of the post-Independent Jamaican state's reliance on claims of emergencies, these episodes provide some empirical and theoretical support in obfuscating and challenging neat understandings of the norm-exception binary as conceived of under the Classical Model endorsed mainly by Schmitt, Rossiter, and other thinkers. These instances of post-independence emergencies will be framed under Agamben's state of exception theory, one that is most useful for analyzing and thinking about Jamaica's unique experiences with emergency powers, primarily those geared towards criminal justice. Such experiences aid to complicate and endorse Agamben's (2005, 1) state of exception thesis which he sees as a modern democratic creation and one that is inherently ambiguous and anomalous in its modus operandi.

Agamben's (2005, 23) thoughts and application to Jamaica can be summed up in the following: "In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns a threshold…where inside or outside each other do not exclude each other but rather blur with each other." In sum, as a "paradigm of government" (Agamben 2005, 2), the state of exception as presented here

in the form of Jamaica's quasi-official emergency statutes and SOEs aid in teasing out potential anomalies and novelties for challenging the Classical Model and traditional theorizations about the neat segmentation of norm versus exception. Finally, it will be argued that there is some evidence to suggest that Jamaica's early democracy is seemingly dependent on this state of exception to solve its criminal justice problem (devoid of normal tools of criminal justice and government) thus leaving some citizens in a juridico-political purgatory.

Furthermore, a postcolonial critique of these early post-independence blurs between norm and exception based on Fanon and Mbembe creates a more rounded story about the development and deployment of emergency powers in postcolonial Jamaica. For them, the history of the colony and present reality of the postcolony are mutually linked, especially when it comes to arbitrary racialized violence. In general, they would argue that the colonial state of exception was the norm and it is this intriguing juridico-political culture that continues to be expressed and replicated in post-independence societies like Jamaica. From this study's point of view, their work seems to challenge Agamben while also complementing it by developing a more unique case analysis of a specific governmental modality—i.e., the colony. This postcolonial analysis of the mid-1970s can be summed up as the following: "When it comes to emergency law specifically, contemporary reality cannot be viewed in isolation from colonial history" (Reynolds 2017, 17).

The Jamaican Constitution: A Colonial Creation

Formal independence is supposed to usher in a new era, but Fanon (2005, 21) is wary of an approach that emphasizes pacified negotiation instead of "violence of the

colonized." Negotiation thus represents non-violent attempts by which the nationalist political parties along with the bourgeois intellectual and business elites attempt to pacify the masses. He excoriates them by saying:

> The nationalist political parties never insist on the need for confrontation precisely because their aim is not the radical overthrow of the system. Pacifist and law-abiding, partisans, in fact, of order, the new order, these political groups bluntly ask of the colonialist bourgeoisie what to them is essential: 'Give us more power.' On the specific issue of violence, the elite are ambiguous. They are violent in their words and reformist in their attitudes. While the bourgeois nationalist political leaders say one thing, they make it quite clear it is not what they are really thinking. (Fanon 2005, 22)

Therefore, using Fanon's critique, we are able to see that continuation of colonial era emergency statutes by post-independent Jamaica is not surprising at all but is arguably the result of what colonial negotiations produce—the possible continuity of a colonial-era laws and practices that once reinforced the idea of *Untermenschen*. In this sense, the targets of the criminal justice apparatus become the new colonized/internal enemy (mainly comprised of Black Jamaicans from poor and working-class inner-city communities, a popular anecdote on the island) instead of targeting only truly violent criminals.

If ordinary Jamaicans thought that 1962 represented a radical break from heavy-handed and *commandement*-driven British colonial model of sovereignty, they would soon realize how wrong their assumptions were due to the continuation of rule *by* law practices in the form of periodic claims of emergency. According to Obika Gray (2004, 24), metropolitan educated elites and the burgeoning middle class, especially those with residual cultural loyalty to Britain had captured the state via the dominant two-party dominant electoral system. This pitted the pro-business, center-right Jamaica Labour

Party (JLP) against the Fabian socialist/center-left People's National Party (PNP). These political forces have undoubtedly played a prominent role shaping modern-day Jamaica, one that has been absorbed into British Crown's Commonwealth Realms and subsequently made it a constitutional monarchy and Westminster-styled parliamentary democracy.

Some scholars argue that colonial origins of emergency powers and general constitutions matter when it comes to studying contemporary emergency governments, especially those that formerly belonged to Britain (Hussain 2003; Lazar 2009; Reynolds 2017). In Jamaica's case, there is some rhetorical support for this position. For example, Norman Manley, leader of the PNP and the Jamaican Premier in 1961, several months before independence, made the following remarks:

> And I make no apology for the fact that we did not attempt to embark upon any original or novel exercise in constitutional building.... Let us not make the mistake of describing as colonial, institutions which are part and parcel of the heritage of this country. If we have any confidence in our own individuality and our own personality, we would absorb these things and incorporate them into our own use as part of the heritage we are not ashamed of. I am not ashamed of any institution which exists in this country merely because it derives from England.[105]

Mark Golding (2012), the current Opposition Leader of the PNP, gives the following take on justice in Jamaica: "Colonial statutes, many of them from an age when laws were designed to maintain order in a highly polarised social structure, were preserved en bloc from constitutional review by s. 26(8) of the Constitution." A final example saw Lord Diplock and other Privy Council judges reasoning in *R v. Hinds* that some new common

[105] Jamaica Hansard, Vol. 4, 1961-62, p. 719 and 751.

law constitutions (Jamaica was the country of origin for this appeal) "were evolutionary not revolutionary" and that their drafters were "nurtured in the common law" (Zhou 2014, 1047). It is therefore reasonable to assume that the preservation of colonial statutes and practices make Jamaica's claim of independence a mythical[106] endeavor, as one observed derisively termed it. Finally, it is reasonable to assume that the role of emergency powers would not be diminished with a colonial-derived constitution,[107] especially one which had continuity in said laws and practices.

It is on the basis of these and other statements by elected officials that Wheatle and Campbell (2020) argue that there is a lack of "constitutional faith" in the Caribbean due to the wholesale retention of British juridico-political norms, institutions, and values thus inhibiting a native Caribbean constitutional identity for both citizens and governments to believe in. Similarly, Dawson (2013) also argues that state legitimacy is an important factor in analyzing the divergent paths of both Barbados and Jamaica in terms of respect for the rule of law, with the latter having more problems validating state authority and power, especially amongst its lower class. Overall, while the Jamaican state can be associated with liberal democratic and constitutional values on paper there have been specific post-colonial practices under claims of emergency which run counter to

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[106] See Louis Lindsay, "*The Myth of Independence: Middle Class politics and Non-Mobilization in Jamaica*," Sir Arthur Lewis Institute of Social and Economic Studies (SALISES) Working Paper No. 6). Retrieved from http://dx.doi.org/10.2139/ssrn.1822826.

[107] See Simeon McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Policy*, (Kingston: Caribbean Law Publishing Company, 2002), 6. He argues that: "…the independence constitutions are Orders-in-Council of the British Imperial Parliament –amended versions of the colonial constitution, with Bills of Rights engrafted onto them. This allowed easy transition from colony to independent state. This continuity implied no important changes between the colonial and independent constitution. The parliamentary system remained virtually the same, and the constitutions, for the most part, are said to have remained monarchical." See also

such vaunted ideals and substantive tenets of the rule of law, especially as it concerns the right to life, privacy, due process, and a number of other important civil liberties that are periodically violated with and without the use of emergency powers.

Jamaica, as a liberal democracy, should guarantee and uphold key individual rights as provided for in Chapter 3 of its constitution entitled "Fundamental Rights and Freedoms." Lloyd Barnett (2006), a local constitutional scholar, notes however that during the drafting period of the Constitution in 1961-62, there was no initial intent to protect the fundamental rights and freedoms of Jamaicans. Therefore, the original version of the constitution contained multiple defects relating to civil and human rights such as: (1) the privileging of colonial laws over constitutional guarantees; (2) "wide and non-justiciable scope for executive abrogation of fundamental rights and freedoms during periods of public emergency; and (3) finally, the suspension of said guarantees by a "special Act"[108] with only a two-thirds majority in Parliament (Barnett 2006, 2).

With such a lacuna in force for nearly 50 years, Jamaica revised the said chapter with a new and seemingly improved Charter of Rights and Fundamental Freedoms (Constitutional Amendment) Act 2011. This constitutional update however still conflicts with some special laws-cum-emergency powers that have been established and declared during Jamaica's relatively young history (a point that will be elaborated on with ZOSOs). For example, the retention of savings clauses by several Caribbean

[108] Jam. Const. Ch. V, § 49 states: "1) Subject to the provisions of this section Parliament Alteration may by Act of Parliament passed by both Houses alter any of the provisions of this Constitution or (in so far as it forms part of the law of Jamaica) any of the provisions of the Jamaica Independence Act, 1962. (2) In so far as it alters- (a) sections 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26." These sections comprise the original Chapter III "Fundamental Rights and Freedoms" of the 1962 Constitution.

Commonwealth countries at the time of their independence, including Barbados, Jamaica, and Trinidad and Tobago, effectively allowed for the continuation of colonial era laws and punishments en bloc. Jamaica's Constitution contains a general clause which more or less insulates the state from judicial scrutiny of violation of fundamental rights for colonial laws in force before the independence constitution.[109] Similarly, Jamaica has a special savings clause that allowed for colonial era penalties while excluding them from judicial review as it relates to the fundamental rights and freedoms proscribing torture and inhumane or degrading punishments.[110] For some Caribbean constitutional scholars such as Burham (2005) and Barnett (2006), these clauses are tantamount to privileging colonial statutes while negating constitutional supremacy and judicial review. Overall, such clauses were a fundamental part of the nation's approach to common law jurisprudence which essentially allowed for pre-independence colonial laws to subordinate guaranteed fundamental rights and freedoms as listed in the 1962 Jamaican Constitution.

[109] The 1962 Jam. Const. § 26 (8) states: "Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions." This clause has subsequently been repealed by Act 12 of 2011 under which the new Fundamental Charter of Rights exist but was seen as the prime example of privileging colonial statutes over constitutional safeguards. See also the discussion of this feature of Caribbean Constitutions by Margaret A. Burham, "Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean," 36 *U. Miami Inter-Am. L. Rev*. 249 (2005).

[110] Jam. Const. Ch. III, § 17 states: (1) "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorise the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

With an inherited colonial constitution with no mass input, one brought into existence by a British Act of Parliament,[111] the state continued to use law as a force for social control of the masses versus more substantive and democratic means of protecting individual rights against arbitrary action and ensuring social welfare. Turning to Fanon's (2007, 21-22) critique of the native middle-class political party machinery strikes a useful reminder here about the consequences of power being merely transferred from the colonial metropole to local elites who seek to preserve the status quo versus starting society anew with violent revolution. Fanon's larger theoretical claims on decolonization strike an important chord here as it relates to bridging the gap between the norm-exception binary, especially one that did not disappear with formal independence. Therefore, this leaves open the door for continued claims of emergencies using the same statutes that were once used to disrupt the emergence and development of a more inclusive democratic, labor, and nationalist political movements, ones described as "seditious" back then. In general, this reinforces what Roberts (2019) called a legacy of "repressive legality" being incorporated into a number of former British Empire colonies independence constitutions. In summary, the gifting of independence can represent continued colonial domination and state violence via the law as a tool of oppression.

Violent Party Politics: Post-Independent Jamaica's First SOE

[111] Similarly, Norman Girvan (2015) Assessing Westminster in the Caribbean: then and now, *Commonwealth & Comparative Politics*, 53:1, 95-107, states that the Jamaican constitution is actually based on a Royal Order in Council. Furthermore, he states, "There is great difficulty in thinking of it as the Constitution of an independent state…You will not find anything in it remotely like a reference to the sovereignty of the people, or even of Parliament. In fact, in the original version, the Jamaican people are not referred to as such, anywhere. Nor is there any reference to social and economic rights of the kind adumbrated the United Nations." (98)

Jamaica's drive to independence has been generally described as a combative affair between the leading political parties, the JLP and PNP. Both political entities had their genesis in the 1930s labor movement with Alexander Bustamante forming the namesake Bustamante Industrial Trade Union (BITU) in 1938 and his first cousin Norman Manley founding the PNP by September of said year (Gray 2004). Both cousins were allies at first, however a split occurred when Bustamante accused the PNP of attempting to seize control of the BITU in 1942 (Gray 2004). Formed in 1943, a year before Jamaica's first universal suffrage national elections, the JLP under Bustamante's leadership has been characterized as having authoritarian and personalistic tendencies combined with a pro-capitalist ideology. However, his cousin was seen as more embracing of the British Labor Party's Fabian socialist model, especially with regards to promoting several economic, social, and civic reforms on the island (Gray 2004; Palmer 2014).

The island's party politics increasingly thus became synonymous with patron-clientelism and violence (Gray 2004; Sives 2010). Due to rising political violence between both political parties' and the impending general election for 1966, Jamaica's first post-independence SOE was declared in the poor and volatile (neither party could hold on to the seat for a sustained period back then) political constituency of West Kingston for a month, between October 3 and November 2, 1966, by the incumbent JLP administration (Stephens and Stephens 1986; Edwards 1998; Gray 2004). Although limited to the aforementioned area, the frequency of political violence employed by both parties would become a defining feature of the island's early independent electoral politics. West Kingston would again make national and international headlines in 2010

when yet another SOE was declared there again which is of utmost empirical value and will be discussed further in Chapter 4.

The JLP-PNP rivalry would ultimately create the need for political enforcers in their respective strongholds, locally called garrisons,[112] which were seen as zones of political exclusion where housing and other social benefits flowed exclusively members of the ruling party as was the case with the development of Tivoli Gardens. "This was achieved by marrying social rights (mainly in the form of housing, through a 'political welfare system') to political loyalty and violence and pitting the urban lower classes against each other" (Campbell 2020, 64). This development represents the initial stages of a notable nexus between organized crime and politics in the post-independence period (Harriott 2008).

Losing at the polls therefore meant either absolute inclusion or exclusion from the state largesse; the epitome of winner-takes-all politics. Jamaican tribal politics thus became a zero-sum game. Therefore, it is important to point out that politics and some types of crime (especially gun-related ones) in Jamaica have historical connections and dimensions rooted in partisan politics and consequently this has led to anecdotal claims that law enforcement is a selective endeavor. A decade later, this rivalry would escalate to unprecedented levels thus culminating in another declaration of emergency by the then ruling PNP government. This event marks a continuation and expansion (juridico-political, spatial, and temporal) of the exception as a technique of government, primarily

[112] James S. Kerr, *Report of the National Committee on Political Tribalism* (Jamaica Information Service: Kingston, Jamaica, 1997). It notes that garrisons are zones of political exclusion by virtue of being "a political stronghold…a veritable fortress completely controlled by a party" (5). See also Christopher A.D. Charles and Orville Beckford, "The Informal Justice System in the Garrison Constituencies," *Social and Economic Studies,* Vol. 61, No. 2 (2012), p.53-55.

in the criminal justice arena, where both "normal" laws (filled with suppressive special powers) and extraordinary legal provisions were proclaimed as state policy to reinforce a modicum of law and order. While this early SOE did not contain notable data in terms of state excesses and violations, it still becomes an important marker in tracing the evolution of emergency powers throughout Jamaica's comparatively young history.

Mid-1970s Declarations of Emergency: The Case of "Special Laws"

Post-independence Jamaica's resort to emergency powers for battling crime and violence is not a recent phenomenon, but one that traces its origins to the mid-1970s, based on the evidence accrued and analyzed here. After just a mere 12 years of independence, the island's seeming tranquility was rocked by a notable increase in violent crimes, primarily those involving firearms. This development is generally attributed to unemployment, party politics, and poverty. Beginning in 1974, the democratic socialist government of Michael Manley developed and implemented the following emergency criminal justice mechanisms or "special" laws: (1) The Gun Court Act of 1974; (2) The Suppression of Crime Act (Special Provisions) of 1974-hereinafter called SOCA, and (3) finally a yearlong SOE between 1976-1977 (which relied on the colonial EPA wartime statute from 1938).

This section documents the development of the aforementioned measures with a view to complicating how the norm-exception binary has operated in the case of Jamaica. By setting the stage with this important historical background, we can then compare the most recent iterations of such practices in the 2010s to showcase continuities between both decades that have seemingly led to the normalization of the exception, especially

when it comes to civil liberty violations for several Jamaicans caught in this designated state space.

The victory by the People's National Party (PNP) in the 1972 general elections allowed for Michael Manley to become prime minister, a feat which had eluded his father, Norman. His government in the midst of the Cold War sought to change the dynamics of Jamaica's domestic and foreign affairs by pursuing democratic socialism. Manley's democratic socialist experiment entailed broad socio-economic transformations in education, increased state ownership of the economy, and mass employment programs *inter alia* domestically. At the international level he sought Third World solidarity on a range of economic and political issues such as apartheid, Cuba, and local ownership of developing countries' mineral resources and wealth in order to limit neo-colonial economic dependence (Stephens and Stephens 1986).

Democratic socialism was envisioned as an economic and political developmental model for transforming the island's imbalanced colonial past based on rigid socio-economic and color inequities which largely continued in the first decade of independence despite some impressive economic growth figures.[113] However, his detractors from the center right/pro-capitalist JLP's, especially its leader Edward Seaga, labeled him as a staunch communist in league with Fidel Castro. The ensuing ideological and political battles would lead to an unprecedented level of violence in Jamaica whereby the firearm became the firm weapon of choice amongst political enforcers and ordinary

[113] Stephens and Stephens (1986, 22) note that the island experienced an average annual growth rate of 7% during this decade, even by growth standards of advanced capitalist countries at the time.

criminals alike.[114] Criminality and political aspirations are generally said to have been intertwined during this decade with often lethal consequences. This ultimately led to the creation of some extraordinary and highly dubious local measures for managing criminal justice in Jamaica's fledgling history.

Jamaica's historical crime trends suggest that the early years of independence were relatively peaceful until the turbulent mid-1970s, which saw an uptick in the homicide rate. For example, between 1969 and 1978 the island's homicide rate based on murders and/or manslaughters essentially doubled, moving from 11.1 to 21.4 per 100, 000.[115] Table 3.1 below also shows raw historical homicide figures as gleaned from the island's main police organization, the Jamaica Constabulary Force (JCF).[116] Considering these figures, the government's emergency response will be explored and analyzed by focusing on the years of 1974-1977. These 3 years represent a significant angle for documenting evidence about the seeming escalation and normalization of exceptional powers within Jamaica's early post-independence history for law enforcement.

Table 3.1 Jamaica's Homicide Figures and Annual Percentage Change, 1962-1978

Year	Homicides	Annual % Δ Change
1962	63	-
1963	70	11

[114] See Arthur Lewin. "Social Control in Jamaica: Causes, Methods, and Consequences." PhD diss., City University of New York, 1977. Microfilm. He lists 4 types of gun criminals in Jamaica: (1) The Free Entrepreneur, (2) Combined Political and Free entrepreneur, (3) Political Enforcers, and (4) Middle Class Bully (p. 147).

[115] *Crimes Reported to the Police for Fiscal Years 1960-1974*, Criminal Investigation Department. Jamaica Constabulary Force, n.d.

[116] Data retrieved from the Jamaica Constabulary Force's website at: https://jcf.gov.jm/stats/. February 12, 2021.

1964	70	0
1965	62	-11
1966	111	79
1967	102	-8
1968	110	8
1969	153	39
1970	152	-1
1971	145	-5
1972	188	30
1973	232	23
1974	195	-16
1975	266	36
1976	367	38
1977	409	11
1978	381	-7

Source: Jamaica Constabulary Force Statistics Division

The Gun Court and SOCA Acts were both passed in 1974 as a response to Jamaica's growing homicides, with particular attention being paid to the murder of three[117] prominent individuals (Calathes 1990). Both statutes gave the executive arm of

[117] Leo Henry, a prominent businessman was shot and killed in March 1974. "Gunmen slay businessman at car side: Young killers escape with money and revolver," *The Gleaner*, March 15, 1974. Two attorneys, Robert Stennet and Paul FitzRitson were also killed during the same time period in 1974. See Sybil E. Hibbert, "Paul FitzRitson knew that he was marked for death: Crimes that Rocked the Nation," *Jamaica Observer*, March 3, 2013. Retrieved from https://www.jamaicaobserver.com/news/Paul-FitzRitson-knew-that-he-was-marked-for-death_13758412

government sweeping powers to detain and prosecute persons suspected of crimes, especially those involving firearms. Certain provisions made both laws deeply controversial. Harriott (2000, 40) is of the view that both laws were enacted as "panics in response to the crime waves" which led to the substitution of substantive for procedural law, meaning that citizens constitutional rights were gradually eroded by the latter approach mainly due to police abuse of said powers. However, as Jamaica's colonial history suggests, this substitution as ordinarily been the rule, not the exception, especially for the socio-economically dispossessed African-descended majority. Both laws have been further described as draconian and during their years of operation were chastised for permitting violations of civil liberties. The extent and features of such violations eventually led to both being challenged and subsequently amended and even repealed, specifically the Suppression of Crime Act (SOCA) which was dismantled in 1993.

SOCA enabled government declaration of geographic "special areas" for up to 30 days with extensions reviewed by the House of Representatives (the Lower House of the Jamaican Parliament). According to Section 4 (1), the police had unbridled authority to do the following without a warrant:

> to undertake a search of any premises, place, vehicle, person or thing; seize, take away and detain vehicle or article which he reasonably suspects is intended to be used or has been used…with the commission of any offence…; arrest any person upon reasonable suspicion of his having committed or of being about to commit an offence; establish a cordon around the special area or any part thereof and restrict the freedom of movement of persons and vehicles into or out of any area so cordoned; enforce any curfew imposed pursuant to regulations under this Act.[118]

[118] The Suppression of Crime (Special Provisions) Act, 1974, no. 3 §4 (1) (a) (b) (c) (d) (e).

The Act, as an example of procedural law, effectively gave the police and military carte blanche operational powers to obtain evidence for arrests and prosecutions without warrants, in direct violation of constitutional guarantees against arbitrary arrest and detention (Harriott 2000, 40). Prima facie, it thus appears to be reminiscent of the rule *by* law approach that was frequently employed in colonial times to ensure the life, liberty, and property of some was well-protected (usually the white socio-economic planter class) at the expense of the African-descended majority.

Manley (1982, 137), in his autobiography, noted that the Gun Court Act was designed as "shock therapy" to gain control over the growing crime situation. Consequently, the statute's "shock therapy" established a parallel court system for prosecuting suspects caught with unlicensed firearms and/or ammunition, even a single bullet. The Gun Court Act developed a "special punishment regime" that had the following characteristics: no jury trials, no bail, mandatory indefinite detentions, a single appeal via Review Board consisting of 5 members, and *in camera* trials[119] (Rowe 2000, 116; Calathes 1990). The composition of these special courts was as follows:[120] Resident Magistrates Division (a single magistrate), Full Court Division with three resident magistrate judges, and a Circuit Court Division manned by a single Supreme Court justice (Rowe 2000; Calathes 1990). Finally, alongside this statute was also the infamous

[119] Arthur Lewin. "Social Control in Jamaica: Causes, Methods, and Consequences." PhD diss., City University of New York, 1977. Microfilm.

[120] The Gun Court Act §4.

Gun Court prison which housed the convicted and was called ominously "Stalag 17" by locals.[121]

Some scholars have described these statutes and the resulting actions of law enforcement as social control measures as a substitute for meaningful social reform, despite Manley's own progressive agenda of democratic socialism, due to the island's colonial past and lopsided socio-economic development (Lewin 1977; Calathes 1990; Chevigny 1990). Altink (2019, 196) makes the following observation: "Even the PNP government, which expressed a commitment to social justice and equality, took with one hand (e.g., the Gun Court) what it gave with the other (e.g., lowering the voting age." While the development of these laws was novel in some ways, the colonial history suggests otherwise. The various martial law declarations, dubious courts-martial, and extrajudicial killings of the Sam Sharpe and Morant Bay rebellions along with colonial "special laws" such as the Public Meetings Law 1939, and the internment camp of World Wars 2 represent long historical markers and trends which show the exception as being synonymous with the rule.

The Gun Court Act's legality was twice challenged locally in the Court of Appeal, with one ruling upholding the statute and the other deeming it unconstitutional (Calathes 1990). However, it is the landmark case of *R v. Hinds*[122] that would provide some conclusiveness on its legality. As such, some sections were adjudged to be unconstitutional by the London-based Judicial Committee of the Privy Council (JCPC),

[121] Jamaica: Stalag in Kingston, *Time Magazine*, September 23, 1974.

[122] *R v. Hinds*, (1977) A.C. 195, 212 (P.C.).

Jamaica's highest and final court of appeal.[123] It is in this decision that we are able to examine how exceptional criminal justice practices, one tinged with discretionary executive powers, were normalized in the 1970s as a response to crime.

The majority of the Privy Council subsequently held that the Full Court Division and mandatory sentences imposed by the Review Board were both unconstitutional but that the Court itself was duly constituted (Calathes 1990; Rowe 2000; Zhou 2014). The court held that the establishment of the Full Court Division was unlawful due to the transferal of jurisdiction from a Supreme Court judge for trying firearm offenses (including murder) to three resident magistrates—who by virtue of their of positions lack the constitutional independence compared to justices of the superior court of record (Rowe 2000, 119; Zhou 2014, 1047). In terms of the Review Board, the majority found that the executive was encroaching upon judicial functions by imposing mandatory sentences and this represented a violation of the separation of powers doctrine, and this was due to the fact that only the chairman of the Board was a judge or former judge while the rest were Executive appointees with non-judicial backgrounds. Lord Diplock, presenting the majority opinion, stated that:

> What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed [constitutionally], a discretion to determine the severity of the punishment to be inflicted on an individual member.[124]

[123] While Jamaica's local Court of Appeal is the highest and final domestic appellate court in Jamaica's judiciary, the London based JCPC has been retained by the island along with several other Anglophone Caribbean countries despite being independent. These include Antigua and Barbuda, The Bahamas, Grenada, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad & Tobago and a host of other overseas territories and dependencies. Retrieved from: https://www.jcpc.uk/procedures/practice-direction-01.html. Also, see Norman Girvan (2015) Assessing Westminster in the Caribbean: then and now, *Commonwealth & Comparative Politics*, 53:1, p.98.

[124] *R v. Hinds,* (p.370g)

Therefore, the Act was amended in 1976 to implement the requisite changes and as such the Full Court Division (with 3 resident magistrates) was replaced with a Supreme Court judge, still sitting without juries. Finally, the Review Board was eliminated, and sentencing was again to be made by judicial deliberations.

The practice of jury-less trials was also legally challenged locally and eventually taken to the Privy Council in another landmark case that served as a win for the government. Unlike *R v. Hinds,* in *R v. Stone* [125] the Privy Council ruled that trial "without a jury under the 1974 Act or the 1976 amendment was a matter of practice and procedure rather than a matter of the 'jurisdiction and powers'...[and] did not, therefore, entrench trial by jury in such cases or render the [Act] unconstitutional." According to Rowe (2000, 121), although the Jamaican Constitution does not explicitly entrench trial by jury,[126] based on the island's common law heritage dating back to the 17th century one could reasonably concur that the practice has been firmly etched in Jamaica's jurisprudential practice. Due to this ruling, however, jury-less trials still continue to the present as it relates to Gun Court proceedings. For example, Act 1 of 1983 states: "For the purposes of this Act a Supreme Court Judge on Circuit in any parish- (a) sitting without a jury, is hereby constituted a High Court Division of the Gun Court; and (b)

[125] *R v. Stone,* (1980), 3 All E.R. 148.

[126] This recent argument was once again brought to the fore during the COVID-19 pandemic, when the current Head of the Jamaican Judiciary, Chief Justice Brian Sikes, reiterated that there's no inherent right to trial by jury as was affirmed by the ruling of *Stone v. R.* Also, see Chief Justice remarks in, Horace Hines, "No right to jury trials," *Jamaica Observer,* September 21, 2020. Retrieved from: https://www.jamaicaobserver.com/news/-no-right-to-jury-trials-_203646?profile=1550

sitting with a jury, is hereby constituted a Circuit Court Division of the Gun Court…"[127] With this feature, as things stand in Jamaica, we see that declared exceptions usually live beyond their original shelf-life and are now thus a seemingly normalized characteristic of the island's judicial architecture, further blurring the distinction between normal and abnormal criminal justice jurisprudence. This blur sees the exception defining what a normal criminal justice procedure, such as a jury trial, should be.

Using Agamben, the Gun Court law represents the blurring of the lines between normal and exceptional responses to modern-day crises faced by nation-states. It also demonstrates how the state of exception has become an embedded part of Western democratic practice, one derived from the modern and contestable notion of necessity, that allows for "suspension of the juridical order itself" (Agamben 2005, 4) as a criminal justice response. The violation of separation of powers doctrine by the Manley government provides a valid account of how the state of exception manages to overcome the threshold of law by obscuring the distinction amongst executive, legislative, and judicial powers, especially in the Westminster parliamentary system that is already defined by fusion instead of separation of powers, as usually occurs in presidentialism. Finally, the erasure of juridico-political rights via the extreme fusion of powers under this law represents the reproduction of a new legal status[128] onto offenders (and even potential ones too) that aid to transform established common law norms and values, particularly

[127] The Gun Court Act §6 (3) a-b

[128] Agamben (2005, 3) speaks about the President Bush's PATRIOT Act which has stripped persons of their legal rights as either of prisoners of war (POW) or persons charged with a crime under American law. This action has produced a "legally unnamable and unclassifiable being." The Gun Court Act as a special punishment regime more or less has some parallels to this post 9/11 American War on Terror practice as a tool within the state of exception, one guided by dubious legality.

jury trials, or the lack thereof, by circumventing legality and being jurispathic–judges killing law instead of creating it (Cover 1983, 53).

There have been several critiques of both legislative tools employed by the Jamaican State and the accompanying criminal justice practices which seem to violate stated rule of law norms and the moderate to limited successes of the measures in and of themselves, especially those of the Gun Court. Scholars such as Lewin (1977) and Calathes (1990) deemed the latter statute to be a failure as it failed to address the primary cause of crime on the island, i.e., socio-economic underdevelopment based on historical undercurrents. In terms of SOCA, Barnett (1977, 428) notes that the broad scope of powers afforded to Ministers of National Security is problematic mainly due to his/her "subjective judgement" combined with the wide scope of powers afforded to persons in this office. It would seem then that the rule *by* law approach here is inherently problematic from quite a few standpoints.

Calathes (1990, 332) dubbed it an "empirical failure" due to its limited efforts in cauterizing crime. Even scholars who found empirical support for the efficacy of Jamaica's tough anti-crime program were skeptical of its long-term impact. For example, Diener and Crandall (1979) noted the following:

> While a 14% reduction in homicides and larger reductions in other crime (25% to 37%) represents a substantial reduction in crime, the present data indicate that there will still be a large number of crimes after strict measures are enacted. In other words, a ban on most guns and concurrent enforcement measures can reduce crime, but not eliminate it. It is important to note that crime levels were still substantial after the anticrime measures were in effect, indicating that crime reduction is a multifaceted process that cannot be solely attained by strict law-and-order legislation. (144-145)

Calathes (1990, 336) also critiqued it as "evidence of the persistence of a colonial form of legislation" due to its comprehensive discretionary powers. Finally, the Act represents the promotion of procedural over substantive law as Jamaican criminal justice policy and practice which further cemented the continuity of a paramilitary colonial policing model, one steeped in an authoritarian instead of democratic model for social control (Harriott 2000, 40).

Both statutes have also been condemned for their dubious legal and human rights records. For example, the Jamaican Bar Association was adamant that the practices of jury-less and secret trials along with draconian mandatory sentencing imposed by the Gun Court, as mandated by said Gun Court law, violated important administrative judicial principles and therefore it joined several efforts to challenge its constitutionality (Lewin 1977). Similarly, the Caribbean Commonwealth Bar Association urged for the Act to be repealed on human rights and rule of law grounds (Smith 2016).

Calathes (1990) notes that the operational side of the law also presented several challenges where the rules of evidence were heavily favored against the accused whereby a person with malice towards another could plant a bullet and inform the police who would then enforce the law with little to any additional investigation. In this sense, the burden of proof was made lighter for the state. Furthermore, he notes: "The Act also led to much discretionary enforcement and hence corruption" (Calathes 1990, 333). In this sense, the law could target rival political gunmen instead of those aligned to the government thus leading to accusations of partisan deployment of the police and military to capture persons with guns and ammunition. Carnegie (1991) notes that historical and contemporary Anglophone Caribbean police powers generally favor the State, whereby

an accused person's right to legal advice is sometimes non-existent in the constitution and Jamaican citizens can still be convicted using illegally procured evidence.[129] This leads Harriott (2000, 40) to state that, "…the notion of illegally obtained evidence was effectively erased under the Suppression of Crimes Act." Under such situations, it is not hard to imagine persons being imprisoned under such dubious circumstances in Jamaica. Overall, both the legal and scholarly community have noted several glaring due process problems which were contained in these tough special laws-cum-emergency criminal justice measures that allowed for abuses of citizens' constitutional rights.

Furthermore international partners such as the United States and Canada also highlighted several constitutional deficiencies with these measures. For example, several U.S. Country Reports on Human Rights Practices,[130] specifically between 1988-1993, have repeatedly criticized the Jamaican government's use of both laws to violate its citizens' rights from arbitrary interference into the privacy of the individual and home along with indiscriminate arrests and detentions without warrants, primarily of persons from poor neighborhoods. The Canadian government declared in a draft preliminary report,[131] an assistance and reform program for Jamaica's judiciary, that the Gun Court is "overburdened and should be abolished," thereby allowing for cases to tried in normal Circuit courts. The draft report also recommended that *in camera* trials should be

[129] *R v. King, (*1969) A.C. 304, (P.C.).

[130] United States. Congress. Senate. Committee on Foreign Relations., United States. Congress. House. Committee on Foreign Affairs., United States. Dept. of State. (1988). *Country reports on human rights practices for 1987: report submitted to the Committee on Foreign Affairs, House of Representatives and the Committee on Foreign Relations, U.S. Senate.* Washington: U.S. G.P.0., 1994

[131] Melina Buckley, "Overview of Jamaican Justice System Reform: Issues and Initiatives, Preliminary Revised Draft" (Kingston, Jamaica: Jamaican Justice Reform Task Force, 2006, p.2-5)

discontinued. Overall, the aforementioned statutes fall short of several procedural and substantive norms which liberal democracies are ideally supposed to uphold in the pursuit of justice. However, a colonial rule of law which emphasizes social control via dubious law and order tools, seems to have been maintained and supplemented with these new "special laws" by the Manley administration despite the talk of democratic socialism and its proposed radical break with Jamaica's colonial past.

In terms of Agamben's state of exception thesis, it is necessary to highlight that both laws appear to have launched a "state of emergency", though not officially declared by the Manley government against broad cross-sections of the urban population. For example, Barnett (1977, 428) critiques SOCA as being "…aimed at introducing emergency measures without complying with the relevant provisions of the constitution…"[132] Although the original intent was to target persons with illegal firearms, both laws have served as the basis for discriminatory law enforcement and violation of citizens' constitutional rights as observed above. The fact that the Gun Court is still operative today provides some substantive validation for Agamben's (2005, 7) state of exception thesis in which he states: "One of the essential characteristics of the state of exception…shows its tendency to become a lasting practice of government."

[132] See William C. Gilmore, "The Suppression of Crime (Special Provisions) Act 1974: A Suitable Case for Treatment," in *Jamaica Law Journal,* April 1975.

Yearlong Declaration of Exception: The 1976-1977 SOE

Jamaica's second declared SOE would go down in the nation's young history as its most infamous due to its spatial and temporal dimension and the polarized political climate in which it was imposed.[133] Even earlier uses of colonial martial law and other emergency powers had been limited to certain sections of the island, but this one radically went beyond such past versions. Nonetheless, there are potential benefits for revisiting some of the key facts, abuses, and the significance this declaration of emergency as it relates to complicating our understanding of the norm-exception approach from a Jamaican perspective. Manley's deployment of an all-island SOE becomes arguably the most controversial of all the anti-crime measures developed during the mid-1970s and represents the first wholesale resort to emergency powers (beyond the initial limited application to West Kingston in 1966) as a state policy to direct criminal justice in the early period of independence.

During the Cold War, Jamaica was arguably embroiled in an ideological proxy war. Its two main rival political parties were seen as either being aligned with either U.S. capitalism (JLP) or the Soviet Union's communism (PNP). Under the PNP, there were widespread fears in Washington that Jamaica might become the next Cuba in the Caribbean (Smith 2016). As previously pointed out, politics in Jamaica was generally a violent affair as political parties frequently employed partisan thugs, primarily from the lower classes, to battle for electoral supremacy and the accompanying scarce benefits that

[133] Jamaica's declared emergency has received less academic treatment compared to its Commonwealth counterpart, India's overlapping "The Emergency," which lasted over a 21-month period, from 1975-1977.

came with such actions (Gray 2004). With that being said, there were fears that the 1976 General/parliamentary elections might engender a political bloodbath. This was one of the main reasons provided by the Manley government for declaring an island wide SOE on June 19, 1976.

Various thinkers, whether absolutist or democratic (liberal or republican) have emphasized the notion of *necessity* as a key premise for declaring emergencies and using subsequent powers.[134] Furthermore, Agamben (2005, 24) notes that: "A recurrent opinion posits the concept of necessity as the foundation for the state of exception." In this sense, the Manley government also used *necessity* as a fundamental basis for justifying the yearlong declaration. It must be noted that all these discussions of *necessity* invariably tend to favor the governors (state power) over the governed and thus makes it a unilateral proposition.

According to *Ministry Paper 22*, prior to the declaration of a SOE: "It was evident that a large percentage of the crimes committed were politically motivated…Criminal activity assumed new and critical dimensions. They included urban terrorist activities previously unknown to Jamaica."[135] The characterization of criminal activities as terrorism[136] by the Manley administration portrays the sense that there was a

[134] Agamben (2005, 26) further notes the following: "It is only with the moderns that the state of necessity tends to be included within the juridical order and to appear as a true and proper 'state' of the law." This viewpoint is emblematic of the incorporation and normalization of the emergency as liberal constitutionalism and the ensuing problems which Schmitt pointed out could accompany such designs.

[135] Keble Munn, Minister of National Security. *Ministry Paper 22*, "Review of the State of Emergency," June 7, 1977, p.1. See truncated copy in Appendix H.

[136] Trench Town, Grange Street, and New Lane Fires were said to have political motives. A number of dwellings were destroyed and the Commission of Enquiry into such allegations agreed as much. See *Interim report of commission of enquiry into incidents of fire and violence at Orange Street and*

local militant threat ready to take control of the state and therefore the government of the day had to respond to such an exigency with alacrity and stringent measures. Similarly, The *New York Times*[137] reported that the Manley government claimed the island was being "destabilized" by both foreign and domestic operatives, primarily being ran by the Central Intelligence Agency (CIA). On the contrary, the opposition JLP countered that the Manley government was using the SOE as a "smokescreen"[138] to suppress its chances of electoral victory by attempting to create a totalitarian one-party state (Stone 1977; Charles 1977). While we may never know the veracity behind the intent (JLP or Manley's claims) of the SOE declaration, we do know that one was declared and maintained for a year.

The Jamaican government concluded that the CIA was actively destabilizing Jamaica, and this was based on local intelligence from both the local police and military (Manley 1982, 138). However, the straw that broke the proverbial camel's back was the brutal stabbing murder of the Peruvian Ambassador, Fernando Rodriquez Oliva, at his Kingston residence.[139] *Ministry Paper 22* (3-4) notes that the declared SOE gave the

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Western Kingston and Saint Andrew (1977). R. Carl Rattray, Minister of Justice, also makes the same conclusions based on said report in in Ministry Paper No. 5 (1977).

[137] Ralph Blumenthal, "Jamaica's Emergency Rule Reduces Political Violence," *The New York Times*, July 16, 1976. Retrieved from: https://www.nytimes.com/1976/07/16/archives/jamaicas-emergency-rule-reduces-political-violence.html. Also, see Manley's own work which echoed such claims likewise: Michael *Jamaica: Struggle in the Periphery* (Third World Media: London, 1982) pp. 131-144. "As things went from bad to worse, it became clear that we were dealing with something far more sinister than ordinary crime…we were experiencing…destabilization" (138).

[138] *Ibid*.

[139] "ROBBERS INTERRUPTED IN EARLY MORNING HOUSE-BREAKING: Peruvian Ambassador murdered, POLICE ON TRAIL OF 2 STABBING SUSPECTS," *The Gleaner*, June 16, 1976. Retrieved from https://access.newspaperarchive.com.rproxy.uwimona.edu.jm/jm/kingston/kingston/kingston-gleaner/1976/06-16/

government, specifically the military and police, additional powers to combat "terrorism" while ensuring Jamaica eventually returned to "normality". These included the power to restrict statements prejudicial to public peace and safety; arrest and detain citizens without warrant; to allow the Minister to make Detention Orders against persons he deemed threats to public order and safety; and finally, to restrict movement of persons suspected or "confine them to their premises" for public safety and order (Ministry Paper 22, 3).

Ironically, some of these powers were already available to the police under the seemingly "normal" yet "special" SOCA and Gun Court statutes passed a few years earlier, save the Detention Orders which were based on ministerial discretion and satisfaction, according to *Ministry Paper 22.* The latter Detention Orders one could reasonably deem as inherently subjective and problematic thus justifying the opposition JLP's fears. The notion of subversion, which gets thrown around in said *Ministry Paper*, also becomes problematic during this episode of emergency rule in Jamaica. This leads DeMerieux (1994) to suggest that fears of subversion can serve as an executive tool of emergency power with little or no clear definition as to what it means juridico-politically within Caribbean constitutions, whereby Jamaica's elections were still held during such a period of "subversion." This point will be elaborated on in detail further below. Accordingly then, "In those situations in which Parliament, or the elected members thereof, largely constitute the executive, the subversion resolution could become a mere tool in the hands of the government of the day", argues DeMerieux (1994, 111). Such an instance is not far-fetched due to the nature of how the Westminster-Whitehall parliamentary system operates under the basis of fusion of powers.

Detention figures from this declared emergency give the following tally as can be observed in Appendix H. A total of 596 Detention Orders were issued. Subsequently, a total of 348 detainees were incarcerated either at Up Park Camp[140] Detention Centre or the Gun Court Prison. Of the total Detention Orders figure, 538 persons (91%) were subsequently released without restrictions while 189 (35%) of them charged and released out of the said total figure. There were quite a number of conditional releases whereby 33 persons had to report to the police and a further 14 were restricted to their homes.

A most notable detention during this declared SOE was that of a deputy leader and Senator of the JLP, Pearnel Charles. Charles is regarded as the most senior figure to have been detained under the proclaimed SOE and was held for 283 days (9½ months, as he composed in his autobiography, *Detained*). Several other high-ranking JLP personnel were also incarcerated according to Charles and *The New York Times*.[141] Charles (1977) notes that within an hour after the SOE's declaration, the police and military surrounded a hotel which was the venue for the JLP's upper-echelon and promptly detained 4 executive members of the party. "This was the final confirmation of the JLP belief that the Government was going to use police power to destroy the JLP organization" (Charles 1977, 10). For these reasons, he thought that the declared SOE was a convenient tool of the government to victimize the opposition party instead of using the criminal justice

[140] This military encampment has been the usual site for political and other types of prisoners in declared colonial emergencies in Jamaica. It is also serving as the current home for the Jamaica Defence Force (JDF).

[141] "Jamaica Detaining the Deputy Leader of Opposition Party," *The New York Times,* June 25, 1975. Retrieved from https://www.nytimes.com/1976/06/25/archives/jamaica-detaining-the-deputy-leader-of-opposition-party.html

system (although he acknowledged that there were several detentions of known criminals). Finally, while we may never fully know the true motives of the government back then, in the context of criminal justice this particular episode sets the stage as a testing ground for normalizing the SOE, ones which were revived in the 2010s by the JLP, at a time when Mr. Charles' ironically served in several capacities in the Jamaican Parliament.[142]

Agamben's thesis on the ensuing blurring of the lines between claims of norm-exception are instructional again for evaluating this definitive period of Jamaican politics. For him, the state of exception is akin to a threshold where law and fact become indistinguishable thus leading to a situation "by which law is suspended and obliterated in fact" (Agamben 2005, 29). For example, while some criminals were detained during this yearlong SOE there is general suspicion regarding law enforcement's impetus behind the Security Minister's detention orders, especially seeing that nearly two-thirds of the detainees were released without charge and 91 % without any restrictions as detailed above.[143]

[142] Mr. Charles served as a Minister of Labour & Social Security from 2007-2011 and as the Speaker of the House from 2016 until his eventual retirement in March 2020.

[143] *Allegations of corrupt use of powers of detention during 1976 state of emergency*. (1979). Kingston, Government of Jamaica Printery. The Security Minister's actions were further scrutinized by a Commission of Enquiry, but it ultimately concluded that there was no evidence to support that Mr. Munn corruptly used his powers to disrupt the JLP. The Commission stated that "Mr. Munn acted solely on reports and information from the security forces… At the level of the Minister, given his *bona fides*, there is always the risk that he may act on information placed before him that turns out to be either unreliable or altogether false" (64). The Commission further examined 6 detention cases, half of which were deemed valid based on the information presented to the minister while the other half consisted of insufficient and vague evidence to justify detentions. A Senior Superintendent Sibbles was fingered out for acting corruptly.

On the contrary, the Classical Model still retains analytical value for interpreting the arguably suspicious declaration of a SOE by the Manley government as a truly genuine political decision that is analogous to Schmitt's sovereign claims about the exception/emergency in the form of a theological miracle (which would be crime for Manley here). From this we can duly note that the state had little to no evidence for against the vast majority of persons who were deprived of their liberty. It further shows how rule of law norms can essentially be erased via executive claims of emergencies for combating factually dangerous circumstances, but with ulterior motives for preserving governmental power.

Nevertheless, the government was still able to claim that the SOE fulfilled its purpose over its lifetime by reducing crime and violence. Specifically, it reported that there was a 17.9% decrease in crime overall while those involving firearms decreased by 24%, as seen in Table 3.2 below showing the comparative periods of crime.[144]

Table 3.2 Pre-SOE vs SOE Crime Figures

Period	Overall Crimes	Crimes w. Firearms	Percentage Change
10/8/75-19/6/76 (pre-SOE)	4600	2900	-17.9
20/6/76-30/4/77 (SOE)	3774	2201	-24.1

Source: *Ministry Paper 22: Review of the State Emergency*

[144] Data was extrapolated from *Ministry Paper 22,* p.7.

Still, the use of a SOE in this particular period seems puzzling when the government had several pieces of ostensibly special-laws-cum emergency measures, such as Gun Court and SOCA at its disposal that could have been easily deployed.

The Classical Model's assumptions about norm-exception approach elides much of the actual workings and practices employed by the Jamaican government in the declared SOE of 1976-1977. For example, while notions about political violence and potential subversion of the state were the official reasons given by the Manley government, it was still seen to be prudent for elections to held during such a period. Consequently, both parliamentary and parish council elections were subsequently held respectively on December 15, 1976, and March 8, 1977. In that sense, it seems a bit contradictory to conduct elections during a declared emergency which shows that there are sometimes no clear-cut lines for delineating norm and exception. However, the counterfactual could be that the Manley government's action represented a commitment to democratic and constitutional norms as it relates to elections.[145] We may never know which of the above was the true intent for holding said elections. Nevertheless, in challenging the Classical Model, the only lines present in this demarcation between norm and exception are ones sometimes rhetorically drafted and maintained by governments in order to create confusion to justify declaration of said emergency actions. Despite the government's actions, the continuation of the SOE was perceived favorably amongst the

[145] Manley (1982, 142) states that: "In calling the State of Emergency, it was made absolutely clear to the Minister of National Security, Keble Munn, and to the heads of the security forces themselves that the powers conferred were to be used with the greatest care and discretion and were not to be directed against the opposition in any way. It was pointed out that we were going to hold elections. I regarded it as critical to the preservation of confidence in the democratic process in Jamaica, that no one should be able to say or feel afterwards that the JLP had been unfairly hampered in the conduct of their campaign. There was to be no banning of public meetings."

populace whereby a public opinion poll saw between 76-83% of persons from Kingston, parish towns, and rural villages giving their stamp of approval (Stone 1977, 261).

Overall, the declared SOE of 1976-1977 provides an early entry into the usage of this tool as a state policy for criminal justice. Future iterations of this said policy arguably have their roots in this specific deployment whereby it became a revived technique of government, one with arguable lengthy roots stretching back all the way to the colonial period. However, emergency regimes and their powers have found continuity and new life within the post-independence period. Therefore, Jamaican claims of emergencies perpetuate themselves them as a panacea to the island's criminal justice problem. They can thus be nominally re-packaged and re-deployed, both to the delight of a panic-stricken public as well as an instance to reassert state sovereignty to show its monopoly on violence on the island.

The mid-1970s from a postcolonial standpoint represents the exception parading as the rule despite notions of formal independence and the so-called cutting of ties with Britain. The circularity of colonial rule *by* law or *commandement* creates an avenue for Manley's government develop and use similar repressive measures as the colonial authorities did to respond to pressing socio-economic problems of the time. While the crime figures were indeed problematic, the government's response betrayed the hopes of fashioning an independent Jamaica that would rely less on arbitrary legal power versus a more substantive version that ensured the protection of individual civil liberties based on some element of social justice and morality—seeing as the PNP was trying to correct historical colonial imbalances.

CHAPTER IV THE TIVOLI INCURSION: A DEADLY AFFAIR

The continuation and usage of colonial and mid-1970s-styled anti-crime declaration of emergency would be revived in 2010 to capture and subdue arguably Jamaica's most prominent counter-society/inner-city community, Tivoli Gardens. This section hopes to provide further exploratory evidence that documents how this process has continued while noting how expressions of both a seemingly sovereign and constitutional blend of dictatorship has continued the colonial legacy of claims of emergencies as a technique of governance. The 2010 Tivoli Gardens Incursion represents a continuity of state policy and general penchant for using declared SOEs as a criminal justice measure onwards (examples of which will be discussed in the subsequent chapter). Using several pivotal governmental reports, primarily ones from the Office of the Public Defender and a locally constituted Commission of Enquiry, this chapter looks at the expressed continuities of claims of emergencies in Jamaica by documenting extralegal practices that were uncovered after the smoke cleared in Tivoli.

Background and History of Tivoli

Tivoli Gardens, namesake of the famed Danish attraction, community forms part of the larger West Kingston area of Jamaica's capital city, Kingston. Historically dubbed "Back-o-Wall" during the 1940s to early 1960s, the community was associated with extreme poverty due to the concentration of zinc shacks along with lack of basic amenities such as electricity, paved roads, and water thus making it "perhaps the most

miserable place on the island" (Gray 2004, 31). Over time, the community would become transformed into Jamaica's first political "garrison" community,[146] a feat achieved via the forced evictions of PNP supporters and the development of modern apartment complexes, under the guise of "urban renewal," for JLP loyalists in a bid strengthen its hold on the community (Gray 2004, 73). Since then, Tivoli has owed and pledged its political allegiance unanimously to the JLP (with no PNP victory occurring there since independence) and it has been described as a garrison community/constituency[147] within the context of Jamaican electoral politics. The JLP has thus solidified its electoral monopoly there.

The community has largely been associated or plagued with both political and/or organized violence thus leading to its characterization as "the mother of all garrisons."[148] Correspondingly, the community's informal governance structure which places so-called "dons/community leaders"[149] as primary interlocutors for what has been described as a patron-client relationship with Jamaica's political class[150] lends itself to a localized and internal declared state of exception for residents in such volatile communities. For

[146] See *supra* note 110.

[147] Former Commissioner of Police Owen Ellington termed Tivoli Gardens, especially under Coke's tenure, as "a state within the State."

[148] Rear Admiral Hardley Lewin, a former head of the army and later Commissioner of Police made the following iconic remark in Erica Virtue, "Army Chief Says Tivoli Mother of All Garrisons," *Jamaica Observer*, October 8, 2005

[149] They are also called "area leaders" and are generally said to have links with the criminal underworld by serving as the masterminds for said operations.

[150] For a fuller discussion, see Carl Stone, *Democracy and Clientelism in Jamaica*, (Transaction Books: New Jersey,1980). Also see Obika Gray, *Demeaned but Empowered: The Social Power of the Urban Poor in Jamaica*, (Kingston: University of the West Indies Press, 2004), especially chapters 1, 2, and 5.

example, a study focusing on Rio de Janeiro's *favelas* has argued that that both narco-traffickers and the Brazilian state are co-participants in creating a state of (in)security and a permanent state of emergency in said spaces (Penglase 2009, 60). Overall, Tivoli's story cannot be told without highlighting the role party politics played (and continues to play) in its formative development.

According to the most recent data from both the local Social Development Commission (SDC) Community Profiles and the Economic Commission for Latin America and the Caribbean (ECLAC) (2010, 6-14), Tivoli has around 16,000 residents with an average household size of 4 persons. ECLAC further found relatively high youth unemployment at 30.4 % with a total of 61 of households being employed and a further 62.5 % of persons having only secondary/high school education as the highest level of scholastic achievement. Finally, the SDC Community Summary Profile lists the following areas as priority issues for Tivoli: (1) High levels of unemployment, (2) Limited or no opportunity for training and employment, and (3) Poor treatment of residents by security forces. Despite being named after a famed Danish amusement park, life in Tivoli historically and contemporarily betrays such an association.

In terms of declared SOEs for Tivoli specifically, there have been two since Independence with the initial one occurring in 1966[151] and the latest being in 2010 (the latter being under discussion here). Furthermore, there have been other sporadic violent confrontations between the state security forces (both police and military) and residents

[151] This was the first declared SOE of Post-independence Jamaica. See William Calathes, "Gun Control in a Developing Nation: The Gun Court Act of Jamaica," *International Journal of Comparative and Applied Criminal Justice*, vol. 14, no.1, 1990.

of this community,[152] who have largely been branded as criminals, as evidenced in April-May 1997 and July 2001[153] which left a cumulative total of 32 persons dead (Amnesty International 2003). Such events led Amnesty International (2003, 38) to state that, "Unfortunately, the West Kingston affair mirrors a pattern of repeated failures by the authorities to adequately investigate…allegations of large-scale loss of life attributable to the security forces, or other violations of citizens' rights." However, the incursion of 2010 would overshadow the previous episodes and represent a continuation of Amnesty's fears about a culture of impunity that is arguably engrained within the Jamaican state, from the colonial to independence periods, whereby Commissions of Enquiries largely seem toothless and don't necessarily alter the state's unmitigated use of discretionary emergency powers towards certain pockets of the Jamaican populace.

SOE and the Search for "Dudus": "The greatest loss of life" since Morant Bay

The 2010 Tivoli Incursion began in earnest as an operation to capture and extradite one of the community's longstanding strongmen, locally called "dons," Christopher "Dudus" Coke,[154] for prosecution in the U.S. for alleged drug-trafficking and firearms charges. However, an extradition request languished for nearly 9 months with

[152] Joint police-military operations in 2005 and 2008 also lead to 4 persons being shot and injured while 5 people died, in the respective years. See the following article: Howard Campbell, "Gun battle in Tivoli- Five killed policeman, soldier injured. Nine weapons found," *The Gleaner*, January 14, 2008. Retrieved from: http://old.jamaica-gleaner.com/gleaner/20080114/lead/lead1.html

[153] Led to the first Commission of Enquiry in 2001.

[154] Coke also went by the alias of "President" or "Prezi" for short, which indicated that his rule of Tivoli resembled some semblances of informal state authority and power. See Commission of Enquiry Report (2016, 16), Coke was the leader of the Presidential Click and had a base in Tivoli Gardens…Coke took the sobriquet "President", and his girlfriend was popularly known as "The First Lady." The Commissioner of Police under which the incursion occurred, Owen Ellington, noted that "Tivoli Gardens under Coke's suzerainty" functioned more or less as 'a state within the State'."

the Jamaican government citing that Coke's constitutional rights had been breached by the manner under which the US obtained evidence on him via illegal wiretaps.[155] The Jamaican government eventually acceded to American demands and this approval set the stage for a collision course between the Bruce Golding-led government and Dudus along with his Presidential Click gang. However, in the hunt for Coke the Jamaican government under the premiership of the JLP's Golding,[156] who ironically was also the Member of Parliament (MP) for West Kingston, turned to the customary SOE declaration to subdue Tivoli with catastrophic results, one which made headlines both locally and internationally due to the brutal tactics used and overall fatalities in post-Independent Jamaica.

Matters came to a head on May 23, 2010, when there were a series of attacks on the police in West Kingston and other related areas within the capital, resulting in the murder of two officers, due to Coke's impending extradition arrest. A week prior to that, Coke and his cronies had barricaded the entrances and exits of Tivoli Gardens, which was seen as a mobilization to prevent his possible arrest and extradition.[157] Such actions led to

[155] Hall, Arthur, "Dudus lawyers move to have wiretap evidence dismissed," *The Gleaner*, June 15, 2011. Retrieved from https://jamaica-gleaner.com/gleaner/20110615/lead/lead2.html. Furthermore, there have been suggestions that this delay by the Jamaican government was also motivated by the documented links between politicians and area leaders like Dudus as it relates to corruption and general criminality.

[156] Jamaican Prime Ministers usually serve as the *de facto* Minister of Defence and Chairman of the Defence Board.

[157] It has been alluded that his unwillingness might be connected to his own father's demise. Lester Lloyd Coke, popularly known as "Jim Brown" was arrested in 1990 for extradition to the U.S. However, he died in a "mysterious prison fire while awaiting extradition." See Mattathias Schwartz, "A Massacre in Jamaica," *The New Yorker,* December 5, 2011. https://www.newyorker.com/magazine/2011/12/12/a-massacre-in-jamaica and Commission of Enquiry Report 2016, p.16.

an emergency Cabinet meeting and eventual declaration of SOE, initially for 30 days, to arrest Coke for extradition proceedings. Furthermore, the declared SOE was spatially delimited to the parishes of Kingston and St. Andrew. However, this measure was further extended twice until the July 22nd and incorporated the adjacent parish of St. Catherine. The declaration of a "limited" SOE incorporated language about the usual powers granted to the security forces such as restricting freedom of movement, conducting warrantless searches, and detaining suspects under reasonable suspicion.[158] Nonetheless, the aftermath was described as "the greatest loss of life in a single State Security Forces operation in independent Jamaica…" (Office of the Public Defender 2013, 1). It would also lead to the political fall of Prime Minister Golding.

Concerning the proclamation of a limited SOE on May 23rd, the following material facts and figures need to be addressed before turning to various allegations of human rights abuses by the state. Similar to the events of Morant Bay in 1865, the aftermath has been labelled a massacre by *The New Yorker*.[159] The *Western Kingston Commission of Enquiry Report* (2016, 14) notes that approximately 800 Jamaica Defence Force (JDF)[160] soldiers and 370 JCF personnel were deployed in an "internal security operation" with the following objectives: (1) to arrest Coke for extradition proceedings; (2) to capture wanted men and "persons of interest; recover illegal arms and drugs;" and

[158] See, "Proclamations, Rules and Regulations," *The Jamaica Gazette Supplement*, May 23, 2010, Vol CXXXIII, no. 43. See truncated version in Appendix I.

[159] See *supra* note 147.

[160] It must be noted that both the military and police forces had different plans in this joint operation whereby the JDF's plan was codenamed "Operation Garden Parish" whilst the JCF went with "Operation Keywest."

(3) finally to restore normality to the community for an environment conducive to regular policing. This deployment was in response to intelligence that Coke had mobilized nearly 300 gangsters to his side in Tivoli.

However, within the course of two days Tivoli was overwhelmed by the state forces, leaving 69 civilians and only 3 members of the security forces dead, according to the Government's official figures and records[161] (Western Kingston Commission of Enquiry 2016). Residents dispute the official figure and put it more closely towards 100-200. To add insult to injury, Coke had somehow managed to evade capture even though Tivoli had been subdued with relative ease during the same time span. Nevertheless, the conduct of the security forces and by extension the State generated much discussion in both public and private quarters, domestically and internationally.

Post-independence Excesses in Tivoli

In terms of the civilian death toll, there have been concerns that some residents were summarily killed by the security forces. The then National Security Minister, Dwight Nelson, invoked what could be deemed as manhunting[162] rhetoric in the local media as a response to Coke's mobilization and attacks on the police. He stated that: "we are going to hunt them down as they ought to be hunted down and bring the full brunt of the law on them."[163] Gregoire Chamayou (2012, 90) notes that while historical policing's

[161] These figures are contested amongst following three groups: Tivoli's residents, the Jamaican state, and international human rights bodies such as Amnesty.

[162] See Grégoire Chamayou, *Manhunts: A Philosophical History* (Princeton: Princeton University Press, 2012). Chapter 8 entitled "Police Hunts" examines how law enforcement rhetoric and tactics like the aforementioned Minister of National Security have evolved since the 20th century to the present.

[163] Gordon Robinson, "Forward in reverse," op-ed, *The Gleaner*, September 16, 2016. Retrieved from: https://jamaica-gleaner.com/article/focus/20160918/gordon-robinson-forward-reverse

hunting power was *outside* the law, its more modern variant is *supposed* to operate within the legal framework although this is more theoretical than practical. He notes: "To be an efficient hunter, one must pursue the prey despite the law and even against it" (Chamayou 2012, 91). Despite him not theorizing about police hunting power within an emergency powers context, Chamayou's observation here would prove Minister Nelson's words to be ominous for setting the parameters, especially their respective "preys", on declared exceptional powers of law enforcement and the military.

Previous conflicts had left a number of dead Tivoli residents before with little to no accountability and transparency about the state's actions. For example, Amnesty International (2016) notes that the allegations of extrajudicial killings might be well-founded due to the excessive use of force by the local police whereby a large number of fatal police shootings of civilians occur, estimated to be at 200 annually until 2014.[164] Furthermore, the former Public Defender, Earl Witter (2013), noted in his interim report that there were around 44 possible instances of extrajudicial killings during this incursion. Six years after the events in 2010, the *Report of the Western Kingston Commission of Enquiry* (2016) noted that there were possible extrajudicial killings based on civilian and two JDF members testimonies. The report drew the following conclusion: "No reason was advanced by any Counsel as to why those two soldiers should fabricate a story against members of the JCF. Their evidence is strongly suggestive of five extra-judicial killings by unidentified officers of the JCF" (254).

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[164] See Paul Chevigny (1990), "Police Deadly Force as Social Control: Jamaica, Argentina, and Brazil," *Criminal Law Forum,* 1 (3), p. 389-425. At p. 405, he states: "The average for the period 1979-1988 was 208 killings per year."

While most of the alleged extrajudicial killings primarily took place within the area of Tivoli and its environs, the case of Keith Clarke, an accountant and businessman, provides an interesting angle for insertion and analysis. In trying to apprehend Coke, the security forces believed that he might be holding out at Mr. Clarke's upscale residence, a good distance from West Kingston. On May 27th, members of the JDF raided Mr. Clarke's residence and he was fatally shot 21 times, with Coke still nowhere to be found (Witter 2013). Subsequently, the Public Defender called for a judicial enquiry, one which has been in the courts since 2012 without resolution since Mr. Clarke's demise.

A key sticking point in the process was the issuance of certificates of immunity/good faith certificates, *ex post facto,* to 3 soldiers by the then-Minister of National Security,[165] Peter Bunting, in 2016. Subsequently, the Constitutional Court in 2020 ruled[166] that these documents were invalid and as such the 3 soldiers should stand trial for their actions. Head (2017, 77-80) notes that such Acts of Indemnity have been generally used throughout the British Empire's history to legalize what was once illegal under vague conceptions of emergency, necessity, and security. Therefore, just as Governor Eyre indemnified the actions of himself and the military forces during the colonial era so too did the post-independence state continue in similar fashion.

Disproportionate use of force was another common complaint against the colonial authorities in their zealous efforts at subduing colonial protests as evinced in Morant Bay

[165] This issuance, it must be noted, was enacted under the PNP administration of Portia Simpson-Miller which won the 2011 elections. Therefore, it can be conjectured that state interests, on rare occasions, take precedence over those of party politics.

[166] Claudette Clarke v Greg Tinglin *et al,* (2020) F.C. 01 2018 HCV 02290 C.D. (Jam.).

in 1865 and the labor movement of the early 20th century in Jamaica. However, such complaints would extend to Tivoli in 2010 as well. There was the criminalization of an entire community and designation of them as enemy combatants[167] by state rhetoric, especially since they had been labelled the "Mother of All Garrisons". This created a pre-textual launching pad for the deployment of mortars against Tivoli residents, guilty or innocent. Whilst this tactic was initially refuted by military officials there was subsequent acknowledgement during the proceedings of the Commission of Enquiry.

The report found that this fateful decision violated 15 persons' right to life. This is constitutional guarantee that is not to be derogated even during SOEs. The commissioners argued that: "… it is our finding that the decision to use mortars on 24 May was a serious error of judgment. Given the demographics and geography of the area as stated above, it was reckless and wholly disproportionate to the threats offered by gunmen" (332). This action therefore demonstrates a wanton disregard for human life and suggests that residents were treated as "collateral damage" under the declaration of emergency. Finally, it also noted that international humanitarian law generally condemns the use of indirect fire weapons such as mortars in densely populated areas like Tivoli. However, Jamaica has not ratified the Rome Statute of the International Criminal Court (ICC) and would thus escape any meaningful international law prosecution and sanctions for war crimes such as deploying mortars against a civilian populace.[168]

[167] A Senior Police Officer, Senior Superintendent (SSP) Hewitt, admitted however in his testimony to the Commission that most residents were peaceful and law abiding. They are for the most part "decent, law-abiding persons but are trapped by the status quo. They don't have guns" (Western Kingston Commission of Enquiry Report 2016, 22).

[168] What's Jamaica's problem with the ICC?", editorial, *The Gleaner,* April 20, 2019. Retrieved from: http://jamaica-gleaner.com/article/commentary/20190410/editorial-whats-jamaicas-problem-icc

Allegations of mass illegal and arbitrary detentions were also leveled against the state. Approximately 4,000 persons were detained over the 3-month declared SOE period (Amnesty International 2011; Witter 2013). This cumulative number moved incrementally during different phases of this declared emergency. For example, by May 28th there were a little over 1,000 detainees according to the Public Defender's reports and those of the former Commissioner of Police, Owen Ellington. Ellington noted that over 600 persons were released around this time. Furthermore, on June 23rd, exactly a month after the declaration of the SOE, the detention figures made an incremental jump as seen in Table 4.1 below.[169]

Table 4.1 Detentions up to June 23, 2010.

Category	Parish Kingston & St. Andrew	Parish St. Catherine	Total
Detainees	2118	290	2408
Persons processed and released	2071	211	2282
Detention orders issued	122	0	122
Active investigations against persons	0	0	76

[169] Figures retrieved from the *Western Kingston Commission of Enquiry Report*.

Towards the end of the SOE, on July 19th, there was an updated report on total detentions which again contained another notable increase, especially with regards to St. Catherine parish detainees and the total number of detainees across both parishes. This can be observed in Table 4.2 below.

Table 4.2 Detentions up to July 23, 2010.

Category	Kingston & St. Andrew	St. Catherine	Total
Detainees	2983	1389	4372
Persons processed and released	2710	1383	4093
Detention Orders Issued	139	0	139
Active Investigation against persons	138	0	138

Overall, the commissioners leveled the following critique against the SOE detention regime upheld by the security forces and by extension the Jamaican state: "The fact that over 4,000 persons were detained but only 148 not released, is powerful evidence from which an inference can reasonably be drawn that the large-scale detentions were arbitrary" (Western Kingston Commission of Enquiry 2016, 167). This speaks to the fact that a number of the detentions were not based on any reasonable grounds but

more likely related residents addresses, especially after the state effectively captured Tivoli and then extended the SOE to the adjoining parish of St. Catherine. Similarly, the Public Defender, in the immediate aftermath of the incursion, observed during a tour of the area that younger and older male detainees "tightly bunched up behind a fence or razor wire, many kneeling in the ground. They were all being 'processed'.[170] There were no sanitary conveniences" (Witter 2013, 37).

Campbell (2020) notes that episodes like that of Tivoli showcase how the security practices of the Jamaican state by way of declarations of emergencies are symbolic of the growing intersection between insecurity and the transformation of state power which can have detrimental effects for citizenship rights in marginalized and securitized geographic spaces. Similarly, Mckinson (2019) argues that historically (during slavery and colonialism) Jamaican black bodies have been violently policed and repressed, thus the 2010 Tivoli Incursion was a continuation of this legacy of disciplining and governance under a post-independent government. She further adds that ordinary Jamaicans lack of respect for the treatment and subsequent loss of life in Tivoli indicates "a legacy of a racist, classist, and exclusionist plantocratic system and, later, a post-independence politics that has condemned black bodies to inferiority" (106). In this sense, citizens from West Kingston and other predominantly working-class areas will have a different interaction with the state security forces compared to persons from middle to upper class

[170] A vague term for arbitrary police detentions in Jamaica whereby they collect information (fingerprints and photographs) from citizens, suspects or not. It effectively functions as an illegal form of data collection for the police. For more information on this practice see Rivke Jaffe, "Speculative policing," *Public Culture* 31, no.3 (2019): 453-456.

strata, thereby reaffirming the latter's constitutional rights and disavowing the former's own. People from such spaces are stigmatized and experience a different interpretation of the rule of law. However, the aforementioned death of Keith Clarke by members of the military throws this general argument into some doubt and reaffirms the fact that claims of emergencies often do not have such neat antitheses, especially when it comes between the intersection of citizenship and public safety.

SOE Abnormalities and Discrepancies

Both the Public Defender and the Western Kingston Commission of Enquiry have argued that the Jamaican state was duly threatened by Coke's actions in May 2010 which necessitated the employment of emergency powers. However, there are notable discrepancies that both bodies found questionable as it relates to such a designation in the first place. For example, the number of recovered firearms paled in comparison to what was initially hypothesized. As a result, only 28 firearms were recovered from Tivoli itself out of an overall tally of 106-115[171] for the duration of the SOE. This inconsistency would therefore not lend itself favorably to claims that Coke had amassed an army of 300 mercenaries and a large cache of weapons ready to destabilize the state. It would also discredit the state's belligerent posturing towards the civilian population as if they were enemy combatants, when they were more akin to hostages under Coke's rule.[172] The Report notes the following:

[171] Poor recordkeeping attributed to these confusing figures; the report noted.

[172] If persons had accepted the Government's offer of evacuation, they would have been labelled as informants and traitors to the community—see Schwartz's article *supra* note 155 and Western Kingston Commission of Enquiry Report.

> With respect to Tivoli Gardens, the main target of the security forces, the number count of firearms recovered reveals a disconcerting deficit. By 26 May, the JDF recovered only 6 firearms; no firearms were found on any of the 19 persons whose deaths we report in Chapter 9. (Western Kingston Commission of Enquiry 2016, 116)

The aforementioned 19 deaths were considered as credible evidence that there were extrajudicial killings within the first two days of the joint operation by the police and military. Therefore, such a paucity of recovered guns would also indicate that the use of force by the state was disproportionate and unjustified within Tivoli, especially given the high civilian death toll that occurred in search of a single man. Lastly, it could be reasonably argued that this poor recovery would also not have warranted the declaration of emergency and that a normal operation using regular statutory powers could have been used to arrest Mr. Coke, a similar point made against Eyre in the Jamaica Affair of 1865.

Another striking drawback discovered during the subsequent Commission of Enquiry was the cumulative number of rounds expended by the security forces versus those recovered for the post-operation analysis. To put things into context, the JDF fired 7,610 rounds compared to the JCF's 1,516. However, only a mere *36* spent shell casings were recovered for analysis after the incursion into Tivoli (Western Kingston Commission of Enquiry Report 2016, 451). The JDF recorded the number of weapons and ammunitions given to each soldier before the operation. This discrepancy along with the Public Defender's charge[173] that there was little to no preservation of crime scenes[174]

[173] See Public Defender's Press Release attached in Appendix. An excerpt reads: "The Public Defender has, over the last seventy-two hours, expressed surprise and latterly, astonishment that, despite the representations and recommendations made to the Police High Command, the venues of certain alleged extra-judicial killings by the security forces in Tivoli Gardens during the recent incursion, none of them is being treated as, or as potential crime scenes."

[174] These were established *10 days* after the events on May 23-25.

(as potential crime zones) further fueled allegations of extrajudicial killings and a potential cover-up by the security forces. Such actions led some to believe that the police and military were purposely hindering investigations thus hiding evidence of their indiscriminate misconduct. Furthermore, some members of this joint operation wore masks and hid their identification numbers and badges, a most unusual practice, one which the Commission found was unauthorized and done to evade accountability and transparency for said actions taken in Tivoli.[175]

The temporal and spatial extensions that occurred in this SOE episode also seem a bit troubling as it signals to the constructed, not inherent, nature on which the norm-exception binary rests. The initial 30 days period might have been reasonable to subdue Dudus and his affiliates, as the Jamaican security forces did just that in the span of 2-3 days. Nevertheless, the extension of said SOE to accommodate a further 2 months seems tricky since it took the authorities approximately a month to "capture" Mr. Coke in a roadblock. The temporal expansion seems self-serving to governmental efforts for managing the criminal justice system more effectively than any real or immediate exigency threatening state survival. The arbitrary arrests and detentions that have been pointed out seem to support this claim. The spatial extension of the SOE to the parish of St. Catherine seems excessive as the wholesale arbitrary and illegal detentions there were not *prima facie* contributory factors that led to the eventual surrender of Dudus to law

[175] The JCF has repeatedly been critiqued for such allowances and actions. See the following articles: "Illegal for police/soldiers to wear masks, says INDECOM boss," *Jamaica Observer*, December 12, 2011, and Jason Cross, "Unmask cops- JCF face more criticism over decision to allow some police to wear masks on operations," *The Gleaner*, August 13, 2016.

enforcement. In sum, both actions are indicative of a manhunting dragnet with no real targeted investigations for assisting and improving the wider criminal justice system.

Overall, claims of emergency generally provide wide latitude for those in power to obfuscate records to fit the original declaration of emergency narrative while also operating in a largely ad hoc fashion.[176] Such actions also enable the state to police itself using different rule of law norms, particularly as it relates to the civilian death count—one which seemed completely avoidable. These further paints the picture that the supposed exigency of Tivoli called for immediate action and as such there was little to no room for accountability and transparency during and after such a period compared to normal criminal justice methods. The actions of the joint police-military force and by extension the state also aids to create this false dichotomy between action and thinking, one which Scarry (2011) attributes to how governments, liberal or otherwise, tend to favor the former over the latter in declarations of emergencies. This growing practice since 9/11 represents a clear danger to democracies as the suspension of thinking and invocation of action can lead to preventable loss of lives, a point not absent in Tivoli's case here. Even in the gravest emergency, real or imagined, habitual thinking grounded in the rule of law can still precedence over illegal actions (Scarry 2011).

In reviewing the declaration of SOE and its operations within a norm-exception framework we begin to immediately see problems with such designations and operations.

[176] See Deborah Thomas, *Political Life in the Wake of the Plantation: Sovereignty, Witnessing, Repair* (Chapel Hill: Duke University Press, 2019), 21. She provides the following anecdote: "Reflecting on what he termed the 'dismal' state of recordkeeping and maintenance in Jamaica, Anthony Harriott once suggested to me that 'the attitude to history is indicative of the attitude to accountability'." Incidentally, Harriott was also one of three Commissioners tasked with investigating the events that unfolded in 2010 in Tivoli.

For example, there was erroneous intelligence and general uncertainty as to whether Dudus was still within Tivoli on May 24th or whether he had escaped. Therefore, this would have made the entire operation "nugatory," according to the Commission of Enquiry (2016, 432). To further make the point, "Dudus" Coke was eventually captured in a roadblock *29 days* (June 22) after the events of May 23rd on a highway near Kingston in the company of notable local clergyman. He was allegedly on his way to surrender himself at the U.S. Embassy in the capital and was disguised in a female wig.[177] Therefore, the declaration of SOE seemed like a pretext for the state, by way of the police and military, to reassert its sovereignty in a most forceful manner and capture a somewhat lost territory. For example, Rupert Lewis (2012) argues that what happened in 2010 was really the first major "assault" on the system of garrison politics, an attempt to reclaim Tivoli Gardens within the national political and juridical system. The aftermath saw direct control being exercised of Tivoli by the Jamaican state move which is arguably parallel to Britain's designation of Jamaica as a Crown Colony and imposition of direct rule via the Colonial Office after Eyre's maneuverings. If the main objective of Coke's capture was achieved in a most ordinary manner a month after the SOE declaration, then its initial proclamation can conceivably be branded as a technique of Jamaican government—both past and present—that acts as a panacea for socio-economic and juridico-political ills that have plagued the island. The aforementioned violations and subsequent claim of emergency might have not been warranted given the security forces only needed to capture a single man, "Dudus" Coke, for extradition.

[177] Rory Caroll and Ross Sheil, "Jamaica Appeals for calm after surrender of Christopher 'Dudus' Coke," *The Guardian,* June 23, 2010. Retrieved from: https://www.theguardian.com/world/2010/jun/23/christopher-dudus-coke-kingston

The event in question has led to more questions than answers, a defining feature of declaration of emergencies not only in colonial Jamaica's history but apparently its post-independence one too. The Commission of Enquiry (2016, 478) came to the following conclusion after reviewing both civilian and security forces' testimonies: "Although the operation of the security forces was justified, the manner of its execution by some members of the security forces was disproportionate, unjustified and unjustifiable." The Commission thus recommended that the Government of Jamaica (GOJ) publicly apologize to the people of West Kingston and Jamaica "*for the excesses* of the security forces…" (Western Kingston Commission of Enquiry 2016, 478). An apology was later issued under the premiership of Andrew Holness in 2017, seven years after the events in question and memories began to fade.[178]

In analyzing the Tivoli Incursion, it is of utmost importance to point out the lack of accountability and transparency in declared emergencies which has become a common feature of the Jamaican state, colonial and independent. It seems as if declared emergencies and their respective operational practices also create more problems than they usually solve, especially those concerning citizens' rights and the rule of law (from the liberal standpoint on which the state presupposes it is constructed on). While the recommendations of the Commission had some tangible and intangible reparatory justice

[178] Edmond Campbell, "'Apology accepted'- Tivoli resident says statement of regret from PM brings closure to loss of son." *The Gleaner,* December 6, 2017. Retrieved from: http://jamaica-gleaner.com/article/lead-stories/20171207/apology-accepted-tivoli-resident-says-statement-regret-pm-brings. Also see Thomas' work in *supra* note 166 which speaks to the concept of Witnessing 2.0 and how this practice can bring about reparatory justice compared to the limitations of liberal human rights and states organizations (Commissions of Enquiries, Truth Commissions *inter alia)* and their already presupposed concepts of rights, truth, enquiry, and reconciliation. Witnessing 2.0 should be co-performative (governments and residents of Tivoli) in order for both parties to assume moral responsibility for moral wrongs.

mechanisms, it somehow forgot to also repudiate the use of SOE's as a panacea for the island's criminal justice problem. Interestingly enough, the use of SOE's as state policy has reappeared between 2017-2021 and will be discussed in the ensuing chapter. Throughout the island's history of declared martial law or SOEs, it seems as if the Commissions of Enquiries were designed to have more bark than bite and this allows for the state to peddle an apology and acknowledge errors in operation. Despite the apparent violent excesses, the state (irrespective of whichever party forms the government) still gets to use a claim of emergency as a technique of governance when the next problem occurs. The Caribbean Policy Research Institute (CAPRI)[179] in a policy brief noted both policy implementation and reform are of utmost importance to change public perception towards Commissions of Enquiry, so that they are not just seen as mere political tools for absolution but substantive ones for addressing and repairing state excesses. Subsequently, the following critique captures the previous sentiment:

> While the West Kingston Commission of Enquiry has been critical to a national (and diasporic) discussion of how sovereign violence has been generated and the institutions through which it is and has been enacted, it has not ultimately repaired the lives of those who lost loved ones or were themselves injured within Tivoli Gardens, even if they were compensated monetarily for damage to property. (Thomas 2019, 213)

Ultimately, the Commission failed to address the continuity and sources of sovereign and constitutional state violence against Jamaican citizens which would again be called upon to as the state's go-to criminal justice policy between 2017-2021.

From a theoretical perspective, the case of Tivoli Gardens can be critically read as the post-independent Jamaican state's reliance on SOEs as a technique of government à

[179] "Commissions of Enquiry and the Potential for Policy Change." CAPRI. June 2016.

la Agamben. As presented here, there is some correlation and overlap between the Jamaican state's invocation of emergency powers and Agamben's contribution on the state of exception as a tool of governing in the contemporary. However, this proclivity to use SOEs as a tool of government has its genesis in Jamaica's slave and colonial society. Therefore, it is precisely at this location that Agamben's Eurocentric state of exception theory, while useful in analyzing the overlap between norm-exception, becomes problematic in explaining Jamaica's historical and contemporary practices related to emergency government.[180] This claim can be backed up by Fanon's treatment on colonialism as a system of violence used to suppress native populations, one which has been preserved into post-independence Jamaican statecraft via emergency statutes. Such statutes were frequently deployed to solve complex economic, political, and social problems of the Jamaican body-politic in an attempt to justify the usual resort to standard state violence. This feature aids to justify Hussain's (2003, 31) assertion of the colony as being based on a "jurisprudence of emergency," one where the "colonial rule of law" holds sway over the fabled Western version of said concept. *Commandement,* not rule of

[180] See the following works for a critique of Agamben's treatment of colonialism vis-à-vis European states of exception: Simone Bignall and Marcelo Svirsky, "*Introduction: Agamben and Colonialism,*" in *Agamben and Colonialism,* ed. Simone Bignall and Marcelo Svirsky (Edinburgh University Press: Edinburgh 2012) pp. 1-14; Yehouda Shenhav, "*Imperialism, Exceptionalism, and the Contemporary World,*" in *Agamben and Colonialism,* ed. Simone Bignall and Marcelo Svirsky (Edinburgh University Press: Edinburgh 2012) p. 19; Inés Valdez, Mat Coleman, and Amna Akbar "Law, Police Violence, and Race: Grounding and Embodying the State of Exception," *Theory and Event* 23, no. 4 (October 2020): 926.

Shenhav makes the following critique: "Giorgio Agamben, who theorizes the inseparability of violence and law, advances an illocalized, ahistorical, and disembodied account of the state of exception that underspecifies and overgeneralizes the workings of the state, and especially of state violence. In so doing, he misinterprets one of his key interlocutors, Walter Benjamin, for whom law and state violence target particular locations and groups."

law thus forms a key structural component of the colony and this feature is also (re)presented as a form of sovereignty and law in the postcolony (Mbembe 2001, 24-26). The fact that it took the state 7 years after the incident to apologized combined with the lack of accountability in punishing government, military, and police officials involved in the Tivoli Incursion speaks volumes as to what we should expect from the Jamaican state, colonial or independent, in its approach to substantively upholding the rule of law in order to provide substantive justice, not just mere monetary reparations.[181] In summary, episodes like Tivoli exemplify how to rule *by* law in the postcolony.

Concluding Thoughts

This chapter was organized around declared state of exception imposed on the West Kingston community of Tivoli Gardens in 2010. As a standalone case, this catastrophic use of a SOE echoes the colonial state terror of Morant Bay in 1865 in both its violations and scope. Therefore, Tivoli cements its place in the annals of Jamaican declarations of emergencies represents both a singularity and continuity.

Post-Independence Jamaica's continued reliance on colonial emergency powers, primarily in the criminal justice sphere, combined with indigenous legal tools point to an interesting blurring of supposed lines between norm and exception and not a neat delineation as is often theorized under the Classical Model. This blur often leads to state security practices which run contrary to stated constitutional norms and values, ones which allow mass arbitrary searches and detentions, and the most egregious of them all, extrajudicial killings as seen in the case of Tivoli Gardens. The incursion here represents

[181] SDC Commission in the wake of the Insurrection disbursed some $200 million Jamaican dollars to assist with an array of issues: funerals, destruction of property and goods,

not an exceptional moment of state violence in a young nation's history. On the contrary, it signifies the continuation of declared SOEs acting as periodical panaceas for what can be characterized as a weak criminal justice system that is further exacerbated by a number of competing political and socio-economic issues affecting the island.

Considering Jamaica's colonial history, one would think that these legal and criminal justice practices under claims of emergency were of a bygone era. However, the evidence from Tivoli shows that they are in fact emblematic of continued claim of emergency as a form of "repressive legality" (Roberts 2019, 4) and arguably what Agamben (2005, 2) calls a "technique of government". The continued usage of the Emergency Powers Act of 1938 has given the state the necessary firepower to periodically engage in states of exception with little to no accountability and recourse to those who have suffered injustices at the hands of such practices. In this sense, there is still the presence of a prevailing colonial rule of law logic in post-Independent Jamaica, one that indemnifies violent state actions at the expense of poor black Jamaicans with poor urban addresses (Hussain 2003; McKinson 2019).

Post-Independent Jamaican state actions, particularly as it relates to the criminal justice system, lend support to Fanon's view on the futility of peaceful transfers of power in the process decolonization. For him, since violence was the tool that molded colonial places like Jamaica, therefore it also has the potential to be cathartic in the fight for liberty against the colonizer. However, Jamaica's experiences have shown here is that the wholesale retention of colonial-era laws and constitutional thinking (especially the application of emergency provisions) cloaked under the rhetoric of (in)dependence can lead to continued state abuses of citizens' rights in a period that was supposed to

guarantee the rule of law based on local political ownership. It appears that this ownership has substituted overseas colonizers for native ones and herein lies Jamaica's problem as it relates the intersection between emergency powers and criminal justice that creates an inherent blur between the lines of supposed norm and exception.

CHAPTER V LATE 2010S: NORMALIZATION OF SOES AND ZOSOS AS CRIMINAL JUSTICE TOOLS

Arend Lijphart (1978, 402) critically notes that scholars should be cognizant of how emergency regimes can abuse constitutional emergency powers by curtailing human freedoms thus disregarding the rule of law and implementing permanent crisis rule instead of responding temporarily to them. Since the Tivoli misadventure, the Jamaican state, beginning in 2017 and 2018 respectively, has resurrected SOEs while complementing them with Zones of Special Operations (ZOSOs) as part of its major anti-crime thrust. This feature, while reminiscent of the earlier discussed mid-1970s approach to criminal justice, ultimately comes with its own unique features and violations which I deem emblematic of the blur between norm and exception. These attributes will be used to challenge and make larger theoretical claims about how complex the norm-exception framework can be in supposedly liberal postcolonial democracies like Jamaica, especially when it has not adequately addressed previous violations under declarations of emergency (with Tivoli occurring only a mere 7-8 years prior to the current renewal of the state of exception approach).

Harriott (2000) warned that Jamaica needed some form of social control for managing crime, although he believes there should be apprehensions about the state-police monopoly as agents of control, especially one historically steeped in colonial authoritarianism. He states that: “Even more importantly, this authoritarian model of police style and administration may degenerate into a new (undemocratic) mode of political administration (Harriott 2000, 43). Similarly, Thame (2014, 10) argues that

Jamaican state violence against its citizens stems from the belief that they are "ungovernable, that their indiscipline has led them into wanton lawlessness, criminality and violence." To complement declared SOEs, Jamaica has also resuscitated the SOCA of 1974 in the form of The Law Reform (Zone of Special Operations)[182] (Special Security and Community Development Measures) Act 2017. There are even further plans to consolidate previous statutes into a more comprehensive emergency law, dubbed the "Emergency Security Measures Act", aimed at crime fighting which further blurs our understanding of a strict dichotomy between the supposed lines that partition norm and exception.[183] In total, the 2010s and onwards reveal a marked continuity, intensification, and normalization of mid-1970s claims of emergency for solving the island's perennial criminal justice difficulties.

With that being said, I document and trace both extraordinary criminal justice measures between 2017 to the present. Firstly, I will analyze the development, implementation, constitutionality, and seeming normalization of Zones of Special Operations (ZOSOs) as a "jurisgenerative" and state-building emergency measure which has been combined with renewed and extended deployments of SOEs for fighting crime. Secondly, I examine and highlight problematic violations of both emergency regimes which have led to prolonged unconstitutional state practices, such as arbitrary arrests,

[182] Hereinafter called ZOSOs as they are dubbed locally on the island.

[183] "National Security Council considers Enhanced Security Measures," *Jamaica Information Service*, March 4, 2019. Retrieved from https://jis.gov.jm/the-national-security-council-considers-enhanced-security-measures. The article was originally derived from the Office of the Prime Minister (OPM). Also see a more recent update on this proposed legislation entitled, Edmond Campbell, "PM sharpening new anti-crime law," *Jamaica Gleaner,* June 21, 2021. Retrieved from https://jamaica-gleaner.com/article/lead-stories/20210621/pm-sharpening-new-anti-crime-law

unlawful mass extended detentions, allegation of kidnapping, and breaches of separation of powers doctrine. Such actions are indeed in violation of the Jamaican constitution as things currently stand. One thing is for sure, emergency powers and emergency-adjacent laws can be abused. I deem the aforementioned abuses to be characteristic of the Jamaican state's colonial and post-colonial reliance on claims of emergencies, especially ones that obfuscate a classical norm-exception framework. Such an understanding shows that there has been a seeming continuity of claims of emergencies within 21st century Jamaica as a tool of government, not a radical break with the past as liberal conventional wisdom might suggest or envision. In sum, and to echo the words of Gross and Ní Aoláin (2006, 12): "Thus fashioning legal tools to respond to emergencies on the belief that the assumption of separation will serve as a firewall protecting human rights, civil liberties, and the legal system as a whole may be misguided."

As it relates to the norm-exception debate, it is important to point out the relevant role that violence plays for Benjamin (2019) in either "lawmaking" or "law-preserving" as part of broader state power and violence. The former's role is to conserve law while the latter deals with the inauguration of law (Benjamin, 1986; Valdez, Coleman and Akbar 2020). Therefore, I read both emergency measures from a Benjaminian perspective in order to develop an understanding of how intricate the relationship between law, justice, and violence is, especially in how they operate in postcolonial spaces such as Jamaica. "The tradition of the oppressed teaches us that the 'state of emergency' in which we live is not the exception but the rule. We must come to a conception of history that is in keeping with this insight" (Benjamin 1968, 257). Benjamin's dictum is quite instructive here in how scholars approach studying

emergency powers in postcolonial democracies like Jamaica. Therefore, I believe that we must come to a similar conception of both past and present declarations of emergencies. Benjamin's crucial insights on violence and law eventually leads to a fundamental conclusion that is grounded in the significant relationship between the two and not one based on mutual exclusivity. This point thus provides an entry into the all-too-familiar thoughts of postcolonial thinkers like Fanon and Mbembe who are already au fait with such understandings of the colony and postcolony respectively, especially the role that normalized and arbitrary violence plays in governing such spaces and peoples.

Agamben's state of exception will be used again to challenge the longstanding assumptions about temporal and spatial notions about norm-exception, especially as it relates to the legal formulations and operations of ZOSOs. However, the significant violations of civil liberties under both emergency laws violently targets certain locations and groups comprising the "oppressed" in Jamaica. This emphasizes Benjamin's dictum and the viability of specifying who the targets of the state of exception are, since some critics find this lacking in Agamben (Valdez, Coleman and Akbar 2020, 904). Finally, Benjamin's work warrants inclusion as it allows us to expand Agamben's horizon beyond the Eurocentric oppressed (likewise his own which I originally argued was also quite Eurocentric with a focus on labor) in the *lager/*camp towards exploring the postcolonial reality of Jamaica in as a potential state of exception, one not too dissimilar from the colonial past.

While the aforementioned thinkers have certainly assisted our theoretical understandings of the norm-exception binary, their work relies too much on Europe as the epistemological and ontological embodiment of the state of exception. Therefore, it is

pertinent to highlight the utility of using postcolonial scholars such as Fanon and Mbembe for complicating and updating our understanding of the aforementioned dichotomous framework. They reveal the arbitrary nature of power and violence as being constant, not an exceptional feature. They also theorize on colonialism has the potential for influencing postcolonial citizen-state relations. By considering how the histories of colonialism, imperialism, racism, and slavery are interconnected with the state of exception, we can begin to re-conceptualize the facile norm-exception binary. Postcolonial scholarship provides a useful point of departure from the sometimes suspect normative and empirical Eurocentric postulations that define even critical scholars (like Agamben and Benjamin) who are weary of the norm-exception thinking.

Zones of Special Operations (ZOSOs): A history and overview

In this section, I will firstly sketch a brief overview of the history, development, and implementation of the ZOSO legislation. Secondly, I provide an overview of the increased powers of the Prime Minister as the head of government, including concerns about the limits of ZOSO powers. Although this work takes a critical perspective as it relates to norm-exception debate, Schmitt's critique of liberal constitutionalism is quite useful here in showing how sovereign decisionism plays a key role in defining what the exception is in Jamaica, one that is not without legal and human rights concerns in terms of violations of citizens' rights. Lastly, a number of rights violations are documented to empirically to show the incongruence between the constitution and ZOSOs. In essence, ZOSOs are not the magic bullet as originally envisioned to fight crime within a liberal rule of law framework. It can thus be argued that it blurs the lines here between rule *of* law versus rule *by* law. The former concept speaks to general, prospective, and clear rules

based on certainty while the latter uses the technical application of laws for governmental action with few limitations (Tamanaha 2004, 91-92).

During the 2016 parliamentary elections, the JLP promised the Jamaican electorate that under its administration they would be able to sleep with their doors and windows open. Since the 1970s onwards Jamaica has had a consistently high murder rate based on global comparisons. It even held the infamous title as the "murder capital of the world" in 2006.[184] The current Minister of National Security and Deputy Prime Minister, Dr. Horace Chang, estimates there have been approximately 1,350 murders per annum over the last 15 years on the island. [185] Similarly, according to a United Nations Office of Drugs and Crime (2019, 11) report, the island's homicides were estimated at 57 per 100,000 in 2017-for a population roughly between 2.8-3 million people-in comparison to the global average of 6.1. To put things into further context, the Americas (inclusive of North, Central, and South America) had an average of 17.2 per 100,000 for the said period under review meanwhile the Caribbean sub-region recorded 15.1 (UNODC 2019, 14). With that being said, Jamaica's crime rate is 9 times the global average and is more than triple both its continental and regional counterparts' averages respectively.

Therefore, after assuming power, the Holness administration developed and launched "Plan Secure Jamaica" in which several legislative commitments were to be

[184] "Jamaica 'murder capital of the world'," *BBC Caribbean.* Retrieved from: http://www.bbc.co.uk/caribbean/news/story/2006/01/060103_murderlist.shtml

[185] Horace Chang, "*Building Capacity for Security Resilience",* presented as part of the Sectoral Debate by the Ministry of National Security, June 30, 2020. Retrieved from https://jis.gov.jm/media/2020/07/Min.-Chang-Sectoral-Presentation-2020-E.pdf

undertaken to strengthen the criminal justice system.[186] Eventually, the Holness administration's pledges gave birth to the Law Reform (Zone of Special Operations) (Special Security and Community Development Measures) Act 2017 or more commonly called the ZOSO Act. The ZOSO Act was described by the Prime Minister as a key pillar of his administration's overarching plan to address violent crime on the island using a three-pronged approach based on the mantra of "clear, hold, and build" which would be crucial for managing each zone.[187] This approach echoes that of the Rio De Janeiro state government's Pacification Programme in Brazil which was deployed to occupy and govern the *favelas* in order to facilitate the hosting of both the 2014 World Cup and 2016 Summer Olympics respectively (Campbell 2020). Moreover, ZOSOs seem acutely similar to Colombia's former president, Alvaro Uribe, "Democratic Security Plan," which involved the use of so-called "rehabilitation and consolidation zones"[188] (Mason

[186] Andrew Holness (2017). *Prime Minister's Contribution to the Budget Debate 2017-2018.*

[187] *Ibid,* p.22. "Mr. Speaker, this legislation is designed to give effect to a well-established and practised security and community building strategy termed Clear, Hold, Build'.

Clear - Law Enforcement goes into selected community and saturate community with their presence and displaces the criminal element and removes their space to operate while at the same time reassuring law-abiding citizens.

Hold - Law Enforcement maintains a sustainable level of presence and control over the area, creating the space and support for a multi-sectoral intervention into the community to address outstanding and critical human needs and basic infrastructure.

Build - Psycho-cultural, social capital, and leadership and organization building and support."

[188] Jamaica's own "Citizen Security Plan" makes mention of Colombia's use of these zones based on the "Clear, Hold, Build" strategy in order to cut homicides substantially and improve economic growth. Furthermore, Mason's work describes Colombia's zones as follows:

> "The expanded faculties of the security forces have evident than in the 'rehabilitation and consolidation zones', specially selected for the intensive implementation of the government's policy of recuperating state control over areas with high levels of conflict. In both the Montes de Maria region that spans the federal departments of Bolivar and in Arauca Department, a special military commander has been placed in charge of implementing a state of emergency. Through a massive military presence, the re-staffing of police posts, roadblocks, restrictions on movement, house-to-house searches, and detention powers, the state's intention is to reinstate control over

2003). It can best be described as an emergency power law, *de facto* and *de jure*. Finally, there is a sort of South-South connection here which runs counter to Cesaire's "boomerang effect" and this is something that critical security studies and postcolonial scholars need to further investigate.

Subsequently, the ZOSO bill was passed by both Houses of Parliament in July 2017.[189] *Prima facie,* the ZOSO Act bears a striking resemblance to the 1974 Suppression of Crime Act (SOCA) and the current Constabulary Force Acts, with the latter retaining a number of the oppressive features of the former, a point which will be furthered elaborated on below.[190] With the ZOSO law in force, a National Security Council (NSC) (with the Prime Minister at its helm) was given statutory authority to declare any geographical area of the island a "zone" for up to 60 days. Additionally, the Prime Minister has the statutory latitude to further extend such zones for another 120 days (the Act provides for three separate but continuous 60-days extensions, for a total of 180 days) before seeking parliamentary approval for an extension.[191] The "special" and arguably extraordinary powers granted to both the police and military include the following: (1) to conduct warrantless searches and seizures of "any place, vehicle, or

effectively lawless areas which have experienced some of the country's worst paramilitary and guerilla violence" (397).

[189] Latonya Linton, "All Clear for Zones of Special Operations Legislation," *Jamaica Information Service,* July 12, 2017. Retrieved from https://jis.gov.jm/clear-zones-special-operations-legislation/

[190] This is an argument that was advanced by Gordon Robinson, an attorney, in a weekly column (op-ed) titled "Where have I heard this before?", column, *The Gleaner,* June 15, 2017. Also compare the provisions of SOCA 1974 at *supra* note 118 with *infra* notes 191-194 to see the similarities with ZOSO.

[191] The Law Reform (Zone of Special Operations) (Special Security and Community Development Measures) Act 2017, §4 (1), §5 (1-2).

person within a Zone";[192] (2) to establish cordons and curfews;[193] and (3) to arrest and detain persons on "reasonable grounds."[194] Overall, since the legislation's passage there have been 7 declared ZOSO's on the island.[195] Table 5.1 below provides the requisite details about their spatial and temporal features.

[192] *Ibid*, §14 (1). The language specifies "reasonable suspicion" as the basis for such searches.

[193] *Ibid*, §12 (1) (a-b).

[194] *Ibid*, §16 (1).

[195] At the time of writing this dissertation, early January 2022 saw the imposition of two new ZOSOs: Parade Gardens in Central Kingston (Kingston parish) and southern Savanna-la-Mar in the parish of Westmoreland. However, the substantive report and discussions will examine the 5 ongoing ones that have been declared between 2017-2021. See following articles as references: (1) "ZOSO declared for Parade Gardens in Central Kingston," *Jamaica Gleaner*, January 9, 2022. Retrieved from https://jamaica-gleaner.com/article/news/20220109/zoso-declared-parade-gardens-central-kingston. (2) Chris Patterson, "ZOSO Declared for Southern Savanna-la-Mar," *Jamaica Information Service (JIS)*, January 16, 2022. Retrieved from https://jis.gov.jm/zoso-declared-for-southern-savanna-la-mar/

Table 5.1 Declared ZOSOs in Jamaica, 2017-2021

Source: Jamaica Information Service (JIS); Office of the Prime Minister (OPM); *Jamaica Gleaner* and *Jamaica Observer*.

Community	Socio-Economic Character	Parish	Date of Declaration	Duration
Mount Salem	Inner-city	St. James	09/1/2017	54 months
Denham Town	Inner-city	Kingston & St. Andrew	10/17/2017	53 months
Greenwich Town	Inner-city	Kingston & St. Andrew	07/1/2020	21 months
August Town	Inner-city	Kingston & St. Andrew	07/8/2020	21 months
Norwood	Inner-city	St. James	06/20/2021	10 months

In examining Table 5.1, the temporal duration of the 5 declared ZOSOs immediately carry us to the permanence versus transience debate as it pertains to declared emergencies. In terms of temporal range, a ZOSO can run from a low of 10 months (Norwood) to a high of 54 months (Mount Salem, the initial ZOSO). Subsequently, the most common value was 21 months (approximately 2 years) for a ZOSO. Finally, the mean ZOSO lasts around 31 months (a bit over 2 years). This temporal data initially suggests that the proverbial exception is increasingly hard to distinguish from normalcy, thus making emergency government the norm due to its prolongation which in turn strengthens governmental power (Gross 2006). In this sense, claims of emergencies are able to extend themselves indefinitely with little to no monitoring and evaluation towards holding governments accountable (governments usually self-police themselves) to strict deadlines based on initial goals.

Gross (2006, 75) suggests that the proverbial exception is increasingly hard to distinguish from normalcy thus making emergency government the norm due to its prolongation, as is the case with Israel[196] and the much talked about War on Terror. Likewise, this turn strengthens governmental power and can lead to further abuses of power. In this sense, claims of emergencies can extend themselves indefinitely with little

[196] In practice there have been continuous SOEs in a number of countries which arguably exemplify notions of permanent rule. Israel for example has been under an unrelenting SOE since its inception in 1948, although this measure was originally conceptualized as a necessary and temporary transitional mechanism during its war for independence. See Oren Gross, "What "Emergency Regime"?" *Constellations,* 13, no.1 (2006): 75. Also, see the following works for a fuller discussion on certain countries' experiences: Sadiq Reza, "Endless emergency: The case of Egypt," *New Criminal Law Review*, 10 no.4 (2007): 532–55; and finally, Charles Manga Fombad, "Cameroon's emergency powers: A recipe for (un)constitutional dictatorship?" *Journal of African Law*, 48 no.1 (April 2004): 62–81.

to no oversight towards holding governments accountable to a strict deadline based on initial goals. Essentially, ZOSOs allow for an indefinite promulgation of emergency and as such the much-touted build phase is yet to be fully implemented and realized, with some zones[197] still transitioning into the holding stages, according to the current Public Defender, Arlene Harrison-Henry (2021). Furthermore, the Jamaica Social Investment Fund (JSIF), the lead governmental institution for the Social Intervention Committee, notes that the build phase could take up to 6 years to transform ZOSO communities.[198]

In analyzing the original remit of a ZOSO we see a pattern of indeterminate time limits both in the language of the law itself and its ground operations, whether for law enforcement or social development/intervention. This arguably allows the government to use of claims of emergencies to subdue (clear) and govern (hold), by way of exceptional instead of normal provisions. Therefore, all the ZOSO communities effectively function according to rule *by* law instead of the rule *of* law for criminal justice and socio-economic development. In summary, the door is open for potential abuses of citizens fundamental rights and freedoms as guaranteed by the Constitution such as arbitrary arrests,

[197] According to the current Public Defender's Report, the Mount Salem ZOSO was transitioning from the holding to building phase in April 2018. For Denham Town, the transition date is not available according to communication from the JCF. Greenwich Town is still in the holding phase, while August Town started its transition from holding to building on July 30, 2020.

[198] Nadine Wilson, "Minimum six years for ZOSO turnaround, says Sweeney-Crime dips in August Town but views mixed over social work 'build phase'," *The Gleaner,* February 1, 2021. Retrieved from http://jamaica-gleaner.com/article/lead-stories/20210201/minimum-six-years-zoso-turnaround-says-sweeney-crime-dips-august-town. Omar Sweeney is the managing director of the Jamaica Social Investment Fund (JSIF), and the comments were recorded at a Joint-Select Committee for reviewing the ZOSO Act every 3 years-a statutory requirement.

detentions, and searches, some of which have been documented by the country's Public Defender and will be discussed in the subsequent section.

While the objectives of the ZOSO Act are primarily for a sudden increased security presence in certain communities as a criminal justice tool, there are also adjacent socio-economic development and state-building elements whereby the Prime Minister "shall, within five working days of the declaration of a Zone, establish a committee to be styled the 'Social Intervention Committee'."[199] In this sense, ZOSOs are not only about putting police and military boots on the ground but should also involve social intervention in vulnerable communities which are often susceptible to crime. Some of these initiatives include employment and skills training programs, improving community infrastructure developments (roads, water, and electricity), healthcare, and general provision of government services (birth certificates, passports, social welfare programs *inter alia*). Ostensibly the government wants to eliminate the proverbial "states within states"/political garrison communities that have developed over the years in Jamaica and are seen as threats to democracy/rule of law because they are considered violent counter-societies. Curley (2015, 697) notes that governments use "discursive institutionalism", an approach which deals with how discourse and ideas aid to construct claims of emergencies for government management whereby this feature becomes an embedded part of state-building. Arguably this feature can be applied to Jamaica's ZOSO Social Intervention Committee here.

[199] *Ibid*, §23 (1) 24 (1) (a-e).

However, the social intervention component, according to Campbell (2020, xiv) is largely "treated as an appendage to the dominant security approach." Furthermore, it offers the state an opportunity to "better monitor and exercise control over marginal spaces without expanding the full franchise of citizenship" Campbell (2020, 15). In this sense, ZOSOs arguably offers the governmental bodies like the police and military to institutionally entrench themselves resource wise (increasing their operational expenditures and funding their own missions) at the expense of building the capacity of the communities and their citizens.[200] While this might not be the relevant case for all the government's actions, it is plausible to highlight this as a potential challenge and problem in the short, medium, and long term ZOSOs endeavors.

Similarly, Wendy Brown's (1995) critique of liberalism through a Foucauldian lens seems quite applicable here in how ZOSO-styled social interventions can be problematic. While aimed at being emancipatory, they can in turn create an intrusive and repressive Panopticon-like atmosphere for residents in such communities. In this sense, residents in ZOSOs become targets for increased discipline and surveillance instead of increased capabilities and freedom a la Amartya Sen. They are now the "other" to be cared for and managed under extensive state surveillance of women's and men' daily lives, work activities..." (Brown 1995, 171). Ultimately, the declaration and use of state of exception practices such as ZOSOs, even with social investments added to them,

[200] While this is not a primary argument of the dissertation, it is one that public affairs scholars and criminologists might want to explore further, especially as it relates to garnering hard numbers for police-military expenditures in such zones vis-à-vis those spent on the socio-economic building aspect. Difficulties aside obtaining such precise expenditures, I have attached figures procured from the Ministry of National Security about the general spending of the government as it relates to the police. Please see Appendix J for this rough breakdown.

seems problematic. Ultimately, the ZOSO social intervention component seems designed for public relations optics and a panoptical surveillance of said communities rather than substantive change and development.

ZOSOs: Constitutionality, enhanced sovereign powers, and problems

In examining the ZOSO Act vis-à-vis the Jamaican constitution, a conspicuous tension readily presents itself. From this perspective, the ZOSO Act seems unconstitutional. This will be elaborated on by using textual evidence from the Act itself to provide another angle for evaluating this new emergency regime. Chapter III of the Jamaican Constitution, otherwise known as the Fundamental Charter of Rights, clearly expresses that: "Parliament shall pass no law and no organ of the State take any action which abrogates, abridges or infringes those rights."[201] These include the right to: "life, liberty, and security of the person;" freedom of thought and freedom of expression; peaceful assembly and association; freedom of movement freely in Jamaica; equality before the law; protection from search of the person and property; privacy of the home and family life; freedom of the person; and due process.[202]

However, with the ZOSO Act there are several provisions which clearly contravene several of these specified rights. This has enabled the security forces to operate carte blanche, in practice if not in theory, in declared zones. Therefore, the joint police-military deployed personnel can conduct searches and seizures of persons, properties, vehicles, and places without warrants under the ZOSO Act's "reasonable

[201] Jamaican Const. Ch. III. §13 (2) (b).

[202] Jamaican Const. Ch. III. §13 (3) (a-s).

suspicion" clause. The systematic trampling on these rights will be illustrated further below. Therefore, one can reasonably make the argument that such a provision is constitutionally vague and thus puts the citizen at the mercy of executive rule via the security force's own interpretation of said clause. The aforementioned state (ZOSO) practices are therefore in direct conflict with the Constitution, specifically Chapter 3 or the Fundamental Charter of Rights, which guarantees the "right of everyone to protection from search of the person and property"[203] as well as "privacy of the home and family life"[204] along with " protection from torture, or inhuman or degrading punishment or other treatment."[205] Noted Jamaican constitutional scholar, Dr. Lloyd Barnett, made his views explicitly known on the matter by stating:

> These provisions are in clear conflict with the fundamental rights guarantees of the Charter of Rights and are not authorised by the constitution. Apart from a state of emergency, no fundamental right can be suspended by Parliament or executive order and only the three identified can be so treated. Any provision which authorises the search of property, invasion of the privacy of the home, or abridgement of the right to humane treatment is therefore contrary to the Constitution.[206]

In sum, these rights are non-derogable even in the context of either a SOE or a ZOSO and from this standpoint it seems as if warrantless searches and seizures are contrary to the supreme law of the land.

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[203] Jamaican Const. Ch. III. §13 (3) (j) (i).

[204] Jamaican Const. Ch. III. §13 (3) (j) (ii).

[205] Jamaican Const. Ch. III. §13 (3) (o).

[206] Lloyd Barnett, "States of Emergency, ZOSOs and the fundamental rights of individuals," *Jamaica Observer,* January 20, 2019. Retrieved from: https://www.jamaicaobserver.com/news/states-of-emergency-zozos-and-states-of-emergency-zozos-and-the-fundamental_154611?profile=1444

In both empirical and normative works on emergency powers, the role of the executive is usually the primary institutional power that is analyzed and emphasized (Rossiter 1948; Ferejohn and Pasquino 2004; Fatovic, 2009; Rooney 2019). Likewise, the legislative and judicial branches of government also play key, but often subordinate roles, in the declaration, prolongation, and ex post facto adjudication/examination of emergency powers (Rossiter 1948, 9-10; Fatovic 2009, 10; Ferejohn and Pasquino 2004, 215). Jamaica as a constitutional monarchy retains a Governor-General who ceremonially represents the British Crown on the island. The Jamaican Prime Minister usually wields executive power in collaboration with the GG (who acts on the Prime Minister's advice) for their assent in declaring SOEs. However, with the passage of the ZOSO legislation, the Prime Minister becomes the key figure in declaring or repealing a *de jure* state of exception without the assent of the Governor-General.

The dual sovereignty, as obtained under SOEs, has been effectively nullified and transferred to the realm of the premiership. Public Defender has thus described ZOSO as being "the prerogative of the Prime Minister" (Harrison-Henry 2018, 3). Subsequently, the head of government is now entitled to declare, for a period not beyond sixty days, any geographical area of the country as a ZOSO. As head of the NSC he/she can declare any area that is a threat to the rule of law, predominantly in the form of gangs and rising murder rates and violence.[207] The key observation here is that the prime minister now has the powers to effectively declare a limited (at least spatially) SOE, a power which was non-existent before and had to be exercised in concert with the Governor-General. While

[207] The Law Reform (Zone of Special Operations) (Special Security and Community Development Measures) Act 2017, §4 (1).

there are checks on executive power whereby the parliamentary Opposition can nullify such expansive powers being exercised, it seems that the Prime Minister is now the one "who decides on the exception," in both *de jure* and *de facto* senses (Schmitt 1985, 5). In essence, we can call ZOSO's a mix of constitutional and sovereign declared community SOE's.

The aforementioned situation in Jamaica seemingly lends some support to Agamben's (2005, 1) anxiety as it relates to the state of exception increasingly being a "no man's land between political law and political fact." Similarly, it also echoes and supports Rossiter's claim (1948, 12) that: *"Crisis government is primarily and often exclusively the business of presidents and prime ministers."* Finally, ZOSOs is now the embodiment of an (un)official declaration of a state of exception whereby Jamaica's democracy seems dependent on a commissarial/constitutional dictatorship to solve its crime problem thus leaving some citizens in a juridico-political purgatory.

By juxtaposing ZOSOs with the Jamaican constitution, further doubts emerge concerning its substantive rule of law content as it relates to transparency. While the legislation had support from the influential Jamaican private sector[208] and the general public as well,[209] the Opposition Spokesman on Justice, Mark Golding (no relation

[208] Douglas Mcintosh, "Private Sector Leaders Support Zones of Special Operations Bill," *Jamaica Information Service*, July 10, 2017. Retrieved from https://jis.gov.jm/private-sector-leaders-support-zones-special-operations-bill. The role of Jamaica's private sector has been critiqued by several works which denounce the historical cozy relationship between itself and the state in crafting policy. For a fuller discussion, see Carl Stone, *Class, state, and democracy in Jamaica*. (New York: Praeger, 1986), p. 84-92. Finally, tourism interests also need to be considered here as well as the need for the use of emergency powers in protecting Jamaica's primary revenue earner.

[209] "Most Jamaicans in agreement with ZOSOs - RJRGleaner/Don Anderson Poll", *Radio Jamaica News, February 28, 2018.* http://radiojamaicanewsonline.com/local/most-jamaicans-in-agreement-with-zosos-rjrgleanerdon-anderson-pol. Therefore, both ZOSOs in Mount Salem and Denham Town saw 75% of Jamaicans supporting this move

former prime minister Bruce Golding), was one of the first to question the constitutionality of giving the security forces further "essential powers" during a Joint Select Committee about the bill in Parliament. Golding argued that ZOSOs would infringe on citizens' constitutional rights in already downtrodden communities. He subsequently questioned the powers being conferred onto the Prime Minister Holness as the NSC head with the following:

> The National Security Council is a committee which operates in a very private and confidential setting. Its deliberations are not subjected to any form of scrutiny outside of its membership. This body, by making an order, can create an environment in these zones which are effectively a limited state of emergency with powers which do not normally exist.[210]

The NSC's role, under the direction of the prime minister, and power to declare and extend ZOSOs in secrecy are indicative of how declared emergency provisions operate beyond a mere norm-exception binary, especially with the latter defining what normal governance is supposed to look and feel like.

The aforementioned observation by the opposition is reminiscent of Carl Schmitt's (1985, 49-50) critique of the parliamentary concepts of openness and discussion, which he contended have been replaced by the secretive[211] machinations of

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[210] Alphea Saunders, "Opposition questions constitutionality of Bill to create zones," *Jamaica Observer*, June 22, 2017. Retrieved from https://www.jamaicaobserver.com/news/opposition-questions-constitutionality-of-bill-to-create-crime-zones_102678?profile=151

[211] Schmitt (1985, 50) further argued that:

> The idea of modern parliamentarism, the demand for checks, and the belief in openness and publicity were born in the struggle against the secret politics of absolute princes. The popular sense of freedom and justice was outraged by arcane practices that decided the fate of nations in secret resolutions. But how harmless and idyllic are the objects of cabinet politics in the seventeenth and eighteenth centuries compared with the fate that is at stake today and which is the subject of all manner of secrets.

"small and exclusive committees of parties or of party coalitions" which are a key cog in the decision-making process affecting entire populaces. Schmitt's point will be taken up below to show the NSC's faulty use of statistics, deliberate or not, to determine a ZOSO.

Schmitt (2005, 1) critically reminds us of the inherent tensions between the rule of law and the emergency by stating that, "Sovereign is he who decides on the exception" to reveal their mutual exclusivity. The Prime Minister, as *primus inter pares,* has now conferred on himself extraordinary executive authority and powers for either declaring or terminating ZOSOs. This move certainly provides some support for Schmitt's critique of liberalism's supposed openness and deliberation as the prime minister's action here represents an expansion of executive power for declaring emergencies. The prime minister's special law is arguably inconsistent with Jamaica's stated liberal commitments of separation of powers and limited government. It also points to the larger contentions about such declarations, which critics usually deride as being tyrannical due to a single individual or group making decisions about what constitutes an emergency and thus further validating Schmitt's sovereign decisionist account of the exception, which he notes cannot be subjected to constitutionalization as they are like oil and water–they cannot mix. However, occurrences like ZOSO, meaning the constitutionalization of the exception, is generally regarded as an outgrowth of the contemporary practice to include the theory of necessity as part and parcel of the juridical order (Agamben 2005, 26). Furthermore, Fatovic (2013, 53) argues that although modern constitutional thinking tries to sharply delineate between norm (executive power) and exception (prerogative), we should discount the way this relationship actually functions, one more akin to a continuum moving from least to most discretionary (most to least rule-bound). This

therefore points to the ultimate concern about the continual blurring of the lines between norm and exception as part of modern constitutional thought and executive practice which a law like ZOSO ultimately confirms here.

Powers for declaring and continuing so-called "states of exception" in the form of ZOSOs are the domain of the Prime Minister and the NSC whereby they can extend said declared zones three times (180 days) without seeking parliamentary approval.[212] As even a proponent of the norm-exception framework forewarns, "in fact it seems always to be the wielders of crisis powers themselves who decide that an emergency exists" (Rossiter 1948, 299). The foundation behind this declaration of course comes with its own problems where erroneous data was used to implement the first ZOSO in the community of Mount Salem in Montego Bay, St. James parish.[213] According to the NSC, there had been 54 murders and 12 gangs in the community at the time of the declaration. However, residents and political representatives disputed this figure and claimed there were only 12-16 homicides and 4 gangs respectively. Updated police statistics eventually validated the residents' initial concerns whereby the NSC admitted to using erroneous murder

[212] The most notable examples here are Mount Salem and Denham Town, which have had their ZOSOs extended from 2017 to the present, as seen in Table 5.1. Both communities were also the first and second Zones, respectively, to be declared on the island in said year.

[213]Adrian Frater, "Faulty data! -Residents challenge crime figures used to declare Mount Salem zone of special operations," *The Gleaner,* September 2, 2017. Retrieved from http://jamaica-gleaner.com/article/lead-stories/20170903/faulty-data-residents-challenge-crime-figures-used-declare-mount-salem

figures to declare the ZOSO.[214] As a matter of fact the community only had 7 homicides and 8 shootings, according to said police data.[215]

This strange error though is arguably some proof that the designation and declaration of states of exceptions are not wholly based on positive liberal constitutional logic where laws are seen to function as autonomous and calculable machines. But, on the contrary, human subjectivity and arbitrary input plays a decisive role, i.e., executive sovereign authority. Therefore, Lazar notes that (2009, 155), while supportive of liberal democracies, we cannot negate the fact that "political agency structures and consistently remolds institutions." Using Agamben, the obfuscation of data by the NSC (deliberate or not), aids to show that the state of exception represents a blurred space where the declaration of a ZOSO lies within the legal order but its concurrent action here lies outside of it as well, thus creating a juridical No Man's Land whereby citizens' daily lives and constitutional freedoms can be affect/suspended at will. Ultimately, this data mishap points to how problematic it is to have the same person (or institution as the NSC) declare an "exception" (ZOSO) while simultaneously also constituting the wielder of "constitutional" dictatorial powers (Rossiter 1948, 299).

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[214] "NSC stands by Mount Salem zone declaration," *Jamaica Observer,* September 6, 2017. Retrieved from https://www.jamaicaobserver.com/news/nsc-stands-by-mount-salem-zone-declaration_110113?profile=1031. See also, Tristan Clavel, "Jamaica's New Security Plan Off to Inauspicious Beginning," *InSight Crime,* September 8, 2017. Retrieved from: https://insightcrime.org/news/brief/jamaica-new-security-plan-inauspicious-beginning/

[215] Christopher Serju, "Danger zone - JCF releases correct murder figures for Mount Salem; stresses ZOSO was warranted," *The Gleaner,* September 8, 2017. Retrieved from: https://jamaica-gleaner.com/article/lead-stories/20170909/danger-zone-jcf-releases-correct-murder-figures-mount-salem-stresses

Another decisionist element of ZOSO (and likewise constitutional dictatorial feature since both follow the norm-exception logic) is that the revocation of a declared zone lies squarely within the remit of the aforementioned executive bodies with very little parliamentary oversight. As such, the Prime Minister merely has to make a statement to Parliament "within fourteen days of each extension."[216] The Prime Minister has even made remarks like the following, "Mount Salem recommends itself,"[217] as if to negate the sovereign authority and decisionist nature of such a declaration provided by virtue of his office and the NSC. It must be noted that such a statement draws our explicit attention to how Schmittian decisionism is purposefully denied and obscured. Nevertheless, Agamben's argument about how blurred the lines between norm and exception can be used to showcase how the prime minister's action and rhetoric are inherently incompatible with stated liberal democratic norms. In sum, these practices mark a deliberate attempt by the executive to clandestinely depart from rule of law and parliamentary consultation norms in the deployment of emergency measures.

Civil Liberties Under Threat? The case of ZOSOs

One of the main critiques leveled against the advent and deployment of ZOSOs are that they generally allow for the gradual erosion of civil liberties via arbitrary arrests, detentions, and searches. Therefore, it is imperative to identify violations which should not occur in theory but are the reality in practice for some citizens. According to the

[216] The Law Reform (Zone of Special Operations) (Special Security and Community Development Measures) Act 2017, § 6.

[217] Ryon Jones, "Mount Salem chose itself," *The Gleaner*, September 1, 2017. Retrieved from https://jamaica-gleaner.com/article/lead-stories/20170902/mount-salem-chose-itself-holness

Office of the Public Defender's Report, one of the most egregious examples of state actions not conforming to the legal provisions as detailed in the ZOSO Act was the arrest and detention of 582 individuals, based on the JCF's own records, in the Mount Salem community between September 2017-August 2018 (Harrison-Henry 2021). Out of this total figure, only *a single* detainee was charged whilst the remainder were fortunately released on the same day of their arrest/detention over the said time period (Harrison-Henry 2021). In another example, Denham Town, a West Kingston community neighboring Tivoli Gardens, saw 772 persons being detained. A total of 615 were *"processed and released"* on the same day, despite the fact that neither the law nor the police define what "processing"[218] entails (Harrison-Henry 2021, 11).

The report additionally notes that the police did not supply the reasons for the wholesale detentions and failed to bring them before lay magistrates, locally called Justices of the Peace (JP). These are statutory requirements under the Law Reform/ZOSO Act. For example, section 16 (2) (a-b) of the ZOSO statute alludes to the fact that a citizen who is detained should be:

> immediately told the reason for his arrest or detention unless the circumstances are such that the person should know; and forthwith be taken before a Justice of the Peace who shall determine whether or not there are reasonable grounds for the arrest or detention.

However, per the Public Defender's report, these statutory requirements of the legislation were largely not upheld thus violating the detained citizens' due process

[218] Please *supra* notes 170 and 221 for further information on this (ir)regular police practice of gathering citizen information, most times without probable/just cause.

rights. The actions of the state forces in ZOSOs *prima facie* seem contrary to the text and spirit of both the Constitution as well as the Law Reform Act.

Using the police's data on warrantless searches, the Public Defender again found notable violations which were not in keeping with provisions of the law, especially the requirement of "reasonable suspicion."[219] The security forces have engaged in searching several thousand homes across the respective declared ZOSOs. Based on JCF data provided to the Public Defender, Mount Salem had a total of 4,604 houses being searched with "significant numbers…yielding nothing" and "that searches were arbitrary and contrary to provisions of the Act" (Harrison-Henry 2021, 7). Only 48 and 20 houses were searched in the Greenwich Town and August Town ZOSOs respectively, with no arrests made and no illegal items emanating from such actions. Harrison-Henry (2021, 16) makes the following observation:

> The unavailability of information on the searches of houses, or the failure to capture details in respect of such searches in the Denham Town Zone, is an indication that the security forces have not learned the lessons from the May 2010 joint police-military operation in west Kingston.

While the security forces have recovered some weapons,[220] they are nowhere what one would think befits a substantive claim of emergency. Therefore, such discoveries could have been performed using ordinary criminal justice measures and laws that are already

[219] See *supra* note 58 and how ZOSOs intersect with the mid-1970s Suppression of Crimes Act (SOCA).

[220] "Four more illegal guns seized in Mount Salem," *Loop News*, September 10, 2017. Retrieved from: https://www.loopjamaica.com/content/four-more-illegal-guns-seized-mount-salem

at the disposal of the government. This has led the Public Defender, Harrison-Henry (2021, 19), to draw the following conclusion:[221]

> It is to be noted that the data provided has not revealed or shown the recovery of firearms or ammunition nor is there any report of any successful investigation and prosecution of any major crimes. From the data supplied it appears as if the zones have only been effective in collecting information on primarily young people.

While the aforementioned ZOSO violations are the main ones which have been documented by the Public Defender, a critical angle must also be used to examine the Law Reform Act itself versus other available and normal legal provisions such as the Constabulary Force Act 1935 and the Criminal Justice (Suppression of Criminal Organizations) Act 2014. Together these should serve as adequate law enforcement tools for the government, practically and theoretically. Although SOCA was formally repealed in 1993, some of its more arbitrary, and some would say oppressive, powers were incorporated under an amended Constabulary Force Act in 1994.[222] Contrasting the Constabulary Force Act with ZOSO complicate things a bit further since the police already had some similar powers under the former statute. For example, the police commissioner under the Constabulary Force Act had "special powers" for crime prevention or detection. These include both cordons and curfews which can be enforced on certain localities.[223]

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[221] See *supra* note 170. This "data collection" is primarily conducted under the aegis of "processing."

[222] Act 14 1994, Schedule 2. The Constabulary Force Act 1935

[223] The Constabulary Force Act 1935, Part IIA, §50b (1) (3a) (3b). This part of the Act was amended and incorporated 1994.

However, this provision for the nation's top law enforcement officer has shorter temporal constraints compared to ZOSOs. Therefore, cordons have been increased from the Constabulary Act's own of 12 hours to 24 (1 day) under ZOSOs. Similarly, curfews have moved from 48 to 72 hours under the same schema.[224] Additionally, members of the police force were already empowered to make certain arrests and searches of dwellings, houses, and vehicle with or without warrants.[225] Overall, the critical sticking point is that the government already had these (extra)ordinary legislative resources for criminal justice.

Consequently, this begs the question as to why they there is an apparent intensification and multiplication of criminal justice laws with overlapping powers that give various governments of the day rule *by* law emergency powers within a seemingly normal legal framework? Essentially, the development of further extraordinary powers by successive Jamaican governments complicates a strict distinction between norm and exception as ordinary criminal justice laws have bestowed (and continue to do so) extraordinary powers on some actors (the Prime Minister and Police Commissioner) already. This again begs the question: Why is there an emphasis on developing extraordinary new legislation? What does it say about liberal ideas about the rule of law vis-à-vis the reliance on state violence in post-independence Jamaica?

[224] *Ibid.* Compare with ZOSO Act

[225] The Constabulary Force Act 1935, Part I, §15 states: "It shall be lawful for any Constable, without warrant, to apprehend any person found committing any offence punishable upon indictment or summary conviction and to take him forthwith before a Justice who shall enquire into the circumstance of the alleged offence, and either commit the offender to the nearest jail, prison or lock-up to be thereafter dealt with according to law, or grant that personal bail in accordance with the Bail Act." Furthermore, §50b (4) (5) refer to situations under which a search can occur whereby the following is stated: "No powers of search shall be exercised under subsection (4) without a warrant in relation to a dwelling house."

To answer these questions, I turn to Benjamin's instructive and elucidating conceptual critique and understanding on violence, specifically that of the state, as either law-preserving or lawmaking. He notes that, "…law-preserving violence is a threatening violence. And its threat is not intended as the deterrent that uninformed liberal theorists intepret it to be" (Benjamin 1986, 285). In this, sense the Jamaican state's willingness to declare a state of exception via positive law enables both the JCF and JDF to go on the offensive, albeit for well-intentioned purposes at first, by illegally circumventing the due process rights afforded to Jamaican citizens and supplanting them with ZOSOs. As it relates to the lawmaking function, ZOSOs allow for both the military and police's "assertion of legal claims for any decree," even ones which are sometimes dubious and violative of citizens' constitutional rights (Benjamin 1986, 287). Finally, according to his insights, Jamaica's current resort to claims of exceptions in the form of ZOSOs can be summed up as: "It follows, however, that all violence as a means, even in the most favorable case, is implicated in the problematic nature of law itself" (Benjamin 1986, 287). Therefore, law and by extension emergency provisions are not divorced from relying on violence to gain compliance but instead it becomes a key tool to achieve said objective. This point is one that a thinker like Fanon can evidently point to in his investigation about normalized colonial violence, especially one contingent on race as being the main support for a theory of necessity.

Another noteworthy theoretical point involves how the colonial rule *by* law ethos which is defined by arbitrariness and violence, à la Mbembe's *commandement,* continues to be the model governmental approach for solving crime in the postcolony. By tracking and tracing how this blur between normal and exceptional powers are operating in

contemporary Jamaica we are able to identify how circular postcolonial laws and practices are, especially looking at the textual similarities between SOCA and ZOSO as special-laws-cum emergency powers. Furthermore, per the Public Defender's Report, the police are also asking for increased powers under the said ZOSO Act. It must be noted that some of these powers are already available to them but they want even more extraconstitutional ones to seemingly combat crime and violence. This strange request reiterates Campbell's (2020) earlier concerns about the erosion of citizen rights under declared states of exception that emphasize security over socio-economic development concerns, thus making the latter element an "appendage"/afterthought for the government.

Other potential answers to the questions posed above can be found in what scholars like Honig (2009) and Sarat (2010) call the jurisgenerative nature of declarations of emergencies. What we see is not, as Schmitt suggested, the suspension of law, but the proliferation of law. Honig (2009, xvii) sees it as the expansion of law. In this sense, the law is the supposed basis for thwarting "the ever-present threat of chaos" that lies within an emergency or potential declarations of such situations, genuine or not (Sarat 2010, 4). With this perspective in mind, we can see how assertions of emergencies maintain themselves via notions of chaos, return to normalcy, necessity, and prolonged threat as the bases for creating new laws. Such rhetoric has been quite prominent in the case of the government's decision for declaring successive ZOSOs. Overall, Jamaican claims of emergencies not only blur the existing legal order but lead to the creation of new laws and amendments of older ones in anticipation and response to said claims thus becoming self-fulfilling and self-perpetuating techniques of government.

SOEs Declared: Prolonged Merger of Emergency and Criminal Justice 2018-2020

Since the last declared SOE of 2010 in West Kingston, a flurry of them have been deployed since 2018 with at least half of the island's 14 parishes and its 19 police divisions respectively being under such emergency provisions.[226] This represents an intensification of the supposed exceptional response to crime and violence in Jamaica. The growing intersection between criminal justice and emergency powers has provided the postcolonial state with more legal resources for managing homicides. While ZOSO's are targeted at specific communities, SOEs are usually declared for much wider geographical areas, mostly entire parishes, or even particular police divisions (the two here are sometimes not mutually exclusive as we will see in Table 5.2). Table 5.2 below provides the relevant spatial and temporal details about Jamaica's most recent declaration of emergencies. While ZOSOs are still ongoing, the declared SOEs in Table 5.2 have been effectively terminated, at least for now, according to a landmark Supreme Court ruling in July 2020.[227] The local parliamentary elections in September were also a contributing factor and this led to the government affirming it would not go to the polls with SOEs intact.[228]

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[226] "States of emergency after the polls," editorial, *The Gleaner*, March 8, 2020.

[227] The Holness government launched on appeal on October 29, 2020. See Edmond Campbell, "Govt appeals SOE ruling," *The Gleaner*, December 19, 2020. Retrieved from: http://jamaica-gleaner.com/article/lead-stories/20201219/govt-appeals-soe-ruling-buntings-remarks-senate-debut-brings-out. Also see news report which characterized this move as a "delay tactic" for the government to avoid paying legal costs to 5 men who had brought the initial suit which effectively ruled that SOEs were unconstitutional: Alicia Dunkley-Willis, "Delay tactic?" *Jamaica Observer*, December 28, 2020. Retrieved from: https://www.jamaicaobserver.com/news/delay-tactic-_210863?profile=0

[228] This move can be lauded since the 1976-1977 SOE continued within a parliamentary election year. "SOEs come to an end August 17; road 'now clear' for elections," *Loop Jamaica*, August 11, 2020. Retrieved from: https://www.loopjamaica.com/content/soes-come-end-august-17-road-now-clear-elections

The prolonged deployment of both SOEs have been designed to arrest and contain rising crime statistics (primarily homicides) by the current Andrew Holness-led Jamaica Labour Party (JLP) government. For SOEs, both the Government and the Opposition (Peoples National Party/PNP) have to work in a statutory bipartisan manner for its continuation. For example, the Jamaican Constitution requires two-thirds majority support of all members of parliament (MP's) for extending SOEs beyond three months while also providing for revocation of such measures by said majority.[229]

Emergency powers can be a polarizing issue and do not always enjoy broad parliamentary support, especially in a hyper-competitive[230] Caribbean Westminster-Whitehall parliamentary system rooted in "adversarialism" (Thorndike 1993; Bishop 2010). Indeed, in Jamaica, the measures cited above are often a source of political conflict. For example, on three occasions, namely July 2010, December 2018, and November 2021, the parliamentary Opposition (based on its statutory right) withdrew its support for then-ongoing SOEs, thus ending the government's efforts to combat crime and violence using such extraordinary measures.[231] Accusations and counteraccusations were thrown around in this period to affirm both parties' stances on crime as well as the constitution, with the Opposition calling for a crime plan, which is expected to work within the normal criminal justice and legal structures, instead of the utilization of

[229] Jamaican Const. Ch. III. §20 (3) (a) (b) (c).

[230] See Girvan, Norman. 2015. "Assessing Westminster in the Caribbean: then and now". *Commonwealth and & Comparative Politics,* 53: 1, 95-107.

[231] In all these occasions the JLP was the ruling party while the PNP served as the Opposition.

emergency powers to fight this phenomenon.[232] Essentially, the thinking between both political camps here pits the norm against the exception. A crime plan signals more or less that the State can combat violent homicides in a normal constitutional manner meanwhile the use of emergency powers forms part of what Curley (2015, 701) calls the "*national security state* model that emphasizes the legality of emergency statebuilding…" This is essentially a contemporary reformulation of Rossiter's constitutional dictatorship.

[232] This matter was recently raised again by the incumbent Prime Minister, Andrew Holness. For a brief account of this battle, see the following article: http://jamaica-gleaner.com/article/news/20180430/opposition-rejects-blame-failed-2010-state-emergency.

Table 5.2 Declared SOEs 2018-2020

Parish	Police Divisions[233]	Initial Declaration	Temp. Suspensions	Resumption	General Election Suspension	Total Duration
St. James	Same as parish	01/18/2018	01/31/2019	04/30/2019	08/17/2020	28 months
Hanover	---	04/30/2019	n/a	n/a	08/17/2020	16 months
Westmoreland	---	04/30/2019	n/a	n/a	08/17/2020	16 months

[233] There are 19 geographical divisions of the JCF with the parishes of Kingston, St. Andrew, and St. Catherine operating being further subdivided to form 8 out of total number of divisions. They include the following: Kingston Central, Kingston Eastern, Kingston Western, St. Andrew Central, St. Andrew North, St. Andrew South, St. Catherine North, and St. Catherine South. The remaining 11 divisions are designated under their respective parishes.

St. Catherine	North	03/18/2018	01/2/2019	09/5/2019	08/17/2020	20 months	
Kingston[234]	Central	09/23/2018	01/7/2019	07/14/2020	08/17/2020	4 months	
Kingston	West	09/23/2018	01/7/2019	07/14/2020	08/17/2020	4 months	
Kingston	East	01/26/2020	n/a	n/a	08/17/2020	6 months	
St. Andrew	South	09/23/2018	01/7/2019	07/7/2019	08/17/2020	17 months	
Clarendon	---	09/5/2019	n/a	n/a	08/17/2020	11 months	

n/a

Key:
(not applicable)

Source: Jamaica Information Service (JIS); Office of the Prime Minister (OPM); *Jamaica Gleaner* and *Jamaica Observer*.

[234] Kingston and St. Andrew are administratively governed as an amalgamation known as the Kingston and St. Andrew Corporation (KSAC) since 1923. Source: https://www.commonwealthofnations.org/partner/kingston-st-andrews-corporation/#

Based on information contained in Table 5.2, we can see that declared SOEs ranged from a low of 4 months (Kingston Central and Western divisions respectively, to St. James' high of 28 months (as a parish and police division). The most common value/mode amongst all declared SOEs were both 4 months and 16 months respectively. On another note, the respective parishes and police divisions experienced an average of 13 months of being under a declared SOE as a criminal justice mechanism. Overall, the imposition of these exceptional measures seems to be governmental strategy for the long haul. The government has even admitted, prior to the Supreme Court ruling, that it could use declared SOEs for up to 7 years until murders reach 500 per annum.[235] Overall, these recent deployments are indicative of old wine being placed in new bottles and this can provide some descriptive evidence of the exception operating as the norm in post-independence Jamaica's approach to criminal justice, especially this new wave of SOE intensification and normalization.

Public Support for SOEs

While there was an initial air of optimism about the declared SOEs for tackling crime, there have been concerns which have been raised about the potential for and actual abuses of power by the state security forces. These fears are grounded in past abuses by the security forces, in particular the most recent declaration of SOE in Tivoli Gardens in 2010 which left nearly 70 civilians dead and even ones further afield in Jamaica's

[235] "Gov't recommends up to seven more years of states of emergency," *Radio Jamaica News*, July 16, 2019. Retrieved from: http://radiojamaicanewsonline.com/local/govt-recommends-up-to-seven-more-years-of-states-of-emergency

colonial history like the events of 1865 Morant Bay. Jamaicans are seemingly in support of nearly any measure that would dent the country's high homicide rate. A major national poll in early 2019 found that 90% of Jamaicans were supportive of SOEs.[236] An upsurge in homicides in 2017 and fear of crime (combined with the moral panic) initially led to support (from the business community and ordinary denizens) of the Western tri-parish SOEs, comprising Hanover, St. James, and Westmoreland. This move was credited with a 70% reduction in murders within the parish of St. James in 2018.[237]

However, despite the early successes of the SOEs throughout 2018 and 2019, murders have continued largely on the same trajectory at the national level[238] and as such the Jamaican public was divided on its support for these measures, with 49% believing that they are effective and 44% viewing them as ineffective.[239] Finally, the 2019 Jamaica National Crime Victimization Survey (JNSCV) reported that 77.7 percent of Jamaicans still supported the use of SOEs and ZOSOs (Statistical Institute of Jamaica and The Ministry of National Security 2021). However, this figure was tempered by the pervasive fear of crime whereby 76.5 % felt crime had increased in 2019 when compared to 2018, a

[236] "Most Jamaicans support states of emergency - RJRGLEANER/Don Anderson poll**,"** *Radio Jamaica News,* March 11, 2019. http://radiojamaicanewsonline.com/local/most-jamaicans-support-states-of-emergency-rjrgleanerdon-anderson-poll_1

[237] "State of emergency declared in western Jamaica." *Loop Jamaica,* April 30, 2019. https://www.loopjamaica.com/content/breaking-state-emergency-declared-western-jamaica

[238] Hall, Arthur. "Clarendon, St. Andrew South lead 2020 crime figures." *Jamaica Observer,* January 25, 2020. http://www.jamaicaobserver.com/news/clarendon-at-andrew-south-lead-2020-crime-figures_184534?profile=1470

[239] Wilson, Nickoy. "Jamaica Split on SOEs-Security Expert Says Crime Has Been Politicised." *The Gleaner,* February 2020. http://jamaica-gleaner.com/article/lead-stories/20200228/jamaica-split-soes-security-expert-says-crime-has-been-politicised

fact which can be observed in Table 5.3 below (Statistical Institute of Jamaica and The Ministry of National Security 2021).

Based on Table 5.3, the fears that Jamaicans had about crime were justified based on the 2019 survey JNSCV. We can clearly see that there was a 3% increase in homicides when comparing 2018 and 2019. However, aggregate homicides were still marginally lower, but still at a constant figure of approximately 1300 murders per annum (2018-2020). Despite Jamaica's declared state of exception across several sections of the island, for 2020 the homicide rate was still at 46.5 per 100,000.[240] This figure made Jamaica the most violent country in Latin America and the Caribbean region (LAC) despite the presence of both SOEs and ZOSOs as de jure declarations of emergencies. While the study does not pretend to make causal conclusions based primarily on descriptive homicide figures, it still represents an important basis for analyzing the government's declared state of exception and the success versus failure of such drastic actions.

Table 5.3 Annual Homicides for Jamaica over a 5-year period[241]

Year	Homicides	Annual % Change
2016	1354	–
2017	1647	21.6
2018	1287	-21.9
2019	1326	3.0
2020	1323	-0.2

[240] Parker Asmann and Katie Jones, "InSight Crime's 2020 Homicide Round-Up," *InSight Crime*, January 29, 2021.

[241] Data obtained from the JCF's Statistics Division and the Statistical Institute of Jamaica (STATIN).

The declared SOEs have largely been operating in conjunction with ZOSOs in the parishes and police divisions where they overlap. Both have been euphemistically termed as "enhanced security measures" by the government.[242] However, we must ask what these aforementioned declared SOEs tell us about norm-exception approach for creating public safety and security in Jamaica? To answer this, I will discuss how declared SOEs have reemerged as a criminal justice state policy and how it challenges the strict binary distinctions between norm and exception in post-independence Jamaica–especially one where the exception continues to lead the way in defining the norm. This is arguably due in part to the fact that Jamaican claims of emergencies show strong tendencies towards civilian abuses rather than resolving crises in a timely and judicious manner thus guaranteeing a return to the *status quo ante*. This current episode arguable continues this blur between norm and exception that emanated from the colonial period and has now been carried over into the postcolonial era and evidently shows the divorce between theory and practice of emergency government.

Civil Liberties Under Threat? The Case of SOEs, Race, and Class

Like ZOSOs, the government's utilization of SOEs as part of the criminal justice system have come under scrutiny within the political sphere, non-governmental human

[242] Anthony Lewis, "Government now wants MoBay operations called 'enhanced security measures'," *Jamaica Observer,* February 07, 2018. Robert Montague, the National Security Minister then, argued that a SOE has a negative connotation for the country's tourism capital. "We want to make it very clear that, after this afternoon, we will no longer refer to the state of public emergency. We are in the tourism capital and tourism is the lifeblood. We would like to refer from henceforth to the enhanced security measures," stated Montague. Retrieved from: https://www.jamaicaobserver.com/news/government-now-wants-mobay-operations-called-8216-enhanced-security-measures-8217-_124526?profile=1607&template=MobileArticle

rights organizations, the media, and international partners of Jamaica. There have been key violations of civil liberties, with arbitrary arrests and extended detentions being the main ones which some citizens have endured because of state actions. The thoughts of Fanon and Mbembe are instructive in revealing how inherent state violence operates, by and large, with law as a conduit with colonial to postcolonial roots.

The Public Defender, Harrison-Henry, lamented the fact that members of the security forces were still arbitrarily detaining citizens, a practice not dissimilar under colonial martial law, SOCA, and ZOSOs. Subsequently, she noted that the primary reason for their detention as stated on citizens' release cards was "SOE/SOPE."[243] Based on police statistics, Harrison-Henry noted that a little over 4,000 persons had been detained under the declared SOE in St. James for an average of 4 days with only 153 persons being charged in 2018, primarily for minor offences.[244] The number of persons charged thus represents a mere 3.92% out of the total SOE detention figures for 2018 (Harrison-Henry 2018, 10). For example, the St. Catherine North police Division's SOE, the JCF revealed that 5, 832 persons had been detained between March-October 2018, with only 374 still being in custody and 51 charged (Harrison-Henry 2018, 39-40). In this sense, a large number of detentions were not based on any reasonable suspicion as outlined under the Emergency Powers Regulations (EPR) Section 30 (1).[245] Instead, the

[243] Livern Barrett, "Cops Breaching Emergency-Power Rules with Faulty Data, Says Public Defender." *The Gleaner*, November 21, 2018. http://jamaica-gleaner.com/article/lead-stories/20181122/cops-breaching-emergency-power-rules-faulty-data-says-public-defender

[244] *Ibid.*

[245] The Emergency Powers Regulations, 2018. *The Jamaica Gazette Supplement: Proclamations, Rules and Regulations*, January 18, 2018, vol. CXLI. Section 30 (1) (a-b) states: An authorized person may arrest, without a warrant, and detain, pending enquiries, any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has-

Public Defender's report notes that, "They have been picked up…at gunpoint and loaded on the back of a truck" as part of an arbitrary dragnet (Harrison-Henry 2018, 27). Similarly, the U.S. State Department's Annual *Country Reports on Human Rights Practices* for Jamaica (2018, 6) noted that during 2018 over 6,000 persons were cumulatively detained, an average of 4 days, across the island with very few arrests leading to substantive criminal charges.

Harrison-Henry (2018) notes that SOEs were renowned for overcrowded cells, non-separation of persons detained versus those charged with crimes, poor food and diet, and finally the prevalence of illnesses. There was even a breakout of gastrointestinal illnesses at the St. James SOE detention center (Freeport Police Station) which affected 105 detainees (Harrison-Henry 2018, 31). In summary, the physical conditions of the detentions have been described by the Public Defender's office as simply "disgraceful!" (Harrison-Henry 2018, 28). We can only speculate, *ceteris paribus,* that other SOE detention facilities would also be found along this continuum. Noteworthy though is that the persons detained under these measures were done so arbitrarily and then forced to suffer such indignities as if they were criminals. This begs the question as to why some citizens' rights can be so easily disregarded in declared SOEs? Essentially, this arguably occurs when the exception takes the lead role in defining the new normal and not actually solving the crisis but instead takes on a practical juridico-political life of its own. It is now the criminal justice norm for areas caught under such emergency declarations which

(a) acted or is acting in a manner prejudicial to the public safety; or (b) has committed, is committing, or is about to commit an offence against these Regulations.

leads to a further bifurcation of Jamaica into normal constitutional versus exceptional areas.

From a theoretical perspective, Benjamin (1986) answers that the "oppressed" is the vulnerable group in a state of exception and its accompanying violence. It is the rule for the "oppressed". Fanon has already pointed out how this specific bifurcated reality of the colony, one shaped normalized racial violence, occurs. Furthermore, Mbembe's understanding of colonial sovereignty as *commandement* is undoubtedly connected to how SOE's continue their postcolonial operations–largely arbitrary and violent- for absolute submission by lumping the proverbial bad and good apples (community members) together under such emergency schemas. It is therefore only logical to think that the implementation of both SOEs effectively target certain socio-economic and even color groups over others. Even the island's popular reggae music as a form of social commentary makes quite a number of references the nation-state as constantly being in a "state of emergency" due to the existence of "Babylon"[246] as a system of the oppression reinforcing colonial hierarchies. (Edwards 1998). The Jamaican oppressed can be best summed up as:

> In the case of Jamaica, elite notions about the nation, nationality, citizenship, and democracy, are undermined by reggae critiques that are grounded in the unresolved questions of race, class, colour, slavery, imperialism, colonialism and neo-colonialism. In these reggae songs, the state is not a liberal democratic entity but rather an oppressive regime: a Babylon system, a state of emergency, and a product of crisis that also produces crises for the poor and oppressed who are described as living in an embattled state of siege, harassed and brutalized by the

[246] Rastafarian theology references see Babylon as a place of bondage, confusion, and oppression. Subsequently its reggae singers such as Bob Marley and many others view Jamaica as another site of bondage for persons of African descent and therefore this can only be corrected via repatriation to the Motherland, Africa. See the following work on Jamaican Rastafarian repatriation back to Africa: Marcus Garvey, *Philosophy and Opinions of Marcus Garvey. (Oakland: Merritt College, 1969).*

> representatives of Babylon (the police and the military), subjected to roadblocks, curfews, imprisonment, and myriad forms of daily dehumanization. (Edwards 1998, 23)

Speaking specifically on police violence, one where Black Lives Matter not only in the United States but also in Jamaica, it is imperative that focus is briefly placed on the island's law enforcement history in targeting the "oppressed" (poor blacks and Rastafarians)[247] meanwhile historically protecting the Crown's and the island's ruling class interests. A "philosophy of its history," especially targeted state violence meted out to certain groups is therefore imperative for teasing out continuities between past and present abuses of power by said body.

Valdez, Coleman, and Akbar (2020) critical take on Agamben's state of exception, one which is illocalized and ahistorical they argue, allows scholars and ordinary citizens to miss a crucial connection between racialized police violence and the law. In this, sense they find it is better to engage with Benjamin's critique of violence, specifically his "philosophy of its history,"[248] as a way of explaining contemporary police violence towards African Americans. However, they note that this framework also has applicability and utility in examining colonialism. Therefore, similar to the aforementioned scholars, this study benefits from and applies Benjamin's critical insights

[247] See the following article by Horace G. Campbell "Coral Gardens 1963: The Rastafari and Jamaican Independence," *Social and Economic Studies* 63, no. 1 (March 2014), pp. 197-214 on the infamous Coral Gardens Incident of 1963, one in which Jamaica perpetuated state violence towards this minority Afrocentric religious group. The state eventually apologized for this incident in 2017 and sought to provide tangible reparations in the form of a trust fund and lands. See Edmond Campbell, "Government says sorry for 1963 Coral Gardens massacre," *Jamaica Gleaner*, April 4, 2017. Retrieved from: https://jamaica-gleaner.com/article/news/20170404/government-says-sorry-1963-coral-gardens-massacre

[248] Walter Benjamin, "Critique of Violence," in (*Reflections: Essays, Aphorisms, Autobiographical Writings,* ed. Peter Demetz (New York: Schocken Books, 1986 [1921]), 299.

towards a deeper theoretical understanding of how ZOSOs and SOEs also embodies a localized targeting. This targeting of the Jamaican "oppressed" here is contingent on classism and colorism as factors which reflect a largely colonial legacy. Overall, both ZOSOs and SOEs aid to show "the grounded and embodied character of state violence" in a postcolonial context (Valdez, Coleman and Akbar 2020, 902). They are foremost reminders of the connection between law enforcement and colonial violence.

One of Jamaica's foremost criminologists in the post-independence period, Anthony Harriott (2000), notes that the JCF was devised primarily to maintain public order and was based on the repressive Irish Constabulary model instead of the British home model of consensual civil policing. An outgrowth of this model is "differential policing against the poor" one which he connects to the class-race structure of Jamaica as an ex-colonial society (Harriott 2000, 42-43). Moreover, he notes that the overriding principle of authoritarianism guides the JCF, and it thus effectively functions more as a paramilitary body in its citizen-police relations rather than a civil police service. This model of policing, one based on coercive force, leads to an antagonistic relationship between citizens and police. Moreover, Jamaicans had the third lowest trust in their police force, with only Bolivia and Mexico performing worse in the recent Latin American Public Opinion (LAPOP)/AmericasBarometer survey (Harriott, et al. 2020).

It is instructive to remember that colonial governors along with the white minority ruling class in both the 19th and early 20th century, as documented in previous chapters, had been suspicious of the formerly enslaved peoples of African descent who made up the majority of the island's population (Heuman 1994; Palmer 2014). They feared a racial upheaval that would make the island the next "Haiti". Moreover, this view also still holds

true in the contemporary with Thame (2014) arguing that the black poor in Jamaica are seen as unruly and in need of discipline. Therefore, the repressive model of the JCF's policing typically disregards citizens' rights in favor of intimidatory and brute-force tactics to gain compliance, especially when dealing with members of Jamaica's underclass found in the gritty inner-city areas of the island (Campbell 2020).

Alluding to the 2010 Tivoli Incursion, McKinson (2019) argues that there is a pervasive class and color criteria for which Jamaican communities and citizens' rights are violated under declared SOEs and subsequent police invasions. Similarly, Campbell (2020) notes that "hard-on-crime" security practices of the Jamaican state underpin concerns about actual and potential violation of citizenship rights in marginalized communities. Finally, the aforementioned views are also reflective of Jamaicans for Justice (JFJ), a local human rights organization, concern for the state of human rights on the island and the targeting of poor Jamaicans under rule *by* law mechanisms.[249]

Extrapolating from a Latin American perspective, one with applicability to the Caribbean, Quijano (2000) states the following:

> But precisely that power is still built upon a colonial axis. So nation-building and especial nation-state building has been intended and worked against the majority of the population: 'Indians', 'Blacks' and 'Mestizos'. The coloniality of power still is, in most of Latin America, dominant against democracy, citizenship, nation and nation-state. (228)

[249] "Supreme Court Rules Detentions Under States of Emergency," blog post, published on September 25, 2020. Retrieved from https://jamaicansforjustice.org/soe-detentions-unconstitutional. The post stated: "The Jamaican government's use of SOEs to 'suppress crime' between 2018 and 2020 created an exceptionally sweeping national system of detention that saw security forces arresting and detaining Jamaicans, mostly from poor communities, often without reasonable grounds or credible evidence."

Building on this argument, we can clearly see that this "coloniality of power" in Jamaica has historically worked against the black and arguable poor working-class majority across several periods, including the current one being reviewed. This can be seen with the claims of emergencies and the subsequent atrocities committed in both the Sam Sharpe and Morant Bay uprisings. Crown Colony government and the early to mid-20th century proved to be no different for the Jamaican black majority again in how the state reacted (usually with normalized episodes of extraordinary violence) to their demands for labor rights, self-government, democracy, and full citizenship. More covertly, this "coloniality of power" also manifested itself in the development and evolution of a burgeoning Creole (brown) middle-class with British values, a class which was allowed to be part of the disciplinary power structure as law enforcement and other civil service jobs (Post 1978; Ledgister 1998; Harriott 2000). This class eventually saw itself as the natural heir-apparent to the reins of power in Jamaica and played a pivotal role as the middle-class intelligentsia labor unions-cum-nationalist political parties (Gray 2004; Thame 2014).

One might be persuaded to think that such thoughts and praxis would subside after 1962. Nevertheless, we see that colonialism was preserved via the constitutional architecture of the Jamaican nation-state which did not hesitate to restrict supposed liberal rights of entire communities-instead of targeting the few, especially when faced with containing homicides. From the mid-1970's (Gun Court, SOCA, and SOE) to the 2010s onwards (Tivoli, ZOSOs, and SOEs) we see the continuities of this coloniality of power via instances of emergency powers being the go-to remedy, not one of last resort, for how criminal justice should be approached and who should be targeted. Therefore,

citizens from areas under declared SOEs (primarily poor inner-city neighborhoods) will have a different interaction with the state security forces compared to persons from middle- to upper-class strata thereby reaffirming the latter's constitutional rights and disavowing the former's own.

Extended Detentions and the Supreme Court: Death Knell of SOEs?

The extended detentions of five men, who were held from a range of 204 to 458 days[250] without charge, would eventually lead to judicial scrutiny and collapse of the SOEs in July 2020. It might also be the most egregious non-fatal violation of SOE powers in the 2010s by the Jamaican state. The police maintain that they use SOEs as an investigative tool, thus justifying extended detentions.[251] However, defense attorney Bert Samuels, in an opinion piece for *The Gleaner* on April 17, 2019, questioned whether

[250] Douglas et al v The Minister of National Security et al. 2020. SU2020CV02455-7 (Supreme Court of Judicature of Jamaica, October 1, p.4.

[3] "The first Petitioner, Everton Douglas, from his affidavit dated July 9, 2020, depones that he has been detained from the 26th day of January 2020 under the State of Public Emergency in Kingston East. He is detained for 177 days and counting without being charged.

[4] The second Petitioner, Nicholas Heath, from his affidavit dated July 9, 2020, depones that he has been detained from July 26, 2019, under the State of Public Emergency in South St. Andrew for 361 days and counting, without, being charged.

[5] The third Petitioner, Courtney Hall, from his affidavit dated July 9, 2020, depones that he has been detained from June 22, 2019, under the State of Public Emergency in Westmoreland for 395 days, without being charged. [6] The fourth Petitioner, Courtney Thompson, has been detained from July 22, 2019, under the State of Public Emergency in St. Andrew South. Again, from his affidavit dated July 9, 2020, he has been detained for 365 days without his being charged. [7] The fifth Petitioner, Gavin Noble, depones in his affidavit that he has been detained from May 17, 2019, under the State of Public Emergency in Westmoreland for a period of 431 days and counting, without his being charged. His affidavit is dated July 9, 2020."

[251] Danae Hyman, "SOE buys time to hunt for evidence- cop," *The Gleaner*, July 28, 2020. Retrieved from http://jamaica-gleaner.com/article/lead-stories/20200728/soe-buys-time-hunt-evidence-cop. Also see *Douglas et al v The Minister of National Security et al.* 2020, p. 6 where the 5 Petitioners contended that: 1 (b) "the JCF continues to, without more, investigate the petitioners to see if they can charge them for the same offences which informs their detentions under the SOE." (c) "In some cases, some of the petitioners were charged and received bail for a criminal offence. The same JCF officers in that particular case imprisoned the petitioner as they use the SOPE to override the decision of the Court."

Guantanamo Bay-styled permanent detentions are the new criminal justice norm for Jamaica.[252] Such "investigations" tare seemingly putting the cart before the proverbial horse. Let us further delve into this claim.

The landmark case of *Everton et al v The Minister of National Security et al* in the Constitutional Division of the Jamaican Supreme Court essentially noted that the men's civil liberties were being infringed upon and likewise the Constitution itself. The writ of *habeas corpus* filed by each man asked the court to enquire on: (1) the circumstances and reasons for their respective detentions as well as the Supreme Court's jurisdiction under Section 20 (5) of the Constitution;[253] (2) the validity of the Emergency Powers Review Tribunal (EPRT), which they believe was not given sufficient and substantive materials by the Government to justify and sustain their respective detentions; and (3) finally to examine the validity of the government's claim that under Section 13 (9) of the Constitution (Chapter of Fundamental Rights and Freedoms)[254] that the court's jurisdiction had been eliminated. The court's ruling will be discussed in light of the aforementioned enquiries while adding other areas which were empirically and

[252] Bert Samuels, "Are permanent detentions the way forward?", *The Gleaner*, April 17, 2019. Retrieved from: http://jamaica-gleaner.com/article/commentary/20190417/bert-samuels-are-permanent-detentions-way-forward

[253] Jamaican Const. Ch. III. §20 (5) states: "The court shall be competent to enquire into and determine whether a proclamation or resolution purporting to have been made or passed under this section was made or passed for any purpose specified in this section or whether any measures taken pursuant thereto are reasonably justified for that purpose."

[254] *Ibid* §13 (9) states: "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (3) (f) of this section and sections 14 and 16 (3), to the extent that the law authorizes the taking, in relation to persons detained or whose freedom of movement has been restricted by virtue of that law, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during a period of public emergency or public disaster."

theoretically rich for this conspicuous violation and calls into question the validity of the norm-exception approach in this circumstance.

Justice Bertram Morrison's oral and written decisions will be used to analyze the larger juridico-political issues present in this episode surrounding the norm-exception debate from a Jamaican perspective. Turning to the first enquiry, Justice Morrison's ruling noted that the circumstances under which the men were detained did not qualify, or rather it did not satisfy some sections of the Constitution as an emergency.[255] It was more akin to an executive detention system thus breaching the 5 men's constitutional rights of fair procedure under the law.[256] "The Proclamation contained no material information to detail the actual situation that caused the declaration by the Governor-General. This, therefore, means the Defendants would fail to displace an onus placed on them to show the emergency actually exists in the material case", argued Justice Morrison (2020, 58). In summary, the government failed in its responsibility to provide concrete and transparent evidence as to what constituted its overall claims of emergency to detain the 5 claimants specifically[257] as well as other Jamaican citizens subjected to this sort of

[255] Ibid §20 (2). These sections deal with the material conditions which effectively validate (or in this case invalidated) the Governor-General's Proclamation of an emergency as well as the judiciary's role in determining said validity. §20 (2) states: A Proclamation made by the Governor-General shall not be effective for the purposes of subsection (1) unless it is declared that the Governor-General is satisfied that- A. a public emergency has arisen as a result of the imminence of a state of war between Jamaica and a foreign State; B. that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life; **c.** that a period of public disaster has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity, whether similar to the foregoing or not."

[256] *Douglas et al v The Minister of National Security et al.* (2020). SU2020CV02455-7 (Supreme Court of Judicature of Jamaica, October 1.

[257] *Ibid*, p.48: "The Petitioner indicates in the writ filed on the 9th of July 2020 and served on the Defendants, including the Attorney General, that he questions whether there is a state of emergency and has

governance under such dubious law enforcement measures. Finally, in the context of Jamaica's crime situation and the resort to use SOEs as an ordinary tool, the court essentially distilled that while such declarations have been utilized to satisfy public appetite and necessity for action they are not solely based on governmental rhetoric and whims but on substantive facts and procedures bound within a constitutional framework.

In terms of the enquiry about the EPRT, the court noted that all of the men saw their detentions being notably extended by the decision of said body.[258] The configuration of the EPRT, according to Section 38 of the EPR,[259] saw a total of 3 members being appointed, with the Chairman being qualified as a current or former judge of the Supreme Court while the remainder were selected by the Governor-General. The government held that this review body was duly constituted and that it received the necessary police evidence as statutory justification for the extended detentions of the 5 men. However, Morrison argued that the separation of powers doctrine was being breached inasmuch as

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petitioned this court to determine the question pursuant to the court's power under section 20 (5) of the Jamaican Constitution.

The Defendant's response is to simply indicate the claimant is detained under the State of Public Emergency. They provide a proclamation. The proclamation does not spell out any situation or information that could provide the background to the Public Emergency. The Defendant's response to this issue ends there.

This response the Petitioner says is woefully short since the acceptance that the accused man is in their custody also imposes a duty on the Defendant to show either at common law or under the Constitution why there is an emergency in keeping with the language of either common law or the Constitution."

[258] *Ibid*, p. 20.

[259] The Emergency Powers Regulations, 2018. *The Jamaica Gazette Supplement: Proclamations, Rules and Regulations*, January 18, 2018, vol. CXLI. Section 38(1) (2) (a-b) states:

For the purpose of these regulations, there shall be established a Tribunal for the review of cases of detention or restriction to be called the Emergency Powers Review Tribunal. (2) The Tribunal shall consist of-(a) one member appointed by the Chief Justice of Jamaica among persons qualified to be appointed as a Judge of the Supreme Court, shall be chairman of the Tribunal; and (b) two other persons appointed by the Governor-General.

it gave "unfettered discretion to the Police/Minister in relation to the committal of persons to penal institutions/jail for…criminal offences."[260] Morrison affirmed the following:

> I hold that the tribunal should not give a direction for the detention of the Petitioner/Applicant in circumstances which conflicts with his constitutional rights unless the derogations of those rights are demonstrably justified in a free and democratic society. The 'expediency or necessary test' should not replace the Constitutional test.[261]

This decision evokes similar memories to *Hinds v R* about the Gun Court's Review Board which the Privy Council held to be unconstitutional and violated the said doctrine whereby the executive was essentially transferring power from the judiciary as it relates to imposing and reviewing sentences.[262] The claim of necessity, a relevant colonial doctrine for justifying emergency declarations, is also challenged in order to show that arbitrariness under rule *by* law should not replace general and prospective precepts under the rule *of* law (constitutionalism).

Furthermore, Morrison ruled that "Regulation 30 and 33, violates the basic structure of the Constitution regarding separation of powers, the rules of law and the protection of fundamental right." [263] Such an aggrandizement of power by the Executive would essentially limit the judiciary's powers *ex post facto* as a restraint on actions like the aforementioned. This would be leaving the 5 petitioners at the mercy of the

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[260] *Douglas et al v The Minister of National Security et al.* (2020), p. 35.

[261] *Ibid*, p. 54.

[262] See *supra note* 64

[263] *Douglas et al v The Minister of National Security et al.* (2020), p. 35.

government and thereby allow them to set the rules of the game and police their own actions in declarations of emergency. Barnett (1977, 337) in an earlier commentary noted that:

> From a constitutional point of view the power to lay down authoritative interpretation of the Constitution is of the utmost importance. For there is the general provision vesting this power in those courts which are by the constitutional provision. It is clear, however, that this must be the intention of the Constitution for if it were otherwise the Legislative and Executive would be in a position to disregard the provisions of the Constitution and make their own tribunals to determine the constitutionality of their actions.

However, emergency powers along with the broad discretionary powers and differing interpretations of them. They arguably allow states to create legal blackholes where such actions are commonly the rule, especially in the 21st century and the inception of the so-called War on Terror, instead of the exception. Likewise for Jamaica, they represent a continuity and transference of such powers from the colonial to the post-independence era. This has allowed for the continuation of a colonial-driven rule of law. Overall, such (ab)uses of emergency have been demonstrably part and parcel of the island's juridico-political fabric ever since the infamous abuses of martial in the 19th and 20th centuries right up until the contemporary.

Based on the third enquiry requested by the detainees, Justice Morrison argued, "It is my view that when one looks at Section 13 (9) of the Charter, that the court's jurisdiction has not been ousted." This confirmed 5 detainees' original argument in their writ where they stated that the court's original jurisdiction was still intact whereby material circumstances, and the aforementioned Proclamation were not supportive of an "emergency". As such, the government as the Defendant failed to produce a timeline for

the culmination of their respective detentions.[264] "Based on the foregoing, it is my view that the 'emergency' must be defined in the proclamation to facilitate the court's carrying out its role or some evidence led by the violators of the basis of the emergency."[265] Therefore, Morrison argued that the SOE was invalid on the basis that "the detention at the will of the executive is violative of our constitution."[266] Finally, his reasoning was based on the fact that the 2011 Charter of Rights has created a "new paradigm" for emergency cases where the government has to show that such measures are "reasonably justifiable to deal with a situation that exists during a state of public emergency" and that the government's actions have to be "rationally linked and proportional" to manage a declared crisis.[267]

In summary, government rhetoric and claims of emergency have to abide by expressed moral and legal continuities that are supposed to be present between normal and exceptional politics, with the former governing the *modus operandi* of crisis government in liberal democracies (Lazar 2009). However, governmental claims of emergencies in both the colonial and post-independence periods does not expressly abide by such considerations. Furthermore, the reliance on the norm-exception approach tends to and sometimes obscure this feature by focusing solely on the exceptional aspect. In other words, Jamaica as a "postcolony" relies on *commandement* to reinforce the colonial

[264] *Ibid*, p. 48.

[265] *Ibid*, p. 54.

[266] *Ibid*, p. 40.

[267] *Ibid*, p. 49

logic of governance, with the exception continuing to serve as the norm (Mbembe 2001). Thus, it might be more accurate to examine contemporary Jamaican exercises of these powers on a continuum, from least rule-bound to most rule-bound (Fatovic 2013). Jamaica's Supreme Court ruled and essentially showed that the Holness administration's exercise of emergency fell on the former instead of the latter side of the continuum, thus indicating a deeply problematic approach with arguable roots in colonialism but which has seemingly continued into the formal post-independence period devoid of the rule of law. Morrison's judgement therefore represents a victory for accountability and transparency in liberal democracies as a formal constraint on emergency power due to the lack of informal and normative ones by those holding office (Lazar 2009).

Furthermore, Morrison's ruling also importantly highlighted that both EPA and EPR, in their contemporary forms, were not compliant with the constitutional amendment of 2011 that created the aforementioned Fundamental Charter of Rights.[268] He argued that the EPA:

> in its current form, does not apply to the current constitution since it: (a) makes references to section 26 of the Constitution which was repealed; (b) it does not qualify as a law for the purposes of section 13 (9); (c) the EPA is in conflict with the Constitution (d) there is no saving laws or modification clause to assist the court. (57)

[268] See *supra* note 142. Barnett also makes an earlier and similar claim, before the judiciary's ruling, whereby he notes the following: "Using this wartime statute, the Government made the Emergency Powers Regulations in 2010. It provides that the Governor-General, the Minister of National Security, the Chief of Defence Staff of the JDF and the Commissioner of Police may, if they consider it necessary, block roads, set up cordons, enter private property to carry out work, requisition any ship or article, require the provision of information, prohibit assemblies, establish curfews requiring persons to remain indoors for such duration as they think fit, restrict access to particular areas, prohibit wearing of uniforms or emblems, search premises and confiscate literature, stop and search vehicles, confine a person to his place of residence, and order the closure of places of public resort and entertainment. These provisions are clearly in conflict with the fundamental rights guarantees and are not authorized by the emergency provisions of the Charter."

In terms of the EPR, Morrison again found it deficient thus creating powers which are incompatible with the current constitution. He ruled that the EPR "is in conflict with fundamental rights, principles and values implicit in the Constitution (we identified 68 such conflicts – any one which would suffice as sufficient basis to strike the EPR)" (58). This further reflects the divide and tension between colonial laws and the current constitutional realities of Jamaica which sees the historical legacy of the island's colonial past still shaping the contours of the criminal justice system (sometimes illegally as in this landmark case) and even wider governance of the island, especially ones that lead to the curtailment of innocent citizens' rights and violate the rule of law. Even though the Constitution has been updated in 2011, the resort to colonial-era statutes vindicates postcolonial scholars who posit that there's been a transference and retention of practices and statutes (Agambenian techniques of government) that exemplify a jurisprudence of emergency (Hussain 2003), *commandement* (Mbembe 2001), and "repressive legality" (Roberts 2019).

In terms of the use of Detention Orders by the government, specifically drafted and issued by the Minister of National Security, Morrison ruled that they were unlawful due to the reliance on the "impugned EPA & EPR" (58). Additionally, other problems with the Orders were highlighted as follows: (a) faulty reasons for detention; (b) lack of proper review in criminal cases (c) failure to show "the necessary control" test; and finally (d) failure to apply "reasonably justifiable" test.[269] "To respond to this state of

[269] Morrison notes that the reasons for detention are "criminal offences," which is in breach of EPA §3 (5), which states: "The Regulations may provide for the trial, by Courts of Summary Jurisdiction, of persons guilty of offences against the Regulations; so, however, that the maximum penalty which may be inflicted for any offence against any such Regulations shall be imprisonment with or without hard labour for a term not exceeding three months, or a fine not exceeding two hundred dollars, or both such

affairs, I observe that there is nothing within our constitutional framework which permits a Minister to issue a detention order. The Emergency Powers Act does not permit the Minister to issue a detention order."[270] Likewise, a textual reading of this statute also shows no such validity for such an action (see Appendix K). Overall, the Jamaican state's rule *by* law approach with these detention orders, one reminiscent of those drafted in the yearlong SOE of 1976-1977, were deemed *ultra vires.*

Overall, this landmark judgement explicitly noted that the executive detention system, especially one that lacked proper review in criminal cases, amounted to a breach of the separation of powers doctrine. "The use of detention order for criminal offences breach the separation of power doctrine and cannot be countenanced…This, I find to be the egregious overstepping of the bounds of the power of the Executive."[271] Subsequently, all five men's detentions were ruled as unlawful and they were released, with the government currently engaged in an appeal of this decision.

Political vs Judicial Controls: The Case for Judicial Protections against Emergency Powers

The Jamaican Supreme Court's decision here sets up an interesting debate within scholarship on what formal restraints there should be on emergency powers; political versus judicial. Tushnet (2008) answers by favoring political ones due to their due to their alacrity and openness compared to the sometimes-slow pace of judicial proceedings.

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imprisonment and fine, together with the forfeiture of any goods or money in respect of which the offence has been committed; Provided that no such Regulations shall alter any existing procedure in criminal cases, or confer any right to punish by fine or imprisonment without trial."

[270] *Douglas et al v The Minister of National Security et al.* (2020), p. 49.

[271] *Ibid*, p. 58.

He found this to be especially true as it relates to the rendition and torture of Maher Arar and the subsequent restitution and official policy changes by the Canadian government.[272] However, scholars such as Omar (2002) and Kuo (2020) argue that judicial controls are the better model at reining in executive abuse of emergency powers. Using India's and Pakistan's experiences with emergencies, Omar (2002) suggests that judicial power becomes a saving force in combating executive (political) abuses of constitutional civil liberties during turbulent periods. Similarly, Kuo (2020) affirms the judiciary's role in framing the public judgement about the legality of declared SOEs in order to assist with the re-constitutionalization of emergency powers. Conversely, Ewing (2008) suggests that political controls in some countries with British Westminster constitutional designs are ineffective due to executive dominance of the legislature being paramount (fusion of powers), thus limiting the checks and balances on Prime Ministerial power. Furthermore, he argues parliamentary sovereignty in Great Britain itself, poses a stumbling block for the judiciary in checking executive power in supposed emergencies

The Douglas *et al* case here established a tangible example of the judiciary acting as a timely and effective power on by not being deferential to executive. This is especially the case if they are popular and there is public opinion which favors expanding executive powers and curtailing civil liberties (Epstein, et al. 2005; Silverstein and Hanley 2009). It represents a radical departure for the judiciary, which usually sided with colonial governors such as Eyre, for prosecuting state excesses against citizens. The

[272] In September 2002 his return flight from a vacation in Tunisia to Canada stopped in New York, where he was questioned by US officials and detained on the basis of what they said were his connections to Al-Qaida. Mr. Arar was a dual national, retaining both Canadian and Syrian citizenship as well. Details of the Arar case are taken from Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar [hereafter cited as Arar Commission Report].

landmark case also aids to settle troubling postcolonial questions and experiences surrounding the use of the EPA against citizens' under ill-defined claims of emergencies, ones which have been costly as seen in the mid-1970s and extrajudicial deaths in Tivoli. While there was no public debate per se about judicial versus political restraints on emergency powers in Jamaica, the case does set a precedent for future governments to think about when contemplating declaring SOEs as a criminal justice measure.

Extraordinary Rendition?

Finally, the illegal arrest and detention of a local dancehall artiste who goes by the stage name "Tommy Lee Sparta" (given name Leroy Russell) is of utmost importance in analyzing Jamaica's resort to claims of exception to deal with its criminal justice issues. Prior to this arrest, Mr. Russell had several run-ins with the law, including the following: lottery scamming charges in 2014, a 2017 shooting incident in Kingston, as well as being listed as a "person of interest" in relation to crimes in St. James, his home parish. He was never convicted in any of these instances. Nevertheless, Russell was arrested in May 2018, an incident his lawyer described as a "kidnapping,"[273] which saw him being arrested by masked police in the capital of Kingston (which was not under a declared

[273] Sade Gardner, "Lawyer says Tommy Lee 'kidnapped'," *Jamaica Observer*, May 22, 2018. Retrieved from: https://www.jamaicaobserver.com/entertainment/lawyer-kidnapped-_133790. Ernie Smith, Russell's lawyer, stated this to the media: "About an hour ago I received information that Tommy Lee had been cartered to Montego Bay where there is a state of emergency... Men came for him at 8:00 am this morning (yesterday) and kidnapped him, so to speak. I had no idea this was done and clearly it was done to desist my *habeas corpus* application tomorrow (today) in Half-Way-Tree. I find it hard to believe that a senior officer had no idea that the citizen had been carted to Montego Bay when we spoke. He was abducted at gunpoint by men in masks and taken to the Half-Way-Tree Police Station where it turned out that the men were police officers. Some time ago they had accused him of causing trouble in Montego Bay. The man has since moved, and they are still accusing him of things that happen in the parish. I want to know who down there wants him and I'm going to speak with a judge to set up a hearing application for his release. They moved him like a thief in the night."

SOE) and subsequently transferred to his home parish of St. James, in the western end of the island, and detained under emergency rules.

Following a *habeas corpus* application, a parish judge eventually ruled that Russell had been improperly detained, after initially giving the police a week to justify the artiste's detention under the declared SOE and that he was to be immediately released.[274] These actions by the police, acting as agents of the state, seem to be reminiscent of a bygone era when George William Gordon, Robert Bruce, and Sidney Levien were all renditioned by the colonial government in 1865. In summary, while this wasn't a widespread case during this SOE regime based on the available data, it seems troubling to say the least that such actions are allowed to continue in modern Jamaica. However, it also might lead us to conclude that violations under SOEs didn't magically cease to exist with the island raising its own flag. Ultimately, it serves as a useful empirical and theoretical reminder of the relationship between the colonial and postcolonial periods, and furthermore norm and exception. In this schema, the presence of colonial laws within a postcolonial liberal democracy sees the recurrence of "law *to rule"* and not the rule of law (Darian-Smith & Fitzpatrick 1999, 3).

The violations here provide a preliminary glimpse, not a gamut, of these supposed "enhanced security measures". Nevertheless, they at least provide us with some

[274] " 'Tommy Lee improperly detained': Judge orders release of entertainer," *Loop News*, May 29, 2018. Retrieved from: https://www.loopjamaica.com/content/tommy-lee-improperly-detained-judge-orders-release-entertainer.

While it would have been empirically rich to obtain the ruling as a data point, the Jamaican judicial system, especially at the lower end of the stratum, tend to not provide or make available their rulings on cases publicly available, with one lawyer expressing to me she had problems obtaining rulings for further analysis.

preliminary insights into the normalization of a declared exception within the Jamaican criminal justice sphere over the past 3 years. They further represent the gravamen of several complaints and suspicions by the main opposition party, local human rights bodies, international governments, and even the press that have resulted in an ongoing dialectic between constitutional rights/rule of law versus the security needs of the state. For example, Lloyd Barnett makes the following observation about the usage of both emergency measures:

> It is, however, quite clear that the Charter mandates that these extraordinary measures should be of limited duration and be continued for no longer than it is necessary. Secondly, the elaborate emergency provisions established by the charter implicitly exclude any competing emergency measures such as ZOSOs, which do not conform with the constitutional standards and leave it to the Executive to impose stringent restrictions on the liberties of citizens.[275]

The point here is that the government has embarked on a path of instituting dubious emergency provisions for the long haul which translates to a declarative state of exception becoming a quasi-permanent[276] way of life for Jamaicans in the years to come with renewed and justified fears of continued constitutional violations. All of this can be traced to the formative colonial martial law for said criminal justice purposes which was centered on racialized violence as the norm working in tandem with an authoritarian ethos of state sovereignty using law to rule instead of the rule of law.

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[275] See *supra* note 142.

[276] Despite the government's appeal of the SOEs in *Douglas et al v The Minister of National Security et al.*, they were briefly declared again on November 14, 2021, by Prime Minister Holness. "Government Declares SOE for Western Parishes and Sections of Corporate Area," *Office of the Prime Minister Communications* (OPM), November 14, 2021. Retrieved from https://opm.gov.jm/news/government-declares-soe-for-western-parishes-and-sections-of-the-corporate-area/. This latest declaration saw the opposition PNP not supporting the SOE extension in the Senate/Upper House of Parliament—one that is reminiscent of the withdrawal of support in July 2010 and December 2018.

Concluding Thoughts

Since independence, Jamaica has periodically seen the deployment (every other decade or so) of either a combination of "special" laws and declared SOES as a major plank of the criminal justice system. This practice is not unique to a single political party but can be attributed to the duopoly that operates in the Jamaican political space, i.e., both the JLP and PNP. Despite some marginal declines in several years, homicide figures have remained largely the same. Considering the evidence presented, the deployment of both SOEs and ZOSOs ostensibly exist on a continuum, specifically one that seems to be least rule-bound instead of the neatness postulated by the Classical Model's norm-exception dichotomy. In this sense, the government, ruling *by* law, has instituted several different statutes which can be activated at will with very little oversight. This further problematizes why some thinkers believe that constitutionalization model that now predominates emergency powers can be abused which allows crisis government to infect and dominate normal governmental proceedings (Gross 2004; Ferejohn and Pasquino 2004; Lazar 2009, 140). These practices sometimes are to the detriment of ordinary citizens caught in the crossfire between criminals and the state, with miniscule judicial review for deterring arbitrary state actions directed at a largely extant crime problem; one which can be approached within the confines of the rule of law for apprehending key perpetrators. Instead, there is a wholesale criminalization of several communities and parishes in the Jamaican state of exception which leads to several rights violations.

While there are occasional modifications in nomenclature, repeals, and transfer of special powers from one law to another, the outcomes are largely the same in the form of arbitrary arrests, extended detentions, extrajudicial killings, and many other violations. These have become synonymous with Jamaica's declared states of exception over the decades, especially since they seem to be incongruent with the rule of law. Instead, they are more akin to Benjamin's (2019, 284) critical take on the fundamental role violence plays in either "lawmaking" or "law-preserving" whereby both the military and police occupy their respective roles, one that can be largely applied to Jamaica's deployment of both the JCF and JDF. To reiterate his position as a theoretical cue for Jamaica's declaration of emergencies and the relationship between violence and law, he notes that: "All violence as a means is either lawmaking or law-preserving. If it lays claim to neither of these predicates, it forfeits all validity. It follows…that all violence as a means…is implicated in the problematic nature of law itself" (Benjamin 1986, 287). In summary, the Jamaican state actions via declarations of emergencies certainly aid in empirically validating this noteworthy thesis.

In terms of the Jamaican state actions over the various periods analyzed here, it would seem that the deployment of emergency powers in the criminal justice arena largely falls within a rule *by* law sphere. The exercise of prime ministerial power has expanded with the advent of ZOSOs. Such an expansion and operationalization of these powers usually occurs from a least rule-bound perspective, especially through the violence perpetuated by the state security forces; a violence which has yet to produce any substantive reductions in the national homicide rate. Since 2017 to the present though,

there has been a number of noticeable constitutional abuses of power as witnessed in the form of arbitrary arrests, prolonged arbitrary detentions, state kidnapping, and executive overreach in criminal justice detention and sentencing. These abuses give cause for concern as they exemplify the deliberate targeting of inner-city communities filled primarily with lower class Jamaicans of African descent (and in some instances high instances of crime and violence). These citizens' constitutional rights are seen as dispensable in the hope of protecting their ultimate right, i.e., the right to life[277] under a quasi-Hobbesian schema involving constitutionalized emergency powers which revolve around violence combined with law. Furthermore, this contemporary period seems to be moving speedily along with blending aspects of sovereign decisionism with constitutional dictatorship as a reminder of how the norm-exception binary has been blurred in Jamaica. This blend has historical roots and evokes the important role that *commandement* continues to play in the postcolony in declaring constitutional and sovereign violence on both good and bad citizens with little or no room for discernment. Henceforth, the colonial authoritarian ethos continues to reign supreme in the postcolony.

[277] "Treat crime like COVID-19. The right to life should supersede all other rights, says army chief; Very dangerous ground, warns constitutional lawyer", *The Gleaner,* August 15, 2021. Retrieved https://jamaica-gleaner.com/article/lead-stories/20210815/treat-crime-covid-19#slideshow-1

CONCLUSION: THEORETICAL ARGUMENT, IMPORTANCE, AND SIGNIFICANCE

Jamaica's extensive experience with emergency powers allows us to critically reflect on the norm-exception binary. It has been documented in the preceding chapters that this binary framework, which has been at the forefront of prominent classical scholarship on emergency powers, does not necessarily reflect the reality of colonial and postcolonial societies' such as Jamaica. It fails to accurately depict and differentiate how blurred the theoretical lines between both normalcy and exceptionalism can be in practice. Emergency powers from a general perspective are antithetical to the constitutional order of a polity, but colonies were not fully constituted nation-states that adhered to regular constitutional norms. Rather, they were extensions of great European powers across the globe and were supposed to follow, at least in theory, the juridico-political system instituted by the mother country/metropole. However, colonial practices reflect a radically different juridico-political format and can be seen as Mill's benevolent despotism operating in practice. This allows for the emergency to become a defining and long-lasting technique of governance, especially in the service of structuring the new normal. With that being said, it is then important to highlight some of the main findings that have been uncovered in the preceding chapters.

The colonial Jamaican state's penchant for using martial law as a preferred governance tool is the ultimate reminder of how theory and practice can be divorced. For example, when surveying the Sam Sharpe rebellion, we immediately see how the exception functioned as the rule with some of the enslaved populace, especially those

deemed innocent in various narratives, being summarily executed or even being accused of and judged for crimes they did not commit primarily and even being summarily executed due to their skin color and legal status as chattel. Although crises are supposed to be time-bound, it also showed that colonial brutality and excesses were prolonged to allow for both arbitrary and juridical violence (Party Law) being inflicted on the enslaved as a form of revenge. The arbitrary nature of dispensing justice under the aegis of martial law in 1831 suggests that respect for the limits (temporal and statutory) of emergency powers were not sacrosanct as the norm-exception framework suggests. Instead, what we see is an early proclivity to violate and blur the lines between norm and exception due to martial law becoming an indispensable technique of colonial governance.

The violence unleashed during the Morant Bay uprising is again a significant marker of how the lines between norm and exception are indistinct. Again, the temporal lines were purposefully extended, similar to the Christmas Rebellion of 1831-32, to ensure colonial violence and terror functioned as the rule under martial law after defeating the rioters within a few days or so. George William Gordon's extraordinary rendition and eventual execution is the quintessential violation of this episode. The audacity of Governor Eyre and the colonial authorities to countenance such a violation, one occurring outside of the spatial boundaries of the declared martial law, becomes an extraordinary act in and of itself but one that was normalized over time with different colonial governors pitching in. However, it also is a useful reminder of the tremendous decisionism of colonial governors like Eyre acting within a so-called (il)liberal constitutional and colonial model— a most contradictory arrangement especially since it was grounded in *commandement* as the operational governing modality.

The fact that extrajudicial/summary executions and killings, arbitrary detentions, brutal floggings, unrestrained destruction of property, and other arbitrary/extralegal punishments became extensions of the rule during this infamous martial law period for black Jamaicans—acts which would not be tolerated in Britain—proves something more sinister is at work than the Classical Model's assertions of the norm-exception framework. It thus becomes important to highlight the role race played in colonial declarations and how relevant were the uses of emergency powers to govern with fear and suppress non-white populations as seen in Jamaica's case and other parts of the former British Empire, as Hussain suggests (2003, 101). The doctrine of necessity thus becomes reliant on the idea of race as a key factor for responding to colonial disturbances with an already established violence and terror that was characteristic of British colonialism, broadly understood. It ultimately complicates and shows how vague the lines are between statutory (normal) powers and extralegal excessive practices for dealing with relatively minor crises with different racial groups outside of the homeland. Examining the legal constructs used to predicate and justify such violent operations against said groupings of people—especially those devoid of rule of law protections against discretionary expressions of power—thus becomes a key element in reformulating the norm-exception narrative. In sum, what we see emerging here is the "otherness" of the colonized being used as justification for using the supposed "other" side of law to combat colonial exigencies deemed necessary enough.

Jamaica's experience with both World Wars speaks to the continual deployment and larger normalization of martial law along with other newly developed emergency measures (the Public Meetings Law and the EPA's Defense Regulations), local and

imported, as colonial tools of government. While it might be plausible to say that Jamaica's early 20th century experiences with such powers provide some verification for emergency cliches (and by extension the norm-exception framework) such as: "Necessity hath no law or *silent leges enim inter arma,"* it also provides evidence of the abuses that emergency doctrines and practices uphold, especially under colonialism where certain rights and standards were disavowed in the colony vis-à-vis the homeland.

For instance, Jamaica's labor movement's entanglements with successive governors, especially Arthur Richards, speaks to the fact that colonial socio-economic crises are often portrayed by said authorities as "rebellious" and therefore require some decisive claim of emergency, under the necessity doctrine of course, to suppress such movements. This then requires martial law combined with a range of special laws-cum-emergency powers to violently engage with and sometimes excessively suppress the labor movement as seen in Jamaica under dubious claims of emergency with the ulterior goal of reminding the population about *commandement* as normality. As seen during this period, the colonial emergency practices here include, but are not limited to, arbitrary extended detentions, several restrictions on civil liberties (freedom of speech; freedom of movement; right to assemble and protest), and even civilian fatalities. Although one could make the case that wars bring particular hardships, the colonial response to the burgeoning labor movement and Jamaican nationalism was to dress up martial law and other repressive special laws as a legitimized form of ordinary governance with an extraordinary bent and intent to curtail the aforementioned impulses.

Jamaica's post-independence period is equally littered with a number of rights' abuses emerging from the continued reliance on emergency powers emanating from

colonialism. As Fanon (2005) notes, colonialism is wholly related to law enforcement. The supposed lawlessness label that was attributed to the colonized by the colonizer, saw the need for constant enforcement and arbitrary use of force to ensure colonial guardianship as benevolent despotism would limit questions of autonomy, freedom, and rights. Arguably the aforementioned dynamic represents a form of stigmatization which has continued well within post-independent Jamaica. This affords those who abide certain middle-class norms and values full liberal democratic Jamaican citizenship while those characterized as the urban poor are stigmatized as criminal and dangerous (Campbell 2020; Harriott 2003). As such, the state takes a *commandement* approach to how it manages the postcolony via oftentimes repressive, arbitrary, and omnipresent law enforcement in areas deemed as "lawless".

Postcolonial Jamaica has seen numerous declarations of emergencies, official and quasi-official, which have been developed in response to criminal justice problems, specifically homicides. Ironically, these responses are grounded in using the British colonial emergency mechanisms like the Emergency Powers Act 1938 that were used to harass and repress ordinary Jamaicans a generation prior. Nevertheless, the mid-1970s saw the experimentation and implementation of locally developed special laws-cum-emergency powers, namely the Gun Court and Suppression of Crime Acts (SOCA).

Despite a brief respite in the homicide statistics, the aforementioned measures have not been long-term solutions to solving Jamaica's longstanding crime problem. The Gun Court in particular has had its fair share of problems in relation to its constitutional structure and the transferal of power away from the judiciary to the executive in determining sentences as per the remit of the now relinquished Review Board. Both the

Gun Court and SOCA conferred extraordinary powers onto the state which were used oppressively to illegally stop, search, and detain a number of working-class Jamaican citizens instead of the intended criminal targets. The longevity of the former serves an important reminder as to how the exception can come to define the ordinary, specifically as it relates to criminal trials involving firearms.

The yearlong and island-wide SOE of 1976-1977 serves as the initial experiment for emergency powers to become a core pillar of the criminal justice. This declared SOE signifies a radical temporal and spatial departure from the past that still relied on executive decisionism in determining those who were to be detained and for what length of time. The fact that most detainees were released unconditionally and without charges is cause for concern. It tells us that the use of such arbitrary powers is less reliant on facts and more on the will of the constitutional and sovereign powers that be. Furthermore, the term subversion lacks constitutional specificity as what actions can be classified as such. This allows for governments like Manley's own to make broad accusations and then invoke emergency powers to rule Jamaica by law in a most opaque manner, especially one that mirrors colonialism's *commandement* brought forward into the post-independence period. In summary, it is important to highlight governments generally seek to invoke crisis rhetoric as a justification for using extraordinary powers without sufficient proof.

The numerous violations that define the 2010 Tivoli Incursion, one that is comparable with events of 1865 Morant Bay, speaks to a marked continuity of state violence (legal and physical) against Jamaican citizens. The declaration of a SOE by the state combined with a colonial paramilitary law enforcement approach contributed

immensely to allegations (and subsequent proof) of extrajudicial killings and mass arbitrary detentions. A person's physical address is thus a marker for the treatment they can expect or will receive from Jamaica's security forces. Therefore, extrajudicial killings and mass illegal detentions within Tivoli and its environs vis-à-vis those released and charged seem to be quite arbitrary and solely dependent on a citizen's address.

The aforementioned constitute those who have been excluded from meaningful citizenship and the body-politic of Jamaica, especially from the (good) middle-class liberal-democratic vision of society (Campbell 2020). Moreover, the state and the police are integral to creating what can be termed "*stratified citizenship*," thus creating a reproduction of societal inequalities based on color, socioeconomic class, and geography (Gonzalez 2017, 495). Similarly, this approach has been termed as "speculative policing" which allows for the framing of certain citizens as "potential criminals" based on their geographical residence (Jaffe 2019, 465). Overall, entire communities and sets of people become labelled as the Other in this emergency-driven criminal justice approach instead of targeted operations, which see post-colonial Jamaica relying on the same oppressive and colonial-derived laws *to rule*, examples of which been documented from the mid-1970s to the 2010s in the form of the Gun Court, Suppression of Crime Act (SOCA), SOEs and ZOSOs.

The eventual escape of Dudus Coke for nearly a month shows that the claim of emergency served no substantive purpose in capturing him as was originally intended. Instead, the Jamaican state used the SOE as a pretextual opportunity to reincorporate the community under its guardianship compared to the informal and extralegal patron-client relationship which embodied the don and Jamaica's dominant political parties. The

Jamaican state in this instance eliminated the proverbial "state within a State" by capturing Tivoli back into its fold. While this geographic reincorporation can be perceived as good, the eventual project here sees Tivoli moving from an informal state of exception to a formal/government one in 2010 and as such the community has been more or less pacified. In summary, the declared state of exception allowed for emergency powers to usher in the new normal for the next decade and foreseeable future in Tivoli.

As it relates to the adoption of ZOSOs as a major pillar of the Jamaican criminal justice system thrust, we are able to identify several glaring anomalies from the foregoing. Firstly, its constitutional structure seems suspect due to the local legislature creation of law (Law Reform Act) which abridged some fundamental rights of Jamaicans (as a textual analysis suggests) even though there has been no judicial review on the matter. Secondly, ZOSOs are seemingly the new normal for several communities, broadly defined. Some zones are now nearing their 5th year of operation and thus cementing a place of permanent exception, even if not referred to as such. Thirdly, the broadening of prime ministerial power to declare such zones are reflective of Schmittian and Rossiterian views on emergency powers as the domain of the executive, but one that not necessarily relies on the neat divide between decisionism (exception) and constitutionalism (norm). Instead, we see a post-independence blurring of the lines that renders both constitutional and sovereign dictatorial techniques of government being normalized via tools like ZOSOs. Fourthly, the subsequent civil liberties violations are indicative of how the exception defines the new normal for said communities and as such there are the usual excesses that accompany a paramilitary law enforcement style emboldened with such (ab)normal powers. This mixture sets the stage for one where

governmental rhetoric of "Clear, Hold, and Build" is often fixed at either of the two first positions, never the latter. This allows for an extension of the declared crisis and enables the implementation of a quasi-permanent regime of rights' abuses in the forms of illegal searches of persons and properties, arbitrary detentions, and arrests to become the rule instead of the exception. It essentially serves as an intimidatory and disciplinary role in urban governance vis-à-vis other Jamaican localities where ordinary policing and laws are the norm.

While no one doubts the severity of the island's crime problem, the commonplace deployment of SOEs tell a different story. It does this by creating a wide dragnet over parishes and communities in pursuit of criminals. Nearly half the country was under some sort of declared SOE governance between 2018-2020. Arguably, normal law enforcement procedures and laws can be used to purposefully target and investigate those believed to be involved with criminality.[278] The deployment of SOEs as the backbone of Jamaica's criminal justice strategy seems to be an overreaction to underlying socio-economic drivers of crime.[279] This strategy is most likely a moral panic, and while its consequences

[278] Jason Cross, "Weapon of war- Commissioner says strategies bearing fruit as 88 illegal firearms seized in January", *The Jamaica Observer*, February 2, 2022. Retrieved from https://www.jamaicaobserver.com/front-page/-Weapons_of_war-commissioner-says-strategies-bearing-fruit-as-88-seized_242932?profile=1373. A further 13 guns were seized on the following day, and this was achieved despite the lack of a declared SOE, bringing the total seizure to a 101 over the course of a month. See Rochelle Clayton, "Gunmen moving uptown, says top cop after 13 firearms found in gated community," *Jamaica Observer*, February 3, 2022. Retrieved from https://www.jamaicaobserver.com/latestnews/Gunmen_are_moving_uptown,_says_top_cop_after_13_firearms_found_in_gated_community?profile=1606. Compare this figure to Tivoli and more recent ones and see how they pale in comparison to this most ordinary, intelligence-driven operation.

[279] Several studies have looked at how Jamaica's socio-economic climate is more or less related to the rate of violent crime there. While they are mostly correlational, they might to an effect worth further exploration from a Jamaican context, i.e., what role does socio-economic factors play, if any, in producing violent crime? Is poverty a cause or effect in this dynamic? In the interest of time, I believe that the following works have good value for assessing this relationship in Jamaica. See, Don Robotham, "Crime and Public Policy in Jamaica," in *Understanding Crime in Jamaica: New Challenges for Public Policy*, ed.

are problematic, the most recent declaration in late 2021 seems to be a timely reminder that there might be no cessation in this ever-evolving and elastic Jamaican War on Crime,[280] primarily in a world where there is an "expanding conceptual elasticity of emergency" (Fatovic 2019, 6). However, this "war" is being defined more by its violations as a declared state of exception rather than its successes, especially with the national homicide figures still hovering at around 1300 per annum during the latest round of paired emergency measures (SOEs and ZOSOs).

The declaration and normalization of SOEs during the last 4 years has seen mass arbitrary detentions and arrests combined with extended confinements without charge becoming the criminal justice norm for certain Jamaican regions. Nevertheless, as the Public Defender and human rights organizations have found, these SOE measures serve as an enabling mechanism for violations of civil liberties instead of targeting the colloquial "gunmen." Jamaican citizens of certain areas, and by extension of a lower socio-economic background, are therefore marked and subjected to extraordinary practices that cannot be countenanced in either substantive law (constitutional democratic values) and normal law enforcement practices. The Supreme Court's ruling is of key value in highlighting the reasons why the declared SOEs and their tactics are wholly unconstitutional. In spite of this judicial review, the government persists to deploy and

Anthony Harriott (Kingston: University of the West Indies Press, 2003), 201-206. He lays out several causal factors such as urbanization, the labor market (unemployment and education), and social inequality as bases for interrogating this relationship. Also see, Dacia L. Leslie, *Recidivism in the Caribbean: Improving the Reintegration of Jamaican Ex-prisoners,* (Cham: Palgrave Macmillan, 2019), 30-34.

[280] For more details, see Anthony Harriott, *Understanding Crime in Jamaica: New Challenges for Public Policy* (Kingston: University of the West Indies Press, 2003), 6-7.

institute SOEs as the new normal of criminal justice and governance– one devoid of time limits that seeks to institutionalize itself by extending the problem instead of solving it.

Jamaica's crime problem is quite serious for a country of its size and warrants some action. There is no doubting that. But successive post-independence governments' hard-on-crime policies have made the state of exception a central plank for combating this problem. This feature though is quite puzzling, especially in the latter 2010s. It represents continuity, aberration, and intensification of the claims of emergency. The claim of emergency reaction is hyperbolic and seeks to cast a wide net by subjecting ordinary citizens, without reasonable suspicion, to extraordinary law enforcement. The current national homicide rate, as shown above in Table 5.3, is evidence that the declared state of exception has not garnered the requisite results to support the claim that ZOSOs and SOEs are effective law enforcement tools. Instead, the homicide rate shows a stubborn consistency (approximately 1300 murders between 2018-2021) even though the government has blamed this primarily on the lack of support from the opposition and judiciary in upholding SOEs as a short to long term band-aid solution for crime.

While the centrality of the state of exception discourse and policy is unquestioned, we have to interrogate the norm-exception framework and move beyond its glib postulations, especially with regards to Jamaica's past and ongoing experience. The colony and postcolony are special administrative regions where the exception has always been the rule. Therefore, it stands to reason then that norm and exception have not been so antithetical in these settings as classical scholars like Rossiter and Schmitt would have assumed. Instead, we have seen where the exception manifests into the rule, and this

allows for ipso facto blurring of the lines between what is considered/declared to be either exceptional or normal.

The postcolony then, as an extension of colonialism's violence and *commandement*, represents a site of continuity and invention in terms of how emergencies are declared and maintained. This continuity and invention can be even merged together in the most covert way to combat a real problem, but one where illegality is tolerated for the greater good. By clarifying Jamaica's past and current relationship with such measures, the following questions have emerged: (1) If emergency powers are supposed to operate on the so-called norm-exception framework, then what is the impact (observed or theoretical) of commonplace declaration of emergencies in Jamaica's case? Can they still be labelled as emergency powers when they are becoming increasingly quotidian and are more or less normalized between 2018-2020?

These parting questions in Jamaica's case indicate a potential waning of the "shock and awe" that SOEs are supposed to deliver to solve crises. Instead of being measures of last resort, they have been used as primary tools in the anti-crime fight. As Bhabha puts it (1994,41), "the state of emergency is also always a state of *emergence."* It remains to be seen what next might emerge from Jamaica's own version of the state of exception. Further continuity and invention? Can we ever fully bid adieu to the norm-exception binary? A blending of both constitutional and sovereign exceptional approaches to criminal justice? For political scientists, (comparativists and political theorists alike), it becomes imperative to challenge the Classical norm-exception narrative by deeply interrrogating and tracing how emergency powers operate in practice (historically and contemporarily), not only theory. This ultimately allows deepening our

understanding of how blurred the lines have been in colonial and postcolonial spaces like Jamaica. *A luta continua.*

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APPENDICES

Appendix A

On the 30th of December 1831, the Governor, with the unanimous opinion of the Council of War (summoned under the Militia Act, 50 Geo. III., c. 17, sec. 74), proclaimed Martial Law (which continued in force until the 5th February, 1832) in these words:—

"We do hereby strictly charge and command all and every the Commissioned and Warrant Officers and Private Men of Our Militia of Our said Island, to repair forthwith to their several and respective Regiments and Stations, and there to hold themselves in readiness to receive and obey all such Orders as shall from time to time be given to them by Our Captain-General of Our Forces in Our said Island, or in his absence, by any superior Officer, upon pain of the highest displeasure, and of such pains and penalties as, by the Rules and Articles of War, established in Our said Island, are inflicted upon such persons as shall be guilty of disobedience of Orders."

The Governor, the Earl of Belmore, acted in the rank of Captain-General, gave his orders to the Major-General in command, and placed the troops at his disposal.

Appendix B

Parish	Total Tried	Total Executed
Hanover Courts Martial	58	27
Hanover Civil Courts	82	60
St. James Courts Martial	99	81
St. James Civil Courts	81	39
Westmoreland Courts Martial	81	39
Westmoreland Civil Courts	52	20
St. Elizabeth Courts Martial	73	14
Portland Courts Martial	23	7
Portland Civil Courts	5	5
St. Thomas in the Vale Courts Martial	9	—
Manchester Courts Martial	15	13
Manchester Civil Courts	16	7
St. Thomas in the East Courts Martial	12	1
St. Thomas in the East Civil Courts	5	2
Totals	626	312

Appendix C

Inclosure 19 in No. 1.

Proclamation of Martial Law.

Jamaica, ss.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, and of Jamaica supreme Lady, Defender of the Faith—

To all our loving subjects!

Whereas we are certified of the committal of grievous trespasses and felonies within the parish of St. Thomas in the East of this our Island of Jamaica, and have reason for expecting that the same may be extended to the neighbouring parishes of the county of Surry of our said island: We do hereby, by the authority to us committed by the laws of this our island, declare and announce to all whom it may concern, that martial law shall prevail throughout the said county of Surry, except in the city and parish of Kingston; and that our military forces shall have all power of exercising the rights of belligerents against such of the inhabitants of the said county, except as aforesaid, as our said military forces may consider opposed to our Government, and the well-being of our loving subjects.

Given at Head Quarter House, Kingston, on the thirteenth day of October, in the

17

year of our Lord one thousand eight hundred and sixty-five, and in the twenty-ninth year of our reign.

Witness:—His Excellency Edward John Eyre, Esquire, Captain-General and Governor-in-chief in and over our said Island of Jamaica, and other the territories thereon depending in America, Governor and Commander-in-chief of the Colony of British Honduras, Chancellor of our said Island of Jamaica, and Vice-Admiral of the same.

(Signed) E. EYRE.

By his Excellency's command,

(Signed) EDWARD JORDON, *Governor's Secretary.*

Appendix D

Jamaica Act, 1866 (29 & 30 Vict.) C A P. XII.
An Act to make Provision for the Government of *Jamaica*.
[23d March 1866]
W HEREAS Two Acts were passed by the Legislature of *Jamaica* during a Session held in this present Year of Her Majesty, intituled, respectively, *An Act to alter and amend the Political Constitution of this Island, An Act to amend an Act passed in the present Session, intituled 'An Act to alter and amend the Political Constitution of this Island ,*' and it is expedient that the said Acts should be brought into operation, under Authority of Parliament, in the Manner and to the Extent herein-after set forth:
And whereas Parts of the said Acts are set out in the Schedule hereunto annexed:
Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

1 So much of such Acts as in Schedule to this Acts to take effect.

1. So much of said recited Acts as is contained in the said Schedule shall come into operation in the Island of *Jamaica* so soon as the Assent thereto of Her Majesty in Council shall have been proclaimed in the said Island by the Officer administering the Government thereof.

2 'Government' to include 'Legislature.' Powers how exerciseable.

2. In construing the said secondly recited Act the Term 'Government' shall be held to include 'Legislature;' and the Powers exerciseable by Her Majesty under the said Act shall be exerciseable by Her Majesty in Council.

Note: this act is listed in the Chronological Table of Statutes as the Jamaica Act, 1866

S C H E D U L E.

An Act to alter and amend the Political Constitution of this Island.
Whereas it is necessary to alter the present Political Constitution of this Island: Be it enacted by the Governor, Legislative Council, and Assembly of this Island, and it is hereby enacted by the Authority of the same,
First, that from and after the coming into operation of this Act the present Legislative Council and House of Assembly, and all and every the Functions and Privileges of those Two Bodies respectively shall cease and determine absolutely.
An Act to amend an Act passed in the present Session, entitled 'An Act to alter and amend the Political Constitution of this Island.'
Whereas an Act was passed by the Legislature of this Island during this present Session, entitled 'An Act to alter and amend the Political Constitution of this Island:' And whereas it is desirable that the same should be amended: Be it therefore enacted by the Governor, Legislative Council, and Assembly of this Island, and it is hereby enacted by the Authority of the same,
In place of the Legislature abolished by the First Section of the recited Act it shall be lawful for Her Majesty the Queen to create and constitute a Government for this Island in such Form and with such Powers as to Her Majesty may best seem fitting and from Time to Time to alter or amend such Government

Appendix E

JAMAICA.

No. 9 --1938.

I assent,

[L.S.]

C. C. WOOLLEY,

Acting Governor.

6th June, 1938.

A LAW to make exceptional provision for the Protection of the Community in cases of Emergency.

[*6th June*, 1938.]

BE it enacted by the Governor and Legislative Council of Jamaica as follows :—

1—This Law may be cited as The Emergency Powers Law, 1938. Short Title.

2—(1) If at any time it appears to the Governor in Privy Council that any action has been taken or is immediately threatened by any persons or body of persons of such a nature as to be calculated, by interfering with the supply Issue of Proclamations of Emergency.

Provided also that no such Regulation shall make it an offence for any person or persons to take part in a strike, or peacefully to persuade any other person or persons to take part in a strike.

(2) Any Regulations so made shall be laid before the Legislative Council as soon as may be after they are made, and shall not continue in force after the expiration of seven days from the time when they are so laid unless a resolution is passed by the Legislative Council providing for the continuance thereof, and in default of such resolution for the continuance of the said Regulations the Proclamation shall cease to have force and effect.

(3) The Regulations may provide for the trial, by Courts of Summary Jurisdiction, of persons guilty of offences against the Regulations; so, however, that the maximum penalty which may be inflicted for any offence against any such Regulations shall be imprisonment with or without hard labour for a term not exceeding three months, or a fine not exceeding £100, or both such imprisonment and fine, together with the forfeiture of any goods or money in respect of which the offence has been committed :

Provided that no such Regulations shall alter any existing procedure in criminal cases, or confer any right to punish by fine or imprisonment without trial.

(4) The Regulations so made shall have effect as if enacted in this Law, but may be added to or altered by resolution of the Legislative Council or by Regulations made in like manner which shall be laid before the Legislative Council and shall be subject to the like provisions as the original Regulations.

(5) The expiry or revocation of any Regulations so made shall not be deemed to have affected the previous operation thereof, or the validity of any action taken thereunder, or any penalty or punishment incurred in respect of any contravention or failure to comply therewith, or any proceeding or remedy in respect of any such punishment or penalty.

Duration.

4—This Law shall continue in force until and including the Thirty-first day of December One Thousand nine hundred and Thirty-eight.

Appendix F

JAMAICA.

No. 27----1939.

I assent.

[L.S.]

A. F. RICHARDS,

Governor.

23rd June, 1939.

A LAW to empower the Governor, by Proclamation, to Prohibit in certain circumstances, meetings and processions, in the interests of good order and the public safety.

[23*rd June*, 1939.]

BE it enacted by the Governor and Legislative Council of Jamaica, as follows:—

Short Title.

1—This Law may be cited as the Public Meetings Law, 1939.

Power of Governor to prohibit meetings and processions.

2—(1) Notwithstanding anything contained in any other Law, rule or regulation, where at any time it appears to the Governor to be in the interests of good order or the public safety so to do, he may by Proclamation, subject to any exemptions contained therein, prohibit in any area, or in any parish, district, village or town in the Island—

(a) all meetings, gatherings and assemblies of persons, and all processions and marches, in any public place;

(b) all persons from organising, holding or speaking at or attending any meetings, gatherings and assemblies of persons, or any processions and marches, in any public place,

save in cases where a permit is issued in accordance with the provisions of Section 3 of this Law.

(2) Every Proclamation under this section—

(a) shall remain in force for a period of not more than one month (without prejudice to the power to issue a further Proclamation at or before the end of such period);

(b) shall be published in the Gazette;

(c) may at any time be varied, altered, amended or revoked by the Governor.

Applications for permits.

3—Where any person desires to organise or hold in any public place any meeting, gathering or assembly of persons, or any procession or march, which is prohibited by a Proclamation under this Law, he shall, at least twenty-four hours before such intended event, make application for a permit to the Resident Magistrate or the senior officer of the Jamaica Constabulary Force for the Parish in which the event is to take place, or to the Commissioner of Police if the application relates to the Corporate Area of Kingston and St. Andrew, or to the Colonial Secretary for any Area in the Island.

Permits.

4—(1) An officer to whom application is made in accordance with the provisions of section 3 of this Law may, in any case, refuse or grant the application.

(2) In cases where such application is granted, the officer shall issue to the applicant a permit for the desired event to take place, but every such permit shall be issued subject to such terms and conditions (to be observed by all persons organising, speaking at or attending the event) as the officer may think necessary in order to effect the objects of the Proclamation.

Appeal.

5—Any applicant for a permit under this Law who is aggrieved by the refusal of an officer to grant the permit or by the terms of the permit, may, within seven days, appeal in writing to the Governor.

Offences.

6—Every person shall be guilty of an offence against this Law, who—

(a) contravenes or fails to comply with any of the terms or requirements of a Proclamation under this Law; or

(b) holds, organises, speaks at, attends or takes part in any meeting, gathering or assembly of persons, or any procession or march which is prohibited under the provisions of this Law; or

(c) contravenes or fails to comply with any of the terms and conditions subject to or upon which a permit under section 4 of this Law has been issued; or

(d) attempts to commit any offence against this Law or who incites, aids or abets any other person to commit an offence against this Law.

Penalty.

7—Every person who is guilty of an offence against this Law shall be liable, on summary conviction before a Resident Magistrate, to imprisonment for a term not exceeding three months, or to a fine not exceeding fifty pounds.

Powers of arrest.

8—Any member of the Jamaica Constabulary Force (and any other person authorised by the Governor in that behalf) may, without warrant, arrest any person who commits an offence against this Law.

Duration of Law.

9. This Law shall remain in force until the 30th day of June, 1940.

Appendix G

NOW WE KNOW

By

Roger Mais

Now we know why the draft of the New Constitution has not been published before. The authors of that particular piece of hypocrisy and deception are the little men who are hopping about like mad all over the British Empire implementing the real official policy, implicit in statements made by the Prime Minister from time to time.

That man of brave speeches has told the world again and again that he does not intend the old order to change; that he does not mean to yield an inch in consessions to anyone, least of all to people in the colonies. Time and again he has avowed in open parliament that, in so many words, what we are fighting for is that England might retain her exclusive prerogative to the conquest and enslavement of other nations, and that she will not brook competition in that particular field from anyone.

For it is not the non-dissolution of the Empire that is aimed at -- there are free Dominions within the Empire -- but it is the non-dissolution of a colonial system which permits the shameless exploitation of those colonies across the seas of an Empire upon which the sun never sets.

That the sun may never set upon aggression and inequality and human degradation; that the sun may never set upon privilege and repression and exploitation . . .

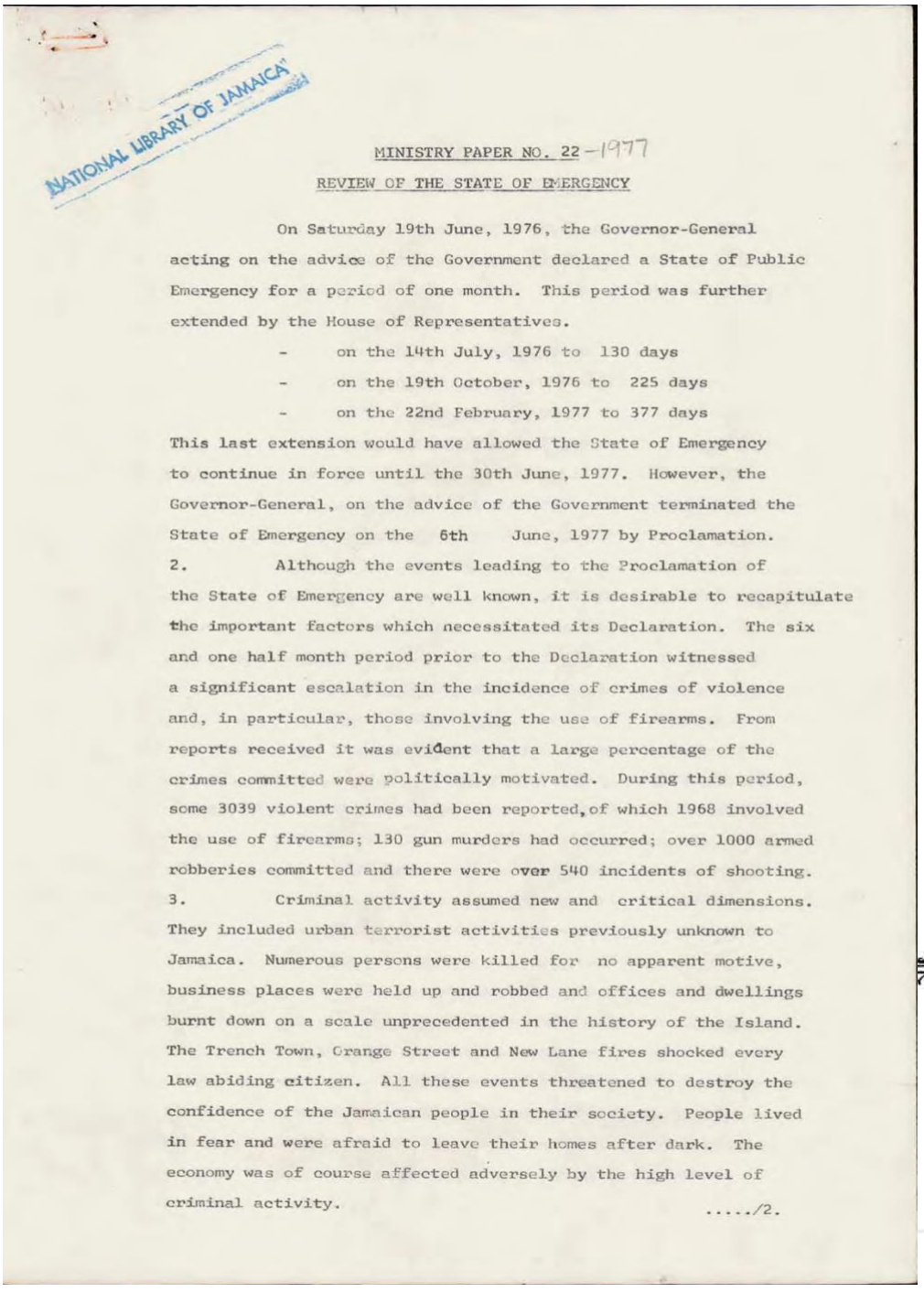
That the sun may never set upon the putting of one man's greed before the blood and the sweat of a million.

That the sun may never set upon urchins in rags and old men and old women in rags, prostrate with hunger and sores upon the sidewalks of cities and upon straw pallets among vermin in poorhouses and prisons and homes;

That the sun may never set upon the groaning of people of alien races who have been brought the blessings of Empire; of famine and plague and the sword . . . .

That the sun may never set upon the insolence and arrogance of one race toward all others; and especially to those whose manhood they hold in eternal bondage through their own straw-bosses and quislings and cheap jim-cracks and all the scabs and blacklegs and yes-men and betrayers of their own whom they can buy for a piece of ribbon to wear on their coats or a medal to wear on their coats or some letters to come after their names or for the privilege of calling some big-wig by his first name, 'Hello, Bill!' 'Hello, Charlie, how's the boy!' or with a sinecure of office with access to travelling expenses or with some other such scraps which fall unnoticed

Appendix H



MINISTRY PAPER NO. 22 - 1977

REVIEW OF THE STATE OF EMERGENCY

On Saturday 19th June, 1976, the Governor-General acting on the advice of the Government declared a State of Public Emergency for a period of one month. This period was further extended by the House of Representatives.

- on the 14th July, 1976 to 130 days
- on the 19th October, 1976 to 225 days
- on the 22nd February, 1977 to 377 days

This last extension would have allowed the State of Emergency to continue in force until the 30th June, 1977. However, the Governor-General, on the advice of the Government terminated the State of Emergency on the 6th June, 1977 by Proclamation.

2. Although the events leading to the Proclamation of the State of Emergency are well known, it is desirable to recapitulate the important factors which necessitated its Declaration. The six and one half month period prior to the Declaration witnessed a significant escalation in the incidence of crimes of violence and, in particular, those involving the use of firearms. From reports received it was evident that a large percentage of the crimes committed were politically motivated. During this period, some 3039 violent crimes had been reported, of which 1968 involved the use of firearms; 130 gun murders had occurred; over 1000 armed robberies committed and there were over 540 incidents of shooting.

3. Criminal activity assumed new and critical dimensions. They included urban terrorist activities previously unknown to Jamaica. Numerous persons were killed for no apparent motive, business places were held up and robbed and offices and dwellings burnt down on a scale unprecedented in the history of the Island. The Trench Town, Orange Street and New Lane fires shocked every law abiding citizen. All these events threatened to destroy the confidence of the Jamaican people in their society. People lived in fear and were afraid to leave their homes after dark. The economy was of course affected adversely by the high level of criminal activity.

...../2.

4. The loss of life and destruction of property continued despite great efforts made by the Security Forces to maintain law and order. There was evidence to suggest that the terrorism had been organised and had as two main objectives - disrupting the economy of Jamaica and undermining the confidence of the people in their democratically elected Government.

5. In addition to the events which occurred in the first half of 1976, the Government was advised by the Security Forces that a new wave of violence was planned for the end of June. It was clear that the Security Forces needed additional powers to control the new type of criminal activity. In view of the increasing threat to public safety, a State of Emergency was therefore proclaimed. It was intended to achieve the following objectives:

(a) to reduce crime and to apprehend the gunmen and the new breed of terrorist;

(b) to smash the link between politics and violence;

(c) to give the nation a breathing space to return to normality;

(d) to create an atmosphere of security conducive to the effective functioning of the economy; and

(e) to permit law abiding citizens comprising the overwhelming majority of our population, to pursue without fear their peaceable business in homes, work-places or in the streets and public places.

6. An important aspect of the State of Emergency was that it gave to the Security Forces, powers in excess of those available through the Suppression of Crime (Special Provisions Act). These powers included:

...../3.

(i) restriction of the publication of statements likely to be prejudicial to public safety or to incite or provoke a commission of a breach of the peace;

(ii) the power to arrest without warrant and to detain, pending enquiries, any person whose behaviour raised reasonable grounds for suspicion that he had acted or was acting in a manner prejudicial to public safety;

(iii) the power for the Minister to make a Detention Order against any person whom he was satisfied had been concerned in any act prejudicial to public safety or public order or was in the preparation or instigation of such acts; and

(iv) the power to restrict the movement of persons or to confine them to their premises if the Minister was satisfied that this action was in the interest of public safety and order.

7. The State of Emergency had been in existence for nearly one year. Throughout the period, the two arms of the Security Forces had been fully mobilised and worked in close collaboration. The Jamaica Defence Force was actively involved in assisting the Jamaica Constabulary Force in maintaining Law and Order not only in the specially troubled areas of Kingston and St. Andrew but also throughout the Island. It had undertaken jointly with the Police, operations which included enforcement of curfews, raids, cordons, searches, roadblocks, mobile and foot patrols, air and sea coastal surveillance patrols, helicopter search-light patrols and harbour patrols.

...../4.

8. From the outset of the State of Emergency, the Security Forces had assessed the threat to public safety to be a sophisticated and planned course of action executed by persons with vested interest in the collapse of the Jamaican Government and economy. It was also subversive and aimed at undermining the Jamaica Constabulary Force as the chief Law Enforcement Agency in Jamaica. One of the main problems faced by the Forces was the inadequacy of information regarding the persons organising and implementing acts of violence, and on the exact nature of the political connection. The holding of the General Elections in December, 1976 and the Parish Council Elections in March, 1977, stimulated certain politically motivated acts of violence. It was to the credit of the Forces that their constant vigilance enabled the holding of these elections without any major incidents.

9. In accordance with Regulations 32 (4) and 35 of the Emergency Powers Regulations 1976, the Minister authorised the Chief of Staff, Jamaica Defence Force, to establish a Special Detention Centre within Up Park Camp. Initially, two such Centres were established. These were known as "Wire Fence" - named as a result of the tents and barbed wire used to surround the tents and "Red Fence" the JDF Detention Centre. After a few months, it became necessary to cease using the facilities at Wire Fence, mainly because of an intolerable dust nuisance. This facility was consequently closed and the detainees were transferred to the New Remand Centre at the Gun Court.

10. As regards the number of persons detained, it is noteworthy that during the State of Emergency:

596 Detention Orders had been issued

348 Detainees were incarcerated at the Detention Centre, Up Park Camp;

189 Detainees were detained at the Gun Court

59 Detainees were incarcerated elsewhere

...../5.

2 Detainees had escaped

538 Detainees were released without restrictions; 33 had to report to the Police; 14 were restricted to their homes, while 9 were restricted to specific areas; 2 were released with permission to go abroad. Charges were brought against 189 detainees.

11. The Jamaica Defence Force which had custodial responsibility for the detainees at Up Park Camp, had made every effort to ensure that the detainees were not only treated in a humane manner but were afforded every possible facility. They had the same diet as the soldiers and those with dietary problems were given special diets on the recommendation of a Medical Officer. They had access to medical treatment and were given the opportunity of attending religious services. The detainees were allowed visits from close relatives and Attorneys and, in relevant cases, were allowed to see persons connected with their businesses on request.

12. As noted before, two detainees had escaped, for which appropriate disciplinary action had been taken on those members of the JDF found negligent. It speaks well for the extremely humane manner in which detainees were treated that letters have been received from released detainees expressing appreciation for the kind treatment they received while in detention.

13. Regulation 39 of the Emergency Powers Regulations, 1976, provided for the establishment of a Tribunal consisting of a Chairman appointed by the Chief Justice and of two other persons appointed by the Governor-General. The purpose of the Tribunal was to hear objections made by detainees and to review cases of detention and or restriction. The Regulation specified that the Tribunal should report its findings on every objection to the Minister.

14. Approximately two weeks after the Declaration of the State of Emergency, the Chairman and members of the Tribunal were appointed under the Emergency Powers Regulations, 1976.

...../6.

Appendix I

APPENDIX 16

THE

JAMAICA GAZETTE

SUPPLEMENT

PROCLAMATIONS, RULES AND REGULATIONS

Vol. CXXXIII SUNDAY, MAY 23, 2010 No. 98

No. 43

THE EMERGENCY POWERS ACT #1

THE EMERGENCY POWERS REGULATIONS, 2010

In exercise of the powers conferred upon the Governor-General by section 3 of the Emergency Powers Act the following Regulations are hereby made:—

Citation

1. These Regulations may be cited as the Emergency powers Regulations, 2010.

Interpretation

2.—(1) In these Regulations, unless the context otherwise requires—

"authorized person" means any competent authority, any member of the Jamaica Defence Force, any constable, any member of any fire brigade or any person authorized by any competent authority to do the act in relation to which the expression is used;

"competent authority"—

(a) in relation to all the provisions of these Regulations which confer any powers upon a competent authority, means the

Appendix J

Expense for Zone of Special Operation and State of Public Emergency F/Y 2018-2019

Period	***ZOSO(Mount Salem/Denham Town***	***SOPE (St. Catherine North/Kingston/St. James)***
Apr. - Aug. 2018	*$ 31,138,232.48*	*$ 162,455,850.65*
Aug. - Dec. 2018	*$ 52,871,026.91*	*$ 150,660,512.99*
Dec. - Mar. 2019	*$ 8,073,000.00*	*$ 75,768,713.70*
Sub-Total	***$ 92,082,259.39***	***$ 388,885,077.34***

Grand Total ***$ 480,967,336.73***

Expense for Zone of Special Operation/State of Public Emergency/Enhance Security Measures & Special Operations F/Y 2019-2020

Period	***Rental of Portable Toilet***	***Accommodation***	***Misc.***	***Catering***
Apr. 2019 to Mar. 2020	*$ 44,011,300.00*	*$ 284,184,619.21*	$ 30,738,928.22	*$ 217,419,465.00*
Sub-Total	***$ 44,011,300.00***	***$ 284,184,619.21***	$ 30,738,928.22	*$ 179,694,108.00*

Grand Total ***$ 538,628,955.43***

Expense for Zone of Special Operation/State of Public Emergency/Enhance Security Measures & Special Operations F/Y 2020-2021

Period	***Rental of Portable Toilet***	***Accommodation***	***Misc.***	***Catering***
Apr. -Oct. 2020	*$ 31,601,250.00*	*$ 201,460,492.00*	$ 1,287,510.00	*$ 157,150,954.66*
Sub-Total	***$ 31,601,250.00***	***$ 201,460,492.00***	$ 1,287,510.00	*$ 157,150,954.66*

Grand Total ***$ 391,500,206.66***

Appendix K

Cap. 111.
Law
39 of 1961.
Acts
9 of 1966,
42 of 1969
3rd Sch.

THE EMERGENCY POWERS ACT

[*6th June, 1938.*]

1. This Act may be cited as the Emergency Powers Act. Short title.

2—In this Act— Interpretation.

"period of public emergency" means any period during which there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; 9/1966 S. 2.

"Proclamation" means a Proclamation, effective for the purposes of subsection (4) of section 26 of the Constitution of Jamaica, which is issued upon the Governor-General being satisfied—

(*a*) that a public emergency has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity whether similar to the foregoing or not; or

(*b*) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life.

3—(1) During a period of public emergency, it shall be lawful for the Governor-General, by order, to make Regulations for securing the essentials of life to the community, and those Regulations may confer or impose on any Government Department or any persons in Her Majesty's Service or acting on Her Majesty's behalf such Emergency Regulations. 39/1961 S. 2. 9/1966 S. 3(a). 42/1969 3rd Sch.

powers and duties as the Governor-General may deem necessary or expedient for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community, and may make such provisions incidental to the powers aforesaid as may appear to the Governor-General to be required for making the exercise of those powers effective.

(2) Without prejudice to the generality of the powers conferred by subsection (1), such Regulations may so far as appears to the Governor-General to be necessary or expedient for any of the purposes mentioned in that subsection—

(*a*) make provision for the detention of persons and the deportation and exclusion of persons from Jamaica;

(*b*) authorize on behalf of Her Majesty—

(i) the taking of possession or control or the managing or carrying on, as the case may be, of any property or undertaking;

(ii) the acquisition of any property other than land;

(*c*) authorize the entering and search of any premises;

(*d*) provide for amending any enactment, for suspending the operation of any enactment, and for applying any enactment with or without modification;

(*e*) provide for charging, in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the Regulations, such fee as may be prescribed by or under the Regulations;

(*f*) provide for payment of compensation and remuneration to persons affected by the Regulations:

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Provided that nothing in this Act shall be construed to authorize the making of any Regulations imposing any form of compulsory military service or industrial conscription, or providing for the trial of persons by Military Courts:

Provided also that no such Regulation shall make it an offence for any person or persons to declare or take part in a lock-out or to take part in a strike, or peacefully to persuade any other person or persons to declare or take part in a lock-out or to take part in a strike.

(3) In paragraph (*d*) of subsection (2) "enactment" includes any Regulation.

(4) Any Regulations so made shall be laid before the Senate and the House of Representatives as soon as may be after they are made, and shall not continue in force after the expiration of seven days from the time when they are so laid before the Senate and the House of Representatives, whichever shall be the later unless a resolution is passed by the Senate and the House of Representatives, providing for the continuance thereof. 9/1966 S. 3 (b).

(5) The Regulations may provide for the trial, by Courts of Summary Jurisdiction, of persons guilty of offences against the Regulations; so, however, that the maximum penalty which may be inflicted for any offence against any such Regulations shall be imprisonment with or without hard labour for a term not exceeding three months, or a fine not exceeding two hundred dollars, or both such imprisonment and fine, together with the forfeiture of any goods or money in respect of which the offence has been committed:

Provided that no such Regulations shall alter any existing procedure in criminal cases, or confer any right to punish by fine or imprisonment without trial.

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(6) The Regulations so made shall have effect as if enacted in this Act, but may be added to or altered by resolution of the Senate and House of Representatives or by Regulations made in like manner which shall be laid before the Senate and House of Representatives and shall be subject to the like provisions as the original Regulations.

(7) The expiry or revocation of any Regulations so made shall not be deemed to have affected the previous operation thereof, or the validity of any action taken thereunder, or any penalty or punishment incurred in respect of any contravention or failure to comply therewith, or any proceeding or remedy in respect of any such punishment or penalty.

[The inclusion of this page is authorized by L.N. 480/1973]

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PUBLICATIONS AND PRESENTATIONS

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