Historia i Polityka
No. 34(41)/2020, pp. 37–59
www.hip.umk.pl
ISSN 1899-5160, e-ISSN 2391-7652
DOI: http://dx.doi.org/10.12775/HiP.2020.035

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Agamben's Two Missing Factors: Understanding State of Emergency through Colonialism and Racial Doctrine

Dwa brakujące czynniki w koncepcji Agambena: postrzeganie stanu wyjątkowego przez pryzmat kolonializmu i doktryny rasowej

• Abstrakt •

Idee stanu wyjątkowego i suwerenności przedstawione przez włoskiego filozofa polityki Giorgia Agambena po wydarzeniach z 11 września 2001 roku zapoczątkowały nową dyskusję w dziedzinie prawa publicznego i filozofii politycznej na temat tego, w jaki sposób prawo i jego ochrona zostają unieważnione w stanie wyjątkowym. Agamben pokazał, że zawieszenie swobód konstytucyjnych w ramach tak zwanego stanu wyjątkowego usuwa status jednostki w sferze prawnej, niezależnie od międzynarodowych norm prawnych czy postanowień konstytucji. Artykuł ten ma jednak na celu zbadanie, w jaki sposób włoski filozof wykluczył istotę doktryny stanu wyjątkowego z postrzegania społeczeństw powstałych w okresie europejskiego kolonializmu, kiedy to właściciele kolonialni niejednokrotnie przyjmowali przepisy dotyczące sytuacji nadzwyczajnych jako środek kontroli nad skolonizowanymi; jednocześnie tekst skupi się na zbadaniu wątku rasowego, motywującego wprowadzanie stanu wyjątkowego zarówno w epoce

• Abstract •

The ideas of state of exception and sovereignty presented by Italian political philosopher Giorgio Agamben in the aftermath of post September 11 context generated a new discourse in the realms of public law and political philosophy on how law and its protection becomes invalid under state of exception. Agamben showed how suspension of constitutional liberties within so called state of exception legally erases any status of an individual regardless of international legal or constitutional norms. However, this article seeks to examine how Agamben had excluded the nature of state of emergency doctrine in colonial societies under European colonialism, where emergency regulations were frequently adopted by colonial masters in subordinating the colonized; at the same time, this article will focus on the racial element appearing behind enacting state of emergency in both colonial era and modern states. The objective of this article lies in underpinning the much important, yet neglected two factors in the whole

kolonialnej, jak i w państwach współczesnych. Celem artykułu jest ugruntowanie dwóch niezwykle ważnych, acz zaniedbanych czynników występujących w scenariuszu stanu wyjątkowego. Wnioski wynikające z tego dociekania pokażą, w jaki sposób eurocentryczne myślenie akademickie porzuciło niektóre zasadnicze kwestie w konstruowaniu pojęcia stanu wyjątkowego.

Słowa kluczowe: suwerenność; stan wyjątkowy; państwo; Agamben

state of emergency scenario. The results emerging from this article will demonstrate how Eurocentric academic thinking has abandoned some real pertinent issues in constructing the notion on state of emergency.

Keywords: sovereignty; emergency; state; Agamben

Introduction

The doctrine of emergency and the discourse related to its legitimacy in legal academic writings are by no means confined to some abstract thoughts, as the overarching opinions about the notion of emergency has always been constituted of many critical viewpoints. The 20th-century legal scholarship on the issues of emergency and exception were mainly attributed to the ideas emerged from the works of Carl Schmitt, the main proponent of theorizing state of exception in the field of public law. Giorgio Agamben had acknowledged Schmitt in following manner: "The essential contiguity between the state of exception and sovereignty was established by Carl Schmitt in his book *Politische Theologie* (1922). Although his famous definition of the sovereign as 'he who decides on the state of exception' has been widely commented on and discussed, there is still no theory of the state of exception in public law, and jurists and theorists of public law seem to regard the problem more as a *questio facti* than as a genuine juridical problem" (Agamben, 2005).

The cardinal elements pertinent to the idea developed by Schmitt and Agamben had shaped up in much elucidating manner focused on sovereignty, state and juridical order around it. In particular, Schmittian understanding of emergency power was palpably parallel to the conventional settings of European nation state system which expressed much empathy for constitutional rights and representative democracy. In ascertaining Schmitt's approach to the concept of emergency or exception, it is evident the epoch existed between two World Wars, and the political legal dilemmas in Germany have drawn larger picture as he had implicitly praised the certain constitutional norms guaranteed in Weimar constitution in postwar Germany to act in a situation of any national emergency. The Article 48 of Weimar Constitution states, "If security and public order are seriously dis-

turbed or threatened in the German Reich, the president of the Reich may take the measures necessary to reestablish security and public order, with the help of the armed forces if required. To this end he may wholly or partially suspend the fundamental rights established in Articles 114, 115, 117, 118, 123, 124, and 153". Schmitt was persuading himself to remove the cynical view targeted in the Article 48 as an instrument that would pave the way for "presidential dictatorship", as he clearly believed such an adoption of state of emergency will inevitably shun the shortcomings arising from the parliamentary politics and bureaucracy. In 1925 Schmitt wrote that "No constitution on earth had so easily legalized a *coup d'état* as did the Weimar constitution" (Schmitt, 1925).

However, it is a deplorable fact that neither Schmitt nor Agamben had comprehended or pressed upon the construction of state of emergency or exception as a mean of oppression upon marginalized races and communities. In his *Empire, Emergency and International Law* John Reynolds argues: "To the extent that contemporary states of emergency and exception have been situated in historical context, significant elements of the discourse and its protagonists *are* marked by a distinct Eurocentrism. Agamben's genealogical mapping of the state of exception, for instance, is encased firmly within the Western political tradition, tracing the origins of the exception through Roman law doctrine, through the French Revolution and martial law in England to the Weimar Republic and the Nazi regime and modern juridical-political systems in Italy, Switzerland and the USA" (Reynolds, 2017).

The exclusion of racial discrimination and using emergency laws as a tool to oppress certain communities from the given analyses of Agamben regarding state of emergency or exception particularly connote some significant drawbacks in the European understanding of the given concept. Fascinating, provocative and compelling work of Agamben has paid much concern in the formulation of theoretical perspective of general state of exception, which he describes as "the dominant paradigm in the government in contemporary politics". From that vantage point, it was an audacious move that Agamben made by illuminating the obvious position of a sovereign as the one who holds the exception in a time of crisis where the entire scope of constitutional rights guaranteed upon citizens can be diminished. In elaborating his idea of exception Agamben has clearly discussed the prolonged state of exception and depicted the Nazi rule as a continued period of state of exception. He states: "Let us take the case of the Nazi State. No sooner did Hitler take power […] than, on February 28, he proclaimed the Decree for the Protection of the People and the State, which suspended the articles of the Weimar Constitution concerning personal liberties. The decree was never repealed, so that

from a juridical standpoint the entire Third Reich can be considered a state of exception that lasted twelve years" (Agamben, 2005, p. 6).

Yet, his silence about the interplay between state of exception and depriving the rights of racial communities living under majoritarian rule have agitated his critics to disrupt his idea of state of exception vehemently from many theoretical perspectives. In this article, we trace the lacuna left by both Schmitt and Agamben in their portrayal of doctrine of emergency (or exception) regarding conceptualizing the place of racial order under emergency laws. To underpin the argument, we further trace the trajectories that have been bolstered using state of emergency upon the oppressed communities since the time of colonialism. In the first half of the article, we explore the draconian role played by doctrine of state of emergency in a destructive manner of legitimizing the violence and undermining the anti-colonial resistance movements during the colonial past and we would further examine the gravity of the racial syndrome, particularly how emergency discourse underpins the routine violence of the law against rationalized minorities, as forgotten and neglected factors by Agamben. Having consolidated the salient anomaly between the state of emergency and the concept of race, our second argument would trace the facts of how current state of emergency functions as a diabolical force in hindering and oppressing the racial communities by majoritarian governments. In order to prove this contention, we seek to trace the emergency laws adopted by Italy in several instances which led to undermine the basic rights of Romani people. This situation unveils the modern reality of state of emergency as it clearly demonstrates the manner executed by a nation founded in the 19th century in hampering and controlling an ethnic community living in a geographical territory since the 14th century. The sheer irony emerging from this given scenario convinces us to believe the legitimacy of the violence.

Concept of State of Emergency under Colonialism

"The Goddess of British justice, though blind, is able to distinguish unmistakably black from white" – this most caustic expression uttered by the early 20th-century Indian Nationalist Bal Gangadhar Tilak was not only a mere rhetorical quibble as it mainly illustrated the naked truth of colonial justice under British rule in India (Gangadhar Tilak, 1907). In colonial context, the concepts of the rule of law and the emergency were duly arranged to subordinate the colonized, and those concepts were meant to be legally validated tools for controlling the whole population. Ostensibly, the rule of law and the state of emergency were in-

tended to last for the good of the people under colonial justice. Yet, the pragmatic reality stemming from their implementation had shown how it persecuted the colonized and the resistance movements under the banner of law and order. In fact, the juxtaposition of those two images had led some post-colonial theorists to deconstruct the state of emergency regulations that existed in colonial societies as some kind of a permanent state of exception. In illuminating his concept called "necropolitics", Achille Mbembe has applied Foucault's idea of biopolitical control of the body to describe a state, in which "new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of *living dead*" (Mbembe, 2019). The concept of necropower has been linked to state of emergency under colonial regimes where the emergency regulations entail a legitimate basis for the right to kill, and such an order continues perpetually as a legalized mechanism. The recorded histories of colonial atrocities have aptly shown the validity of Mbembe's claim regarding status of *living dead* in colonies under emergency laws. For example, the history of British imperialism in the 19th and 20th centuries are the bitter witnesses to the formulation of violence through a legalistic manner, which was always considered a valid and legitimized enterprise in the civilizing missions of European colonial powers over non-European nations. Under the imperial gaze, the norms Europe developed for centuries of upheavals such as freedom of expression and resistance were excluded from colonial rule. In doing so, the colonial powers tended to highlight the necessity of abiding the colonized that it was focused on their own good. The British reaction, sprang after the Amritsar massacre in 1919 in India, was a clear indication of colonial approach to the state of emergency. The official reactions to the lost lives of 379 Indians and thousands of injured Indians were merely confined to criticize the individual responsibility of the perpetrator, General Dyer. Winston Churchill, the Secretary of State for War at that time, called it an "episode […] without precedent or parallel in the modern history of the British Empire […] an extraordinary event, a monstrous event, an event which stands in singular and sinister isolation" (Sayer, 1991, p. 131). By no means the British opinion made any effort to understand the circumstances around martial law that paved the path to General Dyer pulling the trigger. It was a fact beyond dispute that applicability of state of emergency or martial law in a context like India was intended to preserve imperial order, and the notion such as basic liberty or well-being of the colonized population were considered rather insignificant matters before the colonial administration. In the scenario of Amritsar, ruthless reaction of General Dyer to the civil unarmed participants in Jallianwala Bagh in Amritsar was mainly prompted by the sentiments he felt towards the civil diso-

bedience which he considered a threat to the economic and political needs of the empire, and physical violence and violation of any dignified human norms were not taken into account.

The debate relating to the racial elements and force of law in the colonies in the 19th century was mainly an offshoot of the theoretical changes took place in the 19th-century international law. The indomitable position held by naturalist school over centuries in the realm of international law was subdued by positivist arrival, which vindicated law was not given, but was rather contingent on human societies and institutions for its creation. This ideological upheaval resulted in changing the views of European powers towards the non-European societies and later was considered an alienated entity, separated from European institutions. This rationalization of the 19th-century international law was rooted in a deep sense of racial and cultural discrimination. A prominent international lawyer of the late 19th century, Henry Wheaton argued: "Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin" (Wheaton, 1866).

Being a part of Christianized Europe was a criterion to obtain the protection of international law. Before the era of positivist international lawyers like Wheaton, in the 19th century the naturalist jurists too affirmed the cultural difference between European and non-European nations, yet they were adamant about the applicability of universalized natural law as the guiding force. As an example, in the treaties on Spanish acquisition of lands owned by Indian tribes in America, Francisco de Vitoria had shown the strength of natural law as the sole authority between two nations. Albeit, de Vitoria admitted the civilizational difference between Indians and Spanish (Merills, 1966). However, the positivist transformation in the 19th-century international law asserted that only practice of European states was authentic with the legal force and it excluded the non-European states from the realm of law. Prof. Anthony Anghie, being one of main advocates for TWAIL movement, has stated: "Within the positivist universe, then, the non-European world is excluded from the realms of sovereignty, society, law; each of these concepts which acted as founding concepts to the framework of the positivist system was precisely defined, correspondingly, in ways which maintain and police the boundary between the civilized and uncivilized. The whole edifice of positivist jurisprudence is based on this initial exclusion, this determination that certain societies are beyond the pale of civilization. Furthermore, it is clear that, notwithstanding positivist assertions of the primacy of sovereignty, the concept of society is at least equally central to the whole system" (Anghie, 2007, p. 63).

In ascertaining how state of emergency functioned in colonial societies, the above-mentioned analysis provides a clear picture of Europeans' perception towards their colonies which underpinned the manner in which they adopted racially motivated emergency laws and regulations in their colonies. The colonized states were excluded from entering into equal treaties with European powers as European powers refused to admit the validity of the sovereignty of non-European states. Since this matter continued as an intrinsic feature of colonial expansion in the 19th century, imperial powers vindicated their legitimacy of rule which barred the legal constraints on the use of violence in colonies against the colonized. But, ironically, the governments in those colonial powers in Europe were obliged to preserve the civil liberties of their own white populations. In particular, British empire used diabolical methods of emergency regulations in their colonies, which they applied with the intention of deterring the colonial resistance movements. In doing so, their view in the early period of British empire towards emergency rules of martial law took a less serious view as they deliberately excluded emergency regulations from the legal paradigm. As an example, in the question of declaring martial law in Ceylon in 1848, Lord Wellington mockingly described law in a colony as "the will of the general who commands the army" (Hansards, 1848).

The historical understating on the concept of martial law in Europe has clearly shown that it began as a system of rules to maintain the military order of the armed forces, and then gradually its applicability was extended to civilian population in instances such as rebels and open disobediences against the state. However, the genesis of colonial empires imported the idea of martial law when it began to fade away at home under modern democracy. In particular, British showed a notable flare-up for adopting martial law in many instances in suppressing colonial resistance movements and other civil uprisings in their colonies. John Reynolds describes this as "Abandoned at home because of its perceived violent and tyrannical character, the imposition of martial law against native populations in the colonies provoked considerably less reaction from the liberal English intelligentsia. Regimes of martial law came to be regularly imposed by the Crown's agents in India and throughout the empire to protect British interests, consolidate imperial sovereignty and prevent native dissent against everything from colonial taxes and agrarian policies to the maltreatment of slaves" (Reynolds, 2017, p. 73).

As Reynolds has aptly pointed out, the adoption of martial law for the preservation of British interest around the empire was not compatible with how British administration relied on ordinary law in dealing with domestic riots erupted in the 19th-century England, as the former was mainly intended to be applied on basis racial categorization. The reception of pre-existed laws in colonial socie-

ties prior to the occupation was regarded as crude, ambiguous set of rules beyond the standards of European civility, and the state of society was viewed as a state of lawlessness. Hence, the imposed laws and regulations by colonial administrations were supposed to be framed under European perception of civility, yet ironically, they were set up for the good of the imperial institutions. In contrasting this situation with what Carl Schmitt emphasized in his idea of "factual regularity" of order, it becomes evident that such an order is futile without regulating "exception". Agamben has further argued that the suspension of law and order embodies the reality of exception (Agamben, 2005). In understanding the nature of state of exception in colonial India under emergency laws and martial law, we need to admit the suspension of law and order connote recognizing imperial sovereignty in colonial India. Nasser Hussain's notable work *The Jurisprudence of Emergency: Colonialism and the Rule of Law* argues that the suspension of ordinary laws becomes more distinctive as a part of the sovereignty. In his analysis, Hussain has taken the examples from how ordinary legal regulations such as *Habeas Corpus* and other ordinary laws were taken away during British rule in India in the process of promulgating martial laws numerous times in the 19th century. Hussain further stated that in the same era, the government in Britain would not have dared to do so (Hussain, 2003). The attempt of Hussain to investigate the legal exceptions in order to ascertain their relations to the state's sovereignty has been critiqued by Lauren Benton as Hussain paid less concern to highlight the role of imperial sovereignty as the central thesis. Benton argues: "The problem, in other words, for both theorists and historians is that the study of imperial sovereignty begins and ends by reproducing the form of a familiar European discourse characterizing Europe as the historical seat of modern sovereignty. This problem is not trivial. It cannot be removed by railing against Eurocentrism or by acts of 're-centering' global history. In fact, it makes no sense to seek to correct the Eurocentrism of the study of European empires in this context since a particular and important kind of global power cohered in the metropole. At the same time, it is easy to see how the dyad of European sovereignty and 'incomplete' sovereignty outside Europe could replicate itself without shedding much light on the workings of empire. Historians are bound to find the discourse repeated in various periods and contexts, and can cite it if they like as evidence of the distinctions between the rule of law in Europe and rule by law in empire" (Benton, 2007, p. 59).

Now it is quite necessary to examine the assimilation of emergency laws during colonial period into the codified legislations and their authenticities. The British ardor for maintaining emergency laws around their colonies since the 19th century was firstly arising in their control of Ireland, with the rise of many rebellions there

against the British rule. Since martial law was imposed upon Irish in 1798 for the first time, it continued to suspend ordinary laws in Ireland from time to time. By 1850, Ireland had been ruled under the ordinary course of law only for five of the preceding fifty years.

The suppression of Irish colonial resistance by declaring a constant state of emergency was another instance showing the racial aspect of using emergency laws. The contemporary British sources are better indications illustrating the contempt and disgust the English used to maintain towards the Irish as an inferior race (Luckombe, 1780). The tendency of suppressing the Irish resistance and suspension of ordinary laws protecting civil liberties continued throughout the 19th century. The Crime and Outrage (Ireland) Bill of 1847 passed during the Great Famine, Ireland Act of 1871, and Act for the Better Protection of Person and Property in Ireland in 1881 were just several oppressive acts promulgated by British authorities in the 19th century and each Act allowed for detention of suspects without charge or any form of judicial supervision.

The constant proclamations of emergency regulations under the pretext of maintaining law and order as way to keep the grip over natives were not only confined to Ireland as the same policy was mirrored in the parallel mechanism adopted in British India. The frequent Mantra the British were so eager to use in India focused on establishing law and order under the British justice. Since the beginning of the expansion of the British power in the sub-continent under East India Company, the social norms and values intrinsic to Indians were regarded as crude barbaric practices existing beyond the European gaze of civilization. Hence, the British justice system, its laws and order were paramount to shun the savageness of India. The force of the British justice was often regarded as a benevolent form of rule in the context of humanitarian colonialism.

After codifying an ideal penal code in colonial India, T.B. Macaulay could have triumphantly describe British government of India as an enlightened and paternal despotism. Imperialist Sir James Fitzjames Stephen has stated that the two pillars supporting the imperial bridge, "by which India has passed from being a land of cruel wars, ghastly superstition, and wasting plague and famine to be at least a land of peace, order, and vast possibilities", were force and justice (Stephen, 1895, pp. 45–49). He further added: "Force without justice was the old scourge of India; but justice without force means the pursuit of unattainable ideals".

However, the naked truth of Janus-faced British rule (as it was described by John Reynolds) was essentially intended to hold British grip over natives. For instance, the evasive nature of British justice and their penal system in India was aptly narrated in the magisterial work titled *A Despotism of Law, Crime and Justice*

in Early Colonial India by Radhika Singha. As Singha has highlighted, the British interest in abolishing various native Indian practices such as Sati and taming the crimes of various Indian tribes were not really genuine as the same paramount ideal was not applicable in other pertinent issues such as that of capital punishment, were the moral high ground of humanitarianism was not so easily claimed for the natives (Singha, 1998). The suspension of civil liberties and statutory mechanisms for justice were frequent events especially after 1857 Indian revolt. The laws and statutes promulgated in the aftermath of 1857 mutiny were simply contrary to the British legal system that prohibited any detention that breached the procedure of arrest. Two major acts enacted after 1857 rebellion, Heinous Offences Act (1857) and Military and State Offences Act (1857) epitomized the rigidity of British emergency regulations as both Acts granted for trials by Court Martial. In the context of suspension of habeas corpus, Hussein explains the permanence of such suspension in British colonial jurisprudence in India. Moreover, a notable case regarding the suspension of habeas corpus called *In the Matter of Ameer Khan* has clearly shown how colonial judiciary undermined the habeas corpus petition by showing it as a necessity to uphold public order. After having heard the said case on Ameer Khan, Judge Norman states: "[…] if the danger to be apprehended […] is not temporary, but from the condition of the country must be permanent, it seems to me that the principles which justify the temporary suspension of the Habeas Corpus Act in England justify the Indian Legislature in entrusting to the Governor General in Council an exceptional power" (as cited in: Hussain, 2003, p. 94).

1915 Sinhalese-Muslim Riots in Ceylon

In examining the place of hidden racial elements behind declaring state of emergency regulations in colonial societies, the emergency situation occurred after outbreak of Sinhalese-Muslim riots in colonial Ceylon could be a palpable example. Unlike troublesome India filled with communal riots and anti-colonial resistance movements, British administration in Ceylon continued to be tranquil till the early 20th century. However, the emergence of new nationalist movement from Sinhalese community after gaining British education seemed to have upset the British apple cart as those newly emerged Sinhalese nationalist leaders demanded much constitutional reforms from the colonial government. Furthermore, the revival of Buddhism and its cultural values had caused to grow some anti-colonial sentiments among Ceylonese. In particular, the formation temperance movement

disdaining the Christian values imposed upon native population and its keen interest in educating masses to boycott foreign liquor had set ground for British to be more skeptical towards this emerging national movement in Ceylon (Fernando, 1969, p. 249). The underneath causes which paved the path to the riots started from the growing antagonism of Sinhalese towards Muslims, mainly a sect known as Indian Moors who had come to Ceylon from India. The primary cause for the riots was traced back to 1912 as in that year an important religious procession for Sinhalese Buddhist community in the Central province of the country was interrupted by Coastal Moors. Moors opposed to the pageant organized by Buddhists consisting of musical instruments and claimed that it would be a dishonorable act when it passes the mosque. However, Buddhists' rights to organize their religious procession was duly upheld after matter was heard before the district court, yet, the joy of the Buddhists was short lived when the appeal made to Supreme Court reversed the decree of the district judge. The widespread sentiments about the unjust intervention on the long Buddhist practices simply transformed into a communal hatred towards the Muslim community in Ceylon. Events reached its culminating scenario in the year 1915 when the annual Buddhist procession was again obstructed by the Moors when it marched near the Mosque in Gampola. This time Sinhalese retaliated, initiating the worst disturbance in Ceylon since 1848. The government reaction to the communal riots was an astonishing one as they considered Ceylon a much peaceful colony without much political or civil disturbances. Colonial Police Inquiry Commission later stated, "there had been nothing in the recent social or political history of Ceylon to suggest that she would be so careless of her good name" (Fernando, 1969). However, when the riots broke out, colonial government mistook them as a rebellion against the imperial rule and suspected that it was triggered by newly emerged Sinhalese Buddhist leaders to crush the colonial rule in the island. The racial aspect of British colonial attitude towards their subjects sprang out leading to impose martial law. The young Western educated intellectuals in Ceylon at the time were keen to demand more constitutional reforms and their involvement in temperance movement and Buddhist revival in the island increased British suspicion about rise of anti-empirical movement like India. In particular, when the riots broke out in Ceylon in 1915, the political unawareness of British colonial administration about the growing tension between Sinhalese and Moorish communities misinterpreted the whole scenario as a rise of Sinhalese middle class to challenge British imperial sovereignty in the island and this misconception caused British indignation towards Sinhalese community. Imposing martial law was mainly motivated to deter Sinhalese community as it was indicated as a necessity by colonial advisor

to Governor Edward Stubbs despite Governor Chalmers was reluctant to impose it at the beginning. Stubbs firmly believed that disturbances were initiated by Western educated Ceylonese Sinhalese men determined to test their strength against the imperial powers. Governor Chalmers too had some resentment on this newly emerged Sinhalese nationalist movement in the colony. His position was clearly evident in a letter sent to the colonial secretary where he stated the "excitable and undisciplined nature of the Sinhalese" regarding the rioters. After declaring martial law, resulting in suspension of civil liberties and ordinary laws of the colony, the British went on to arrest many of the Sinhalese nationalist leaders. P.T.M Fernando has clearly mentioned the atrocities committed by British authorities were driven by their racial hatred towards Sinhalese Buddhist nationalist leaders. He states: "Far worse were the atrocities committed by 'English volunteers' – mainly planters of the tea estates and employees of Colombo Commercial firms – who recruited to patrol the 'disturbed' areas. Many persons were harassed and flogged without being tried, and accusations were rampant many were also executed without trial by these impetuous volunteers" (Fernando, 1969, p. 257).

The reaction of the colonial office to the riots and the unjust manner used by Governor Chalmers in taming them was rather lethargic and the maximum reaction of the office was to dismiss Governor Chalmers from his service. His successor Sir John Anderson appointed a committee to investigate the roots that led to riots and the atrocities committed which finally concluded that allegations on the illegal shootings and other acts committed by European town guards and planters were illegal, yet they were done in good faith. As a matter of fact, the racial element behind imposing martial law in Ceylon was vividly exposed and the British intention of silencing the voices of Sinhalese Buddhists were accomplished as many of the prominent leaders of the temperance movement and Buddhist revival were arrested under emergency regulations. The manner British authorities executed martial law in Ceylon during the riots convinces of their racial motives, because contemporary reports have shown that town guard forces, consisted primarily of European planters and Punjabi soldiers, mainly picked Sinhalese as their victims. Having heard one brutal shooting done by an English planter during the riots, Sir John Anderson stated: "His conduct deserved the loathing and disgust of every decent Englishman" (Archives Reports, 1916). Nevertheless, the dismiss of the governor Sir Robert Chalmers or appointment of inquiry commission could not do any justice for the victims of British brutality of martial law during the riots. More importantly, British colonial office was less interested in granting justice as their reaction to the handling of the riots was more concerned with legality than justice. On the other hand, colonial office

never acknowledged the illegality of suspension of civil liberties and the racial indignation of European community towards Sinhalese Buddhist middle class. The sympathetic views showed by newly appointed governor Sir John Anderson towards Sinhalese community caused severe resentment from the European community in island. Ironically, the English apotheosized theory of Dicey on the rule of law had affirmed martial law as an unknown law to England. Dicey was adamant that under English law, governmental authority could never pass to the military restriction which provided unmistakable proof of the permanent supremacy of the law under English constitution. But, this British constitutional ideal was a non-existent component in the imperial rule in the colonies and the manner British meddled with the situation occurred in Ceylon in 1915 simply demonstrated their least concern over legality of their action. Particularly, the incident of imposing martial law, suspension of civil liberties and the grave consequences risen from the imperial brutality in Ceylon would prove my hypothesis of racial nature in declaring emergency laws in the imperial period. As it was pointed out by David Dyzenhaus, the "threat of martial law was an essential resource for the officials who maintained the British Empire, as they sought to defend imperial interests in the midst of an often very hostile local population" (Dyzenhaus, 2009, p. 59). As we explored in this section by tracing the historical illustrations from colonial societies starting from Ireland to Ceylon, it was notably clear the notion of race was given much relevance behind imposing emergency laws as a pivotal factor rather than the legitimacy of such statutes.

However, in our attempt to create the cardinal thesis in this article, Agamben has entirely excluded the racial elements which were widely prevalent in the state of exception under colonialism in his Eurocentric approach on the concept which was exclusively developed as a paradigm for contemporary democratic governance in modern France, Weimar Republic, Nazi regime, Italy, and Switzerland. While critiquing Agamben's notion of "state of exception", Israeli scholar Yehouda Shenhav states: "What is conspicuously absent in this genealogy is sustained analysis of the role of the 'exception' in the history of imperialism. This is unfortunate, if only because at the beginning of the twentieth century Western colonies occupied some 85 per cent of the world's territory (Fieldhouse 1967), creating political spaces in which imperial powers used alternative models of rule, and thus providing a rich arena in which to study sovereignty" (Shenhav, 2012, p. 21).

Having examined the given historical references in Ireland, India and Ceylon, critique on Agamben's defect of deconstructing emergency situation in colonial periods and the racial motives maintained by colonial powers becomes a salient factor.

In fact, the intellectual nourishment of Agamben's conception of state of emergency was mainly attributed to Walter Benjamin, and his idea of describing the state of emergency was mainly portrayed through his narrative in the context of Holocaust. Benjamin had mainly analyzed his thesis from the standpoint of the oppressed and the uptake of using the phrase "state of emergency" was akin to the oppression that people face from state regimes. Benjamin described the constant oppression of the people under so called "state of emergency" as not an exception, but something that will finally transform into a rule (Benjamin, 1978). The racial aspect under such a rule and its repercussions in anti-colonial struggles were further elucidated by Franz Fanon, whose thesis on colonialism had duly depicted the way exception became the rule in colonies. In the thesis constructed by Fanon, under the guise of French colonialism in Algeria he saw the lives of colonial subjects living in there as a mere existence (Fanon, 1968). The most important part of Fanon's analysis on the imposed state of emergency in colonial rule deals with racialized distinctions that begot different ways of subjectivity in the colony. The methods of colonial legality that created the distinction between Arabs and Europeans in French Algeria were often taken as instances in Fanon's approach to state of exception. His exile in Paris further sharpened his understating on the racial distinctions behind emergency regulations in colonial emergency as he himself became a victim of racist experience in France. This situation was vividly described by Shenhav: "Fanon left the colony (Martinique) for France; in fact, he ran away intending not to come back. In Paris he discovered with great dismay that the black subject could not escape his blackness, and so he left once more for Lyon. Fanon's *Black Skin, White Masks* [*Peau noire, masques blancs*, 1952] was one of the first books born of this tormented intellectual and chronic transgressor of boundaries. Fanon provides an assertive depiction of the ways in which the cultural melting pot of colonial encounters is at best an illusion of lives shared, portraying the splits, attractions and rejections that characterise every colonial subject. Fanon was drafted into the French occupation forces in Algiers, only to resign and join the FLN anti-colonial forces" (Shenhav, 2012, p. 22).

However, the notable contribution made by Fanon declared a revolutionary mechanism which theorized revolutionary violence in anti-colonial struggles. As a matter of fact, in this article we have taken the kaleidoscopic picture drawn by Fanon in tracing the racial factors along with emergency laws in colonial Algeria as a palpable illustration revealing the defective side of the "state of exception" theory of Agamben. "Camp" was the extreme manifestation that Agamben regarded as a space of exception where detainees had no legal rights and acts carried out by authorities against them did not appear as crime. Agamben described them

as *hominis sacri*. But, in his analysis on the said concept he paid a less concern regarding the state of coloniality and exception rules. Our analysis in this section tracing the colonial encounters with state of emergency is totally wrapped with racial element and how race mattered in imposing emergency laws in colonies.

New Face of Racial Order: Declaring state of Emergency against Roma Community in Italy

The awful events that took place in Italy in 2008 could be regarded as a palpable instance of state of emergency and its force as an oppressing tool targeting a particular racial community in contemporary time. In the months of May and June in 2008, newly elected government of Silvio Berlusconi systematically confined country's Roma community under strict rule of collecting their finger prints. As this abrupt decisions of Berlusconi's government came into force in the dawn of the 70th anniversary of Fascist's regime's introduction of racial laws, some of the critiques tended to look at the situation as a revival of Fascism in its birthplace (Marino, 2009). Nevertheless, in this section we would examine the legal trajectories that paved the path to undermine the position of Roma community and in this analysis we would unveil how state of emergency doctrine can become a practical mechanism in our time as a derogatory principle to fulfill racial motives.

The history of Roma community has long roots dating back to late middle age in Italy and Roma community has always been intertwined with Italian culture even before Italy emerged to become a nation state in the late 19th century. In the late 20th century, larger influx of Roma people to Italian peninsula was mainly attributed to Roma refugees coming from Eastern block and Balkan countries, yet their reception in Italy was filled with skepticism and xenophobic attitudes. Despite having been subjected to different treatments in Italy for centuries, the overall population of Roma community in Italy represents approximately 0.25 of the overall population in the whole country. However, the state of emergency imposed upon them under Berlusconi's government shows the perception that has been sparking towards this particular community among Italians. The regulations introduced by Berlusconi's government mainly defined "Nomads" as a public safety problem. In examining the discriminatory legal status related to Roma community in Italy, it is a fact beyond dispute that their image as a threat to public safety was adequate reason to persecute them. In some instances, there had been attempts made by Italian scientists to demonstrate the criminality as an inherent genetic feature among Roma community, which was seen as an adequate cause to

exclude them from the society (Marinaro & Sigona, 2011). However, the emergency regulations adopted in 2008 as the most recent discriminatory law against Roma community in Italy declared Nomad Emergency Decree which granted emergency powers to the local prefects in the Campania, Lazio and Lombardi regions to adopt laws specifically targeting the Roma living in nomad camps. Isabella Marinaro's article titled *Between Surveillance and Exile: Biopolitics and the Roma in Italy* is a vivid portrayal showing the situation of Roma community in Rome. This study has argued the usage of segregating Roma community as a humanitarian need for the public safety. As an example regarding the reforms taken by city's mayor in 2007, the author states the following: "Encouraged by the evident electoral success of defining Roma as a major problem for the city, and galvanised by the increasing visibility of Romanian Roma following the country's EU accession in January 2007, Veltroni stepped up the camp demolitions that year, triggering an open letter of condemnation by Roma communities which defined his policy a 'pedagogy of terror'. In May 2007 he unveiled a 'Security Pact for Rome' signed in conjunction with the Interior Minister and Regional and Provincial authorities. The pact proposed to advance the social inclusion of the euphemistically-termed 'people without a territory' by building four 'Solidarity Villages', each able to accommodate a thousand people, and to demolish all illegal settlements which would be replaced by parks and other urban renewal projects. One hundred and fifty extra police officers would be deployed to increase surveillance in the new 'villages' and fight organized begging. The text stated that city residents had a right to security and quality of life which were being undermined by people living in unauthorized settlements. While it avoided specifically naming the Roma, it was clear that they were the cause of the security threat, the enemy that had to be contained" (Marino, 2009, p. 276).

In asserting the way how Italy opted for emergency regulations in segregating and confining Roma community as public enemy, first and foremost the history of emergency laws in republic of Italy should be understood. The current constitution in Italy promulgated in 1948 has not explicitly mentioned about suspension of constitutional rights of civil liberties. However, the article 78 of the constitution stands for right of waging war, and has been implicitly regarded as a legal justification to curtail the constitutional rights when circumstances urge to do so. In the recent history of Italian constitution, law makers seemed to have taken some steps to limit civil liberties and fundamental rights guaranteed by the constitution in order to envisage the security threats albeit constitution has not explicitly allowed to limit the basic liberty of the citizens. Yet, those laws are always subjected to the review of the constitutional court and the emergency doctrine has been

important for Italian legal system for two causes. As it was articulated by Gabriella Angiulli, "the first one is the existence of a statute law disciplining the state of emergency and the second one is the existence of a source of law that the founding fathers introduced in our Constitution in order to face the situations of extraordinary necessity and urgency. In both these cases the Constitutional Court had the opportunity to assess the consistency of laws with Constitution" (Angiulli, 2009).

In the context of emergency regulations declared under Berlusconi's government targeting the ethnic group of the Roma, it is possible to assume that the compelling causes mainly arose from the antipathy towards the particular race. Especially, the situation occurred after Romania's accession to the EU in 2007 caused a sense of trepidation in Italian society as many believed the sudden influx of Roma people would disrupt the peace and this situation was further triggered by several statements made by some right wing politicians. For example, after the accession of Romania to the EU in 2017, mayor of Rome Veltroni stated: "Before Romania's EU accession, Rome was the safest capital in the world. We need to repatriate people again; otherwise cities like Milan, Rome, and Turin can't cope with the situation (as cited in: Hepworth, 2014).

In the advent of emergency decree, the situation provoked by right wing politicians in Italy escalated the general feelings against Roma community as the public enemy, and such statements did not prompt any controversy. Before declaring emergency regulations in 2008, in November 2007 the prefect of Rome, Mr. Carlo Mosca made the following statement: "I shall sign the first expulsion orders straightaway. A hard line is needed because, faced with animals, the only way to react is with maximum severity" (Legge, 2007).

As we pointed out in the above section, the constitution of Italy has not widely provided any salient mechanism on emergency laws except Article 78 which refers to waging war, yet, it was affirmed that making such emergency regulations should be based on severe necessity and urge. The reasons that escalated the path to declare emergency laws under Berlusconi's government were not based on any severe necessity or urgency that were hampering the republic of Italy, instead of that, the anger based on suspicion and contempt towards a certain community seemed to had been the main causes galvanized to impose emergency regulations in 2008 and which was further agitated by the above mentioned racially motivated statements of some politicians.

The breach of rights of the Roma community in Italy perhaps could be well examined under Foucauldian narrative of bio-power where Foucault had revealed how politics of bodies remain to be a pivotal factor. In his analysis the function of racism works to differentiate and establish hierarchies between the groups in the

populations and to link the biological survival of one type of people to the death of another; the more 'inferior' and 'degenerate' people are eliminated, the more 'superior' group will become stronger and able to proliferate: "If you want to live, the other must die" (Foucault, Bertani, & Ewald, 1997, p. 244). In this context the enemies are akin to biological threat to the existence and ought to be eliminated from the system for the general good. However, the position held by Foucault was much appealing as his idea of eliminating the public enemy was not necessarily meant to be a physical one, but it emerged in more implicit forms. For instance, Foucault states the form of indirect murder: "the fact of exposing someone to death, increasing the risk of death for some people, or, quite simply, political death, expulsion, rejection, and so on". Perhaps, the depiction of the Roma as a public enemy who is detrimental to public safety in Italian society should be comprehended under Foucauldian guise of biopolitics.

Nevertheless, the fervent racial motives filled with the actions of Italian government during 2008 has again affirmed how emergency laws become a technique of oppression based on heinous racial prejudices. The state machinery of Italy has relied on the racial insecurity against an ethnic community, whose presence has been well established in the peninsula for centuries and the decree of emergency of confining the Roma community to a particular section was simply an act resulting from the skepticism towards that community as an existential threat to Italian public life. The emphasis on the need to issue special decree of emergency upon Roma community from an ostensible security perspective allowed Italian state to persist their governance over an ethnic community based on racial element.

Conclusion

Throughout this article we attempted to reexamine and explore the bare reality that was not touched by the gaze of Agamben in formulating his most compelling idea on the emergency rules. He had constructed the overall idea of "emergency rules" as "permanent technology of government" which existed before the emergence of contemporary security state. Nazi regime was the illustration Agamben applied in analyzing his idea on "contemporary security state", albeit he discussed the 18th-century England and France to a certain extent. Yet, his silence on the imperial ventures of those countries and their constant state of emergency over the colonized clearly diminishes the academic impartiality of Agamben. In his most notable creation of *homo sacer*, borrowed from Roman law, whose position lies outside natural and human law, Agamben has depicted this figure as numb

and worthless: his life can be taken away, but such an act will not be considered a murder. Thus, *homo sacer* becomes a life that does not deserve to live. In applying this archaic model to the contemporary time, he has reckoned on *homo sacer* as an object of modern day sovereign power. Conceptual binaries and zones of indistinction such as inside/outside, norm/exception are established in Agamben's paradigmatic state of exception which continues to produce a bare life through sovereign violence. This so called 'bare life' is formed through the construction and performance of the space in this exception and Agamben has taken the 'camp' as the most rudimentary manifestation of his space of exception. Camps were conceived out of no ordinary legislations where only possible agency happens to be either state of exception or martial law. Agamben has further assessed life of the inhabitants living in those camps as much akin to the life he described in *homo sacer*, because the inhabitants of the camps are removed from their legal status and completely deprived of their every right. Moreover, no actions taken against them by their captors could be questioned as they are treated as *hominis sacri* by the sovereign power which confines their very presence in camps to a 'bare life'. However, in elucidating his analysis on the bare life under state of exception, Agamben seemed to have heavily relied on the concentration camps under Nazi rule (Nazi Lager) as the cardinal embodiment. A very brief concern has been given to British internment camps in South Africa where, as he claims, "a state of emergency linked to a colonial war is extended to an entire civil population". The whole analysis of Agamben has been critiqued by John Reynolds in his book *Empire, Emergency and International Law* in the following manner: "This is conspicuous as a rare and fleeting allusion to colonial history in Agamben's analysis. He does acknowledge the significance of the temporality of the state of emergency in his observation that since the world war, voluntary creation of a permanent state of emergency (though perhaps not declared in the technical sense) has become one of the essential practices of contemporary states, including so called democratic ones. With this move (framing it as a post war phenomenon), however, Agamben simultaneously excises the element of entrenched emergency that had been a feature of legal systems and governance dynamics in the colonies. It also bears noting that while he draws on Hannah Arendt's work on Nazi racial policy in developing his theory of the exception, Agamben leaves aside central elements of her analysis that […] situate the origins of European totalitarianism and 'race-thinking' in European colonialism" (Reynolds, 2017, p. 41).

The silence of Agamben in constituting his analysis on the exception has clearly unveiled that in his works less attention is paid to seeking the trajectories that existed in colonial period, which deeply undermines his formulation of the 'state

of exception' notion. The three main examples we essentially used in refuting the partiality of Agamben's idea on exception have aptly presented the grim reality that lies behind veil of colonialism and racial superiority. In both examples mentioned above, the manner British enacted their emergency regulations in Ireland and India during their colonial enterprise were contingent to the racial and colonial motives of the empire. The bare life existed among the colonized in both Ireland and India: they were not born out of the blue as their sovereignty was vanquished by British imperialism. From a vantage point, the emergency laws imposed upon the natives in India and Ireland were conspicuously driven by racial hatred and they were basically intended to impede natives from continuing their resistance against the colonizers. The martial law declared by British administration in Ceylon during the 1915 Sinhalese-Muslim riots is another illustration that we elaborated in this article which vindicates the racial motives behind emergency regulations. The manner British authorities intensified the process of arresting Sinhalese leaders consisted in taking steps such as confiscating properties; the action was rooted in the hesitation they had towards the Sinhalese Buddhist middle class community as a new threat to the imperial rule in Ceylon. The violence Agamben vividly portrayed in his image of *homo sacer* was quite a frequent experience in Ceylon during 1915 Sinhalese-Muslim riots. Furthermore, declaration of martial law dragged the civil lives and liberties to a deplorable status and emergency doctrine was simply taken up as necessary evil for creating law and order. The colonial resistance movements were trampled under the guise of law and order and the state of emergency was the shield of the empire in gaining the subordination of the subjects. The emergency regulations persisted in colonial India, particularly in the aftermath of Amritsar massacre, and they took rather draconian outlook even though British were much keen in picturing the whole process as sort of necessary evil for preserving the imperial sovereignty in the sub-continent. The imperial attempt to salve their acts of imposing emergency regulations was critiqued by Nasser Hussain in his notable work *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, where the author stated: "Lord Chelmsford suggests, echoing once again a thematic of despotism, every law is a personal and direct manifestation of the sovereign. To call for even the nonviolent disobedience of the Rowlatt Act is to unleash a more general 'disturbance' that threatens the authority of the state. Thus, the real need for martial law is not merely to put down this or that outbreak of violence but to restore this authority" (Hussain, 2003, p. 127).

The given scenarios we portrayed in this article in order to underpin the coloniality and emergency regulations further demonstrate how colonialism has become the best example for any proper investigation on norm, exception and emergency

rules. In the words of Shenhav, "Emergency in the colonies was used as an elastic category, stretching over political disturbances such as riots and insurgencies, as well as to allow for imperial capitalism" (Shenhav, 2012, p. 27). On the other hand, it is a salient factor that Agamben's entire concept on exception owes a heavy intellectual debt to Hannah Arendt (besides his other influences from the works of Schmitt, Benjamin, and Foucault). Yet, he has left no empathy upon her most astute analysis on imperialism. In her monumental work, *The Origins of Totalitarianism*, Arendt went on to discuss the insatiable nature of European nation states, as how European powers persisted in colonial expansion and exploitation finally resulted in forming a tremendous disparity between colonized and colonialists. Arendt has aptly elaborated how European colonial powers enjoyed the liberty of exceeding the legal norms and democracy prevailed in Europe in their colonial administration process (Arendt, 1951, p. 238). The state of exception that emerged from the colonial setting clearly illustrates the legal gap between the rights of the citizens in home country and colony, were the latter was stripped from any legal rights. Agamben's silence on taking the colonial encounter and how emergency regulations operated as a perpetual tool to enslave the whole colonized population as major examples in his thesis has simply proven the Eurocentric bent he adopted in his analysis.

Apart from the colonial prejudices behind the formation of emergency regulations, we unveiled the element of racial discrimination and how it operates in the process of emergency regulations in the modern nation states by providing the so called "nomad emergency" imposed upon the Roma community in Italy under Berlusconi's government in 2008. In fact, racial animosity is another forsaken feature by Giorgio Agamben in constructing the notion of exception and the contemporary events that took place in Italy confirm the gravity of racial hatred in carving emergency regulations against a particular community. In the analysis of Agamben, his endeavor made no attempt of considering how racial superiority plays an indispensable role in making the exception. Even though he has duly pointed out the emergency situation arose in the post 9/11 scenario in his most elaborated description about how Taliban captured in Afghanistan were not protected as POW's under the guise of Geneva conventions and how they were excluded from any right given to a person charged with a crime according to American laws, his silence on considering racial element in carving the pillars of emergency regulations disappoints a serious reader who looks into the deeper causes of emergency doctrine. This defect seems to have risen from the notion of locating racial difference in a field prior to and a distance from mere conceptual contemplation. As it was explained by Alexander G. Weheliye, the distance of

locating racial difference obstructs analyzing race as a key element, which shows how racialized subjects have been subjugated by different means (Weheliye, 2014, p. 89). In this article through given illustrations we have argued the emergency powers are not entirely calculated on averting any danger or forming a rapport between the people and authorities, but rather used as necessary mechanism aiming to protect the sovereign power and assist the ongoing governance. The objectivity of Agamben in constructing his idea of the 'exception' was fundamentally rooted in the historical trajectories of Europe. For instance, the antecedents to the ideological inspiration of Agamben mainly emerged from Roman law doctrine and other European historical events, which is clearly responsible for neglecting the more pivotal impressions stemming from race and coloniality. The contention we presented in this article affirms the continuity of racial doctrine in imposing state of emergency even in the post-colonial world as racial exclusion still holds the helm of declaring emergency regulations in modern nation states. Nevertheless, the state of emergency is a doctrine emerged from the kaleidoscopic versions of racial order, coloniality and preservation of imperial sovereignty that have endowed its inheritance to the de-colonized states born in the post-colonial context. The applicability of state of emergency in legitimizing the political order and taming the particular communities when they appear as a challenge for the state apparatus became a habitual system in many Asian-African states. Especially the state of emergency declared in India, Pakistan and Sri Lanka in many instances in their post-colonial order is a full retrospect of exact acts of regulating emergency or martial laws by their colonial masters in the past. Hence, the main thesis we developed in this article is refuting the one-sided analysis of Agamben and unveiling the bitter and dark history of the state of emergency.

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