行政院國家科學委員會專題研究計畫 成果報告

全球化憲法秩序下的人流管制
研究成果報告(精簡版)

計 畫 類 別 ：個別型
計 畫 編 號 ：NSC 95-2414-H-002-007-
執 行 期 間 ：95 年 08 月 01 日至 96 年 07 月 31 日
執 行 單 位 ：國立臺灣大學法律學系暨研究所

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報 告 附 件 ：出席國際會議研究心得報告及發表論文

處 理 方 式 ：本計畫可公開查詢

中 華 民 國 96 年 10 月 30 日

行政院國家科學委員會補助專題研究計畫 □X 成果報告 □期中進度報告

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計畫類別：X 個別型計畫　　□ 整合型計畫
計畫編號：NSC－95－2414－H－002－007
執行期間：　2006 年 8　月 1　日至 2007 年 7 月 31　　日

計畫主持人：葉俊榮
共同主持人：
計畫參與人員：

成果報告類型(依經費核定清單規定繳交)：X□精簡報告　□完整報告

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執行單位：國立台灣大學法律學系

中　華　民　國　96　年　7　月　30　日

壹、中英文摘要

一、中文摘要

全球化的現象之一便是人的快速跨界流動。人的流動雖然可以讓人才資源有限的國家取得全新與多元的人才來源，但也同時帶給各國政府在疆界管制上一個前所未有的衝擊與挑戰。

從全球化的脈絡下來看台灣的人流管制，也呈現許多結構性的變化。台灣在過去威權時期，對人流採取消極管制的態度，包括政治上的黑名單，以及對全民採取嚴格的出入境管制。隨著台灣的自由化以及民主轉型，不管是解除戒嚴、開放觀光、到近年積極爭取吸引外國科技人才來台，清楚呈現出一個從過去的嚴格管制邁向積極開放的脈絡，而與前述全球化的開放脈絡相當一致。這種變化與全球發展一致，但也有兩岸關係的特殊問題存在。

本研究從全球化憲法秩序來探討人流管制。在確定全球化憲法秩序下人流管制的原則與內容之後，本計畫將進一步探討台灣在人流管制的規範與政策制定，檢視其與前述全球化脈絡的異同，並具體提出適用於台灣的規範與政策建議。

關鍵字：全球化、人流、人流管制、全球憲政主義、全球人權、遷徙自由

二、英文摘要

Globalization has brought not only transnational exchange of goods, services, technologies or ideas, but also, in a rather rapid and profound way, border-crossing human flows. The increase of human flow at global scale brings unlimited human resources and new opportunities while at the same time posts unprecedented challenges on national border controls. On the one hand, economic globalization and free trade demands an open global policy of human flows and competitions. After September 11, 2001, however, the threat from global terrorism has triggered a global cooperative framework on anti-terrorism that aims at strengthening border controls and screening human flows.

Compared to the global trend, the Taiwanese development on human flow regulation has reflected a similar pattern: from the rather strict regulation to a more open policy. In the past,

Taiwan exerted strict border controls over human flow, black list for example, as a result of political authoritarianism. With political liberalization and democratization, a more open policy on human flow has gradually taken root. Yet, due to special – and sometimes even hostile – relationship across Taiwan Strait, human flow between the mainland and Taiwan faces quite different challenges and has been difficult to resolve.

Not only human flow must be understood again the background of globalization, but also human flow regulation must be developed and scrutinized under a global constitutional structure that includes global trade order, global human rights regime and global constitutional arrangements. This project aims at developing general principles of human flow regulation under global constitutionalism and applies them to the particular context of Taiwan. It is hoping that this project would be concluded with certain useful policy advice on human flow regulation in Taiwan that would live up to global human rights stand while meeting with the demand of global competition.

Keyword: Globalization, Human Flow, Human Flow Regulation, Global Constitutionalism, Global Human Rights, Rights to Travel

貳、報告內容

一、前言

全球化造成快速的跨界流動，除了商品、科技或理念等「客體」的流動外，也呈現出「主體」流動的現象：人流。人的快速跨界流動，雖然可以讓人才資源有限的國家取得全新與多元的人才來源，但也同時帶給各國政府在疆界管制上一個前所未有的衝擊與挑戰。一方面，在貿易自由化與經濟全球化的要求下，各國必須開放人才的自由流動與競爭。但另一方面，在 911 事件之後，「反恐」成為全球重視與共同合作的目標，反過來又要求各國相互間的疆界管制以及人流的限制。

從全球化的脈絡下來看台灣的人流管制，也呈現許多結構性的變化。台灣在過去威權時期，對人流非常嚴格管制的態度，不僅基於政治控制的理由有所謂的黑名單，即連人民

的出入國或外國人的進出台灣都採取非常嚴格的許可制。不過，隨著自由化以及民主轉型，不管是解除戒嚴、開放觀光、到近年積極爭取吸引外國科技人才來台，清楚呈現出一個從過去的嚴格管制邁向積極開放的脈絡，而與前述全球化的開放脈絡相當一致。但台灣在人流管制的問題上，亦有其獨特的問題，那就是兩岸之間的人流管制。

本研究從全球化憲法秩序來探討人流管制。全球化憲法秩序的三個層次：全球貿易秩序、全球人權秩序、以及全球憲政秩序，無一不與人流管制發生密切的關係；而人流管制的適當性與正當性，也必須同時受到這三個層次的檢驗，才能真正具有實踐與規範的功能。在確定全球化憲法秩序下人流管制的原則與內容之後，本計畫將進一步探討台灣在人流管制的規範與政策制定，檢視其與前述全球化脈絡的異同，並具體提出適用於台灣的規範與政策建議。

二、研究目的

全球化(globalization)使得商品(goods)、資金(capital)、服務(service)、科技、甚至是抽象的想法與理念(ideas)都在全球進行快速跨界的交換與流動。這些全球化的交換與流動，不但在「量」的方面史無前例的增加，甚至在「質」的面向也有很大的改變。今天，一個在歐洲登記、而在美國進行主要銷售的公司，其電話客服部門可能是設在印度。除了商品、科技或理念等「客體」的跨界流動之外，全球化的快速發展已經進一步呈現出一個「主體」快速流動的現象：人流(human flow)。人的快速跨界流動，雖然可以讓人才資源有限的國家取得全新與多元的人才來源，但也同時帶給各國政府在疆界管制(border control)上一個前所未有的衝擊與挑戰。全球化的人流，比起先前商品、資金、科技、甚至是理念的交換與流動，都在一個更根本的基礎上衝擊、甚至侵蝕著建立在傳統主權觀念下的國家及其依此觀念所生的規範與管制體系。

一方面，在世界貿易組織(World Trade Organization, WTO)的規範體系下，要求各國必須開放人才的自由流動與競爭，以促進貿易自由化與經濟全球化。各國或為了追求競爭力、或為了發展觀光，甚或可能是在其他國家要求開放的壓力下，而必須開放其內國對於人的「進」與「出」的管制：可能是積極爭取其他國家的人進來，也可能是替自己國家的人積極爭取出去的機會。這使得全球化下的人流，不管在實際需求或規範制定的面向上，

都呈現出快速開放、減少管制的呼聲，甚至包括一些要求「去國籍化」或「多重國籍」的基進論點。然而，另一方面，因為2001年美國紐約的911事件以及這幾年陸續在各地所發生的恐怖攻擊，使得「反恐」(anti-terrorism)成為全球重視與共同合作的目標，因此又反過來必須加強各國相互間的疆界管制以及人的流動。從而，全球反恐的結果，反而是要求管制、甚至進一步的限制人流。其實，不論是反恐或恐怖活動本身都要放在全球化的脈絡下才能加以適切理解。全球化加速文明間的對話與整合，但也同時加深所謂優勢文明與劣勢文明之間的落差，引爆不同文明之間的衝突，恐怖活動成為一個引爆點，也是一個全球化具體的反挫。人流的「開放」是因為全球化，但人流的「限制」又何嘗不是因為全球化呢？

從全球化的脈絡下來看台灣。台灣在過去威權時期，對人流非常嚴格管制的態度，不僅基於政治控制的理由有所謂的黑名單，即連人民的出入國或外國人的進出台灣都採取非常嚴格的許可制。不過，隨著1980年代開始的自由化以及1990年代的民主轉型，不管是解除戒嚴、開放觀光、到近年積極爭取吸引外國科技人才來台，清楚呈現出一個從過去的嚴格管制邁向積極開放的脈絡，而與前述全球化的開放脈絡相當一致。

這個在實際上以及政策上的開放趨勢，也已經相當程度地反映在規範層面上。司法院大法官釋字第558號解釋即以人民具有入出國境之基本權利，來指摘國家安全法（舊法）未作區分即一概採入境許可制的方式係屬違憲。入出國及移民法在1999年公布施行之後，也有4次重大的修正，以因應前述人流開放管理的相關問題。內政部入出國及移民署組織法也於今（2005）年11月8日於第6屆立法院第2會期正式通過。

不過，即使是在積極開放及對外爭取人才的趨勢下，目前的管制與規範體系還是呈現出相當的僵硬與封閉。大法官釋字第558號解釋以有無戶籍作為區別國民入境是否須許可的標準，即引發不少討論，也有從國際法或普世人權的觀點來提出批判者。其實，台灣受到過去威權遺緒以及部分意識型態的影響，在政府用人的考試與人事制度上，不管是在憲法的條文規範中，還是在整體運作的文化層面上，都對人流的開放構成相當的限制與困難。

此外，台灣在人流管制的問題上，亦有其獨特的問題：兩岸之間的人流管制。因為經濟、文化等競爭與交流的需求，兩岸間的人流快速增加。台商到中國大陸投資是對岸經濟

發展的關鍵性來源之一；愈來愈多的台灣學生、人民到中國大陸求學、觀光，甚至兩岸婚姻的增加等。但是，也因為兩岸特殊的敵對關係，不管是基於國防安全的理由或是治安維護與防制犯罪的必要，兩岸間人流的管制與限制，都勢所難免。這正是台灣在面臨人流管制上一個相當棘手的兩難問題。不過，在處理與大陸之間的「人流」議題上，也並非只有台灣面臨特殊困難。香港在 1997 年成為中華人民共和國的特別行政區後，就曾經因為香港永久居民在大陸的子女是否可以遷住香港(right of abode)的問題，導致香港特區上訴法院、香港政府以及中國人大之間一連串的憲法爭議。這個問題，除了攸關約 10 萬大陸人民是否具有香港永久居留權而可以遷住香港的政策考量外，也涉及國際社會相當關心之基本人權以及香港回歸中國後人權是否倒退的隱憂，才會引起國際間相當高度的重視。

很清楚地，人流管制，必須放在全球化的脈絡下來思考，才能完整處理。不管是開放（例如基於全球競爭）或限制（例如基於全球反恐），其實都無法脫離全球化以及其所衍生跨國管制或合作的問題。當然，人流管制也必須與人權規範（尤其是全球人權秩序）加以結合，才能避免政策或規範動輒發生違反內國憲法或國際人權公約的疑慮。台灣在不管是對外國人出入境、外籍配偶或外籍勞工的相關規範與政策制定上，一直都無法避免可能有人權違反或不當歧視的指摘，恰恰反映出此一問題。畢竟，人流管制的對象同時具有內外的特質：既包括內國人民、也包括外國人，在相關規範或政策制定上，原本就比其他議題，更需要考慮跨國或國際規範標準。

因此，我們必須從全球化憲法秩序(global constitutionalism)來探討人流管制(human flow regulation)。全球化憲法秩序的三個層次：全球貿易秩序、全球人權秩序、以及全球憲政秩序，無一不與人流管制發生密切的關係；而人流管制的適當性與正當性，也必須同時受到這三個層次的檢驗，才能真正具有實踐與規範的功能。在確定全球化憲法秩序下人流管制的原則與內容之後，本研究將進一步探討台灣在人流管制的規範與政策制定，檢視其與前述全球化脈絡的異同，並具體提出適用於台灣的規範與政策建議。

三、研究方法

本研究從全球化憲法秩序探討人流管制，首先要分析全球化憲法秩序下人流管制的原則與內容，其次則將檢視台灣在人流管制的規範與政策制定，探討其與前述全球化脈絡的

異同，最後並具體提出適用於台灣的規範與政策建議。

1.人流、人口及人力

本研究釐清「人流」問題的本質與特色。「人流」的問題，往往與「人口」及「人力」二個問題相互混淆，但其實三者是相關、卻非常不同的問題。人口沒有「質」的問題，卻可能有「量」問題：人口過剩或人口不足。

目前台灣面臨「少子化」問題、大陸或外籍配偶以及所生子女的相關議題，應該放在人口結構下來思考。而人力，則有「質」、也有「量」的問題。向外國爭取高科技人才來台（或者，相反地，限制台灣的高科技專業人才到大陸），是人力在「質」的面向上控制的問題；外籍勞工或大陸勞工來台工作的問題，則是人力在「量」的面向上的管制。人口以及人力的管制，牽動人流的管制；而人流的管制，也必須配合人口與人力的相關考量。三者互相關連，卻不能混為一談。

如何在充分釐清人口、人力與人流的關係之後，將人流管制的議題加以清楚定位，成為本計畫探討的重點。很清楚地，人口與人力涉及內國的各種政策考量，而必須面臨在地化與全球化的拉扯，而其中又要如何適切地納入人流考量，使其不致發生人流的「溢流」或「阻塞」，成為人流在制度因應上的重點。

2.全球化憲法秩序與人流管制：國際秩序與內國秩序的交互作用

全球化憲法秩序的三個層次：全球貿易秩序、全球人權秩序、以及全球憲政秩序，無一不與人流管制發生密切的關係；而人流管制的適當性與正當性，也必須同時受到這三個層次的檢驗，才能真正具有實踐與規範的功能。

首先，在以世界貿易組織(WTO)以及其他相關的全球或區域貿易規範為主要內涵的全球貿易秩序(Global Trade Order)，即與高階專業人才或中低階勞工的輸出入密切相關。在兩岸都已成為世界貿易組織的會員之後，台商與兩岸的人流管理，也必須放在此一脈絡下來思考。而這些科技人才或勞動人才在台灣停留或居留期間的相關工作權之保障與歧視禁止，也與國際勞工規約密切相關。

其次，也是人流管制最需要重視的，就是以〈公民與政治權利國際盟約〉(International Covenant on Civil & Political Rights, ICCPR)〈社會、經濟與文化權利國際盟約〉(International Covenant on Economic, Social & Cultural Rights, ICESCR)為核心並向外圍擴展的「全球人權秩序」(Global Human Rights Order)。在人流管制上，過去台灣曾經發生的黑名單、人球或返鄉權的問題、雙重國籍的處理、外國人驅逐出境的爭議等，無一不涉及〈公民與政治權利國際盟約〉的相關條文規定，如第 12 條涉及本國人民之返鄉權、遷徙自由，第 13 條涉及外國人驅逐之合法正當程序等。曾經喧嚷一時的吳宜樺案所涉及之跨國兒童監護的問題，亦與全球第一大人權公約：〈兒童權利公約〉(Convention on the Rights of Child)的規範有關；台灣所面臨的諸多跨國色情或仲介（甚或強制）從事色情行業的議題，亦必須受到全球第二大人權公約：〈禁止對婦女一切歧視之公約〉(Convention on Elimination of All Forms of Discrimination Against Women, CEDAW)以及其後所發展出之相關規範（例如，International Legal Standard on Trafficking in Women）。

全球化憲法秩序的第三個層次是以類如歐洲聯盟憲法條約或歐洲人權公約等跨國憲政秩序為基礎的規範架構，而此一架構與我們在面對跨國婚姻、國籍、或反恐的相關議題時，往往也是密切相關。從歐盟有關從人流管制相關議題的發展看來，相關人權公約扮演重要的角色。台灣在國際參與不足的情況下，雖然在相關公約的參與面及實際執行面向容有不同，但卻必須重視此等公約的發展。

四、結果與討論（含結論與建議）

1. 全球化的發展帶動了人的流動，但在同一個發展脈絡下，全球化也帶動了憲政秩序的普遍化，尤其是國際貿易與競爭秩序的快速發展與國際人權理念的普遍建立，均對各國人流管制的政策的態度造成相當的影響。從歐盟的研究中可以清楚地發現這樣的現象。台灣雖然在國際組織與國際公約的參與上有其特殊之處，但在全球化脈絡下所受的衝擊與其他國家並沒有多大的不同。

2. 在「人流」問題的掌握方面，必須特別注意「人流」問題與「人口」及「人力」二個問題相互混淆。其實三者是相關、卻非常不同的問題。人口沒有「質」的問題，卻可能

有「量」問題，包括人口過剩或人口不足。人流問題所引起的許多歧視與融入或多元文化的爭議，往往與此有關。

3. 在掌握人流問題的本質與處理原則下，對於新移民或外來移工等的處理態度，應該從要求「他們」融入「我們」的社會，轉向為創造一個多元的社會，讓各種因素的加入，豐富文化的內涵。

4. 台灣在面臨全球化下的人流現象，必須積極從國際上爭取人才，但在政策與制度面向上，必須注意到:(1)國家發展是多面向的，所謂向國際爭取人才並不侷限於科技人才，而是廣泛地包括體育、文化、金融、法律、建築等各方面的人才，以提升台灣各方面的發展。(2)為了真正落實人才的延攬，政府必須改變現行僵硬的人事制度，包括考試用人以及薪給等制度都必須重新檢討。

5. 除了國家競爭力的考量外，人流現象所帶來的社會結構與正義問題，更必須正視。由於各國對人流現象的處理與國際人權公約密切相關，從國際比較的研究也發覺此一趨勢，因此政府對國際人權公約的融入，必須更積極與用心。

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肆、計畫成果自評

本研究從全球化的現象中具體點出其中的人流現象，並從全球憲政秩序的角度進行分析，清楚地掌握國際上處理此一問題的面向。在此一方面，對全球化或人流問題的處理，有相當的成果。為了掌握國際上處理此一問題的內涵，本研究特別探討歐盟相關問題地探討，也看出其中國際公約的深刻影響。這對與國際公約（尤其是國際人權公約）沒有密切扣合的台灣而言，特別具體意義。

然而，台灣面臨全球化人流的考驗之餘，還有一個特殊的問題，那就是兩岸之間的人流管制課題。本研究有此一意識，也掌握到一些資料與課題，但仍沒有能夠做深入的調查與研究，有待以後繼續研究。

伍、附錄

一、計畫中補助出席國際會議發表論文心得報告

二、發表論文原文

附件二

Paper presented at the VIIth World Congress of Constitutional Law: Rethinking the Boundaries of Constitutional Law, International Association of Constitutional Law, Athens, Greece, June 11-15, 2007

Theorizing a Dichotomy in Emergency Constitutionalism

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1. Introduction

Terrorist attacks or at least threats to attacks have rejuvenated a constitutional discourse on modern responses to emergencies. Massive destruction of natural disasters or epidemics, however, has yet to be included in our reflection of emergences. The SARS epidemic, Hurricane Katrina or Tsunami in South Asia came to our minds as vivid illustrations. Profound casualties as pictured by recent climate change experts may pose threats along the line with much greater ramifications.

In the context of terrorist attacks, a particular enemy is targeted at and a war between sovereigns or distinctive groups is initiated. If reacted not properly, terrorist attacks may invite retaliations or intensify conflicts. In light of natural disasters or epidemics, however, no particular enemy is present and it is not a war between humans but rather, a war between human and nature. No immediate retaliation from nature may occur. Despite sharp contrasts, both nevertheless lead to disastrous consequences that are massively destructive, perhaps irreversible, and most importantly, threatening to normal functions of constitutional democracies.

In what ways and to what extents should modern constitutionalism recognize such a dichotomy in dealing with emergencies? Would constitutional exceptions required by natural disasters or epidemics be justified rather more easily than by terrorism? Should it be so? What are distinctive natures and characteristics underlying this dichotomy that may demand for respective theorizing in the discourse of emergency constitutionalism? To answer these questions, this paper aims at theorizing a dichotomy in emergencies and hopes to provide a distinctive view on various dilemmas posed by the recent discourse of emergency constitutionalism.

2. The Debate on Emergency Constitutionalism

The 911 terrorist attack and responding measures by the United States and the international community have invited constitutional scholars worldwide to debate about the role of constitutions in emergencies.[1] Issues abound, but at the core stand three mostly debated and fundamental issues. First, should any modern constitutions recognize extraordinary measures or provide special arrangements for the time of emergency? If without any constitutional codification, can any extraordinary measures or special arrangements be constitutionally undertaken and legitimized due to exceptional necessity? Can legitimacy be derived from necessity in modern constitutionalism? The second issue is about decision-making frameworks and institutional arrangements in time of emergency. Should the executive take the lead and enjoy greater discretion or the legislature maintains to make primary decisions? Last but not the least, should standards of review by courts be altered in time of emergency? Should they be so loosened to allow more aggressive measures? Whether and to what extents may courts provide for compensation? If provided, what is the nature of such compensation? In the following, I shall reexamine the issues in the

[1] Of the most noted debates is the argument for and against the emergency constitutionalism between Professor Bruce Ackerman of Yale Law School and Professor Laurence Tribe of Harvard Law School. *See generally* Bruce Ackerman, *The Emergency Constitutionalism*, 113 YALE L. J. 1029 (2004); Laurence Tribe & Patrick Gudridge, *The Anti-Emergency Constitutionalism*, 113 YALE L. J. 1801 (2004). Other symposiums on this issue bound. *See e*.g. Symposium, *Civil Liberties in a Time of Terror*, 2004 WIS. L. REV. 253 (2003); Symposium, *Emergency Power and Constitutionalism*, 2 INT'L J. CONST L. 207 (2004); Symposium, *Terrorism and the Constitution: Civil Liberties in a New America*, 6 U. PA. J. CONST. L. 998 (2004); Symposium, *Emergency Powers and Constitutionalism*, 40 GA. L. REV. 699 (2006); Symposium, *Terrorism, Globalization and the Rule of Law*, 27 CARDOZO L. REV. 1079 (2006).

current debate of emergency constitutionalism and point to what is missing as a result of their monolithic view.

2.1. Constitutional Dualism in Emergency

The debate between Bruce Ackerman and Laurence Tribe made explicit a profound question: whether the necessity in emergency should lead to any formal recognition of a set of different arrangements in the Constitution? With a rather pragmatic view, Ackerman argues for a constitutional doctrine "*that allows short-term emergency measures but draws the line against permanent restrictions*."[2] In contrast, Laurence Tribe maintains that "*constitutional law, in all its ordinary complexity, should not in important respects be set to the side and suspended during certain defined episodes*".[3] Although both scholars speak to merely the American constitutional context, their debate sets up resonance in the world.

"*Sovereign is he who decides on the exception*"[4], the most famous phrase by Carl Schmitt, speaks for the political nature of exceptional powers and perhaps leaves much room for *above*-constitutional measures in time of emergency. Against this Schmittian understanding that exerted great influences upon the German constitutional practice during between the two Wars, however, recent constitutions have been considerably cautious in permitting any greater discretion in time of emergency as lived war experiences and subsequent internal conflicts lingered.

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[2] Bruce Ackerman, *id*. at 1030.

[3] Laurence Tribe & Patrick Gudridge, *id*. at 1807.

[4] Carl Schmitt, George Schwab trans., Political Theology: Four Chapters on the Concept of Sovereignty 5 (University of Chicago Press ed., 2005)

Recent researches show that new constitutions in young democracies or newly independent states are inclined to place stronger congressional checks on executive measures in time of emergency.[5] These surveys clearly indicate that the pragmatic view represented by Ackerman is more prevalently accepted in global constitutional practices and perhaps is an inevitable compromise between on one side *above-constitutional* by Schmitt and on the other *strictly constitutional* by Tribe.

The actual issues, consequently, are not about *whether* but rather about *to what extent* exceptional powers are to be recognized and arranged in modern constitutionalism. This leaves us to consider the next two debated issues.

2.2. Constitutional Decision-Making Framework

Given constitutional dualism in emergency, two pivotal issues concerning decision-making framework are left for further consideration. First is the debate on constitutional or legislative model.[6] Should exceptional power in time of emergency be regulated in the Constitution or by ordinary legislative means? The choice between constitutional model and legislative means stands a very different attitude in reckoning with emergency.

The legislative model handles emergencies by ordinary statutes that grant measures different from ordinary ones with clear implications that they are only

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[5] Venelin I. Ganev, Emergency Powers and the New East European Constitutions, 45 AM. J. COMP. L. 585, 594-95 (1997); Margaret DeMerieux, The Regimes for States of Emergency in Commonwealth Caribbean Constitutions, 3 J. TRANSNAT'L L. & POL'Y 103 (1994).

[6] For a rather comprehensive examination of this issue, *see* John Ferejohn & Pasqualie Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. J. 210 (2004).

temporary: once emergencies subside, a return to normality should be in place. The legislative model also gives the legislature an upper hand since it has primary power to control over emergencies. Many advanced countries –regardless constitutional traditions or government systems– adopt the legislative model.[7] In contrast, constitutional model codifies a different decision-making framework in advance –by constitutional framers rather than contemporary legislators– to prepare for emergencies. The constitutional model inspired by the old Roman tradition often assigns the executive – elected presidents in modern constitutions– to take the lead in time of emergency regardless ordinary decision-making arrangements. Variations do exist, however, in the degree of parliamentary controls over the executive, and in a few cases of strong parliamentary tradition, parliaments maintain to have primary controls.[8] Unlike legislative model, constitutional model seems to have entrenched emergency powers and granted much stronger endorsement of extraordinary arrangements.

The actual and critical difference between constitution and legislative models, in my view, is in two ways: time of authorization and risk of abuse. Regarding time of authorization, constitutional model signals a green light at much earlier time as long as conditions are met with prescribed constitutional requirements. In legislative model, however, although pre-enacted statutes may remain intact and in this way function similarly to constitutional model, the legislature are always invested with primary powers to make revisions or even enact a new law upon current

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[7] Such as Germany, Italy, Spain, Great Britain and the United States. *Id*. at 215-17.

[8] *Id*. at 213-14.

contingencies. Thus, the timing of decision making in emergency arrives at much later time.

Risk of abuse exists in both models but in quite different ways. As the consequence of constitutional entrenchment, constitutional model runs the risk of emergency powers being abused by the upper hand –often the executive–. Many dictatorial and authoritarian regimes in the last century testified to this high risk. But legislative model also runs the risk of being abused by the legislature responding not in a promptly fashion. Certain gives and takes may even occur in requesting legislators for quick response.

The second debate on decision-making framework in time of emergency is the division of labor between the executive –often the president– and the parliament. Although constitutional model may correspond to executive model and legislative model to parliamentary one, it does not always correspond. In assigning primary emergency powers to the executive, efficiency and capacity stand at pivotal concerns. In maintaining parliamentary prevalence, however, rule of law and human rights protection are of core values. The seemingly diverting values render this institutional choice contested. But most constitutional practices are often in the middle: either assigning primary powers to the executive but with strong parliamentary checks or maintaining parliamentary prevalence but with greater administrative discretion.[9] With both institutions partaking in emergency, the third party –courts– becomes inevitably noticeable, and that brings us to the third issue.

[9] *Id.* at 226-31.

2.3. Standards of Review & Role of Courts

In times of crisis, certain aggressive measures may be undertaken in order to tackle with emergencies more effectively. Preserving civil liberties in emergencies thus becomes a challenging task particularly facing courts.[10]

Should courts review these measures with a much loosened standard for the sake of emergencies? Or, should judicial review be undertaken with an even heightened standard because political branches are already given much greater discretionary powers? With stands loosened or heightened, one may even reasonably doubt about any positive role played by courts in times of crisis.[11] Are courts going to have any influences at all during the time when necessity and expediency are given a much higher priority? In addition to the debate on standards of review, the critical nature of timing is often overlooked. It is often that when the crisis came into an end or at later stages, courts would be involved. At this later time, courts would not have to rush into conclusion –as it is often too late for rights-infringed citizens or even non-citizens– and might exercise certain hindsight in judging circumstances. Hence, one may reasonably argue that precisely due to this later timing, courts must rely upon hindsight and exercise stricter standard for the protection of human rights.[12] But,

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[10] See generally Oren Gross, Chaos and Rules: Should Responses to Violent Crisis always be Constitutional?, 112 YALE L. J. 1011 (2003); Mark Tushnet, Defending Korematsu? Reflections on Civil Liberties in Wartime, 2003 WIS. L. REV. 273 (2003); Samuel Issacharoff & Richard H. Pildes, Emergency Contexts without Emergency Powers: the United States' Constitutional Approach to Rights during Wartime, 2 INT'L J. CONST. L. 296 (2004); David Cole, Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis, 101 MICH. L. REV. 2565 (2003).

[11] Mark Tushnet, *id*.; Oren Gross, *id*.

[12] David Cole, *supra* note, at 2568. See also Oren Gross, *id*.

would it be fair for the judiciary to take advantage of hindsight and judge emergency measures that were thought as unavoidable in such a very urgent and short time span?

Perhaps what courts can do is, alternatively, compensation. In times of crisis, rights infringements may be inevitably yielded for expediency but grave loss may nevertheless be compensated.[13] In this sense, a special kind of "transitional justice" may be taken into consideration in emergency constitutionalism. Still, how generous should these compensations be? In what ways should compensations be funded? Should it be prepared in normal times? By whom should these compensations be provided? All of us? those responsible? terrorists? Al Qaeda regime? Or enemy states?

2.4. Problems with the Monolithic View

Indeed, constitutional choices on the aforementioned issues are never easy. Perhaps a more significant but rather underestimated problem in the present debate is the risk of oversimplification by expressive or implicit monolithic view. In debating these issues, scholars of emergency constitutionalism do not distinguish different types of emergency or crisis. There in fact exists a wide array of emergencies ranging from bird flu to biochemical attack, from climate change to suicidal bombing, from tsunami to sabotage, to nuclear installation. Should we treat these very different types of emergency the same way? Should choices about emergency constitutionalism be made equally applicable to each and every type of crises without differentiation?

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[13] Bruce Ackerman, *supra* note.

Treating all hazards under one formula is much easier than identifying each of them with respective legal frameworks in their authorization, institutional arrangements, monitor, review or even compensation. But simplicity makes no excuses for inaccuracy. Facing terrorist attacks or threats to attacks, time may still be allowed for deliberation –rather than rushing into counter-attacks– and democratic legitimacy for decision-making is much more in need. In cases of epidemics such as SARS or bird flu, however, time is much urgent and medical or special expertise may suffice for preliminary legitimacy for decision-making. Besides, emergency management always involves various levels of compromise among competing interests. Terrorist attacks of 911 and Hurricane Katrina represent quite different modes of emergency. There existed an identifiable enemy in 911 while no one would actually charge our mother nature as the enemy in Katrina. Would it be possible that we prefer different models for different emergency situations? At least, given a wide array of crises and the increasing need of preparation in advance in highly complex modern societies, a monolithic view on emergency and the resulting constitutional design runs the risk of being both over-inclusive and under-inclusive. In the following, I shall advocate for a typology in emergency constitutionalism and based upon which the difference in institutional arrangements would be drawn.

3. The Dichotomy of Man-Made and Natural Emergencies

Emergency regimes envisaged by a monolithic view risks oversimplification. It is only sensible to design modern emergency constitutionalism based up typologies. The critical issue is what kind of typology? It would be reasonable to take an ad-hoc position and treat every specific kind of emergency in its own right. But would that

help us in any way in designing constitutional regimes for emergency? If neither monolithic oversimplification nor ad-hoc fragmentation is proper for designing modern emergency regimes, what should be our option?

3.1. Typology in Emergency Constitutionalism

The following discusses standards by which various typologies may be drawn and explain why this paper argues for a dichotomy model that serves different functions both at constitutional and institutional levels respectively

3.1.1. Standards of Typology

Although most constitutional or legal frameworks rarely distinguish types of emergency in their respective provisions, a few nations manage to create various typologies in their treatments of emergencies. For instance, the Indian Constitution distinguishes three types of emergency –war, failure of constitutional machinery in states and financial emergency– and provides each of them with various institutional and time constraints.[14] A legislative model, the Canadian Emergency Act also distinguishes four types of emergency including public welfare emergency, public order emergency, international emergency and war or armed conflicts; each of which requires different institutional arrangements and periods for reauthorization.[15]

[14] Articles 352 through 360 of the Constitution of India.

[15] For introduction of the Canadian emergency regime, *see generally* Kim Lane Scheppele, *North American Emergencies: The Use of Emergency Powers in Canada and the United States*, 4 INT'L J. CONST. L. 213 (2006).

The tripartite or more distinctions drawn in the Indian or Canadian emergency regimes may shed light on our contemplation of typology. In the Canadian framework, there seem to be mixed standards by which four types of emergencies are drawn: domestic/international; public welfare/public order; war/non-war. The Indian regime seems to distinguish types based upon nature of emergencies: war, political or economic. Also, theoretically speaking, one may refer to the stages of the historical path for typology. The distinction between cold war and anti-terrorism serves as one example along this line.[16] The other typology may distinguish between domestic and international emergencies. It is not surprising at all that a variety of emergencies may be distinguished on the basis of various typologies, but is any most sensible typology to be based and distinctions drawn?

3.1.2. Designated Functions of Typology

In my view, any sensible typology must be drawn because of their distinctive functions at both constitutional and institutional levels. We draw distinctions on any typology in emergencies precisely because of their distinctive constitutional and institutional responses. In other words, we must ask whether there is a distinctive type of emergency that requires different constitutional choices from others. If so, why and how? If for example a distinction between international/domestic emergencies triggers no different responses at both constitutional and institutional level, it remains hence merely an interesting contemplation. In light of constitutional and institutional

[16] Laurence Tribe & Patrick Gudridge, *supra* note (comparing the difference, in particular, the role of the court, between the past Cold War regime and the current war-on-terror regime)

functions of typology, I argue that the division between man-made and natural emergencies deserves most recognition in theoretical debates and institutional arrangements about emergency.[17]

3.2. Dichotomy between Man-made and Nature

Man-made disasters refer to a situation of crisis triggered by individuals, groups or states with an identifiable intention regardless of domestic or international origin. Suicidal attacks such as 911 or more aggressive plots along this line are typical examples of this category. By contrast, natural disasters refer to incidents triggered by natural forces, including physical ones, such as such as storms, flood, draught, earthquake, tsunami, or biological ones, such as SARS, bird flu or other epidemics. Bio-chemicals used by enemy or terrorists in order to provoke casualties and fear are classified as man made disasters.

The constitutional ramifications of this typology concern on the separation of powers or human rights infringements regarding to counter measures employed in the man-made and natural disasters. Should we employ a different standard in reviewing the constitutionality of regulatory actions in terrorist attacks from aggressive measures in countering natural disasters? The institutional aspect of this typology deals more with efficient management in emergency. Should we treat all hazards under one institutional mechanism or in separate forums?[18] For example, should we establish a

[17] For similar arguments in placing upon the importance of typology and in particular, man-made and natural distinctions, *see e.g.* Jon Elster, *Comments on the Paper by Ferejohn & Pasquino*, 2 INT'L J. CONST. L. 240, 240-41 (2004).

[18] Robert J. Rhee, *Terrorism Risk in a Post-911 Economy: the Convergence of Capital Markets, Insurance, and Government Action*, 37 ARIZ. ST. L. J. 435 (2005); Robert J. Rhee, *Catastrophic Risk*

unified agency responding to all hazards or allowing existing regulatory agencies to perform their job separately? To answer these questions and develop our responses properly, it is necessary to explore further distinctive features of Man-made and Natural disasters.

3.3. Distinctive Features of Man-made & Natural Disasters

At least five distinctive differences between man made and natural disasters are recognizable with different ramifications for constitutional and institutional choices. These five aspects include: 1) enemy, 2) fear, 3) liberty, 4) space, and 5) time

3.3.1. Enemy

In the man-made disasters, there is always an enemy that triggers or plans to trigger a disaster. In disasters caused by natural forces, however, there is no enemy positioning somewhere except our mother nature.

This distinction is important in judging the timing and feasibility of counter measures beyond merely cost-benefit analysis. In man-made disasters, any counter measures have to take enemy's retaliation or scaling up the tension into consideration. By contrast, decision makers need not pinch relief measures on any intuitive response of our mother nature.

3.3.2. Fear

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and Governance After Hurricane Katrina: A Postscript to Terrorism Risk in a Post-9/11 Economy, 38 ARIZ. ST. L. J. 581 (2006).

Fear is designed as an end-goal in terrorism. Terrorists try to provoke as much fear as possible through ad-hoc attacks and threats to attacks. As long as fear spread to a level, their end-goals are served.[19] Fears make us rather easily misconceive, be mistaken. Fears are contagious. In a fearful atmosphere, we are easily to feel fear stronger than never before even against small risks or things we have never in fear.[20]

In contrast, natural disasters bring us grave losses –tangible or intangible– but not fear. Even if fear comes to us about natural disasters, it is the kind of *ex post* fear towards disastrous happenings but not ex ante fear we have against terrorism. Perhaps sometimes we feel uneasy –in a sense, fear– about any potential possibility of natural disasters or epidemic diseases, but we have slightest chance to know whether natural disasters such as earthquake or tornados would hit us. In contrast, while we do not know when and where terrorist attacks take place, but we know for sure that terrorists want to launch such attacks. But our mother nature is never determined to launch "any attack" to any designated place at any specific time.

3.3.3. Liberty

In man-made terrorism, civil liberty in constitutional democracies may be used as loophole for launching attacks. As a result, there is a tendency for incumbent governments to constrain civil liberty in fighting terrorism. Even for the purpose of fighting terrorism, the infringement of civil liberty itself is a worse thing in any

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[19] Eric A. Posner, *Fear and the regulatory model of counterterrorism*, 25 HARV. J.L. & PUB. POL'Y 681 (2002).

[20] *Id*. at 684-90.

constitutional democracy, and if that continues, it would render grave harms to the society. In one way, this is part of the end-goals of terrorists, who would like to undermine the legitimacy of western liberal democracies not only physically but also spiritually.

In natural disasters, by contrast, civil liberty does not normally present as a loophole for damages. Governments may have to evacuate some and confine others in any designated areas in order to avoid grave casualties in natural disasters. But these measures are taken not to fight against someone, but to secure public interests, preventing any greater casualties from happening.[21] There is no co-relational evidence in that disaster relief works necessarily relates to constraining civil liberty. However, a direct link exists in fighting terrorism and liming civil liberty.

3.3.4. Space

Space of vigilance in fighting terrorism is crucial as it involves with strategic total impacts exercised by terrorists. Before actual attacks, it is impossible to predict places where attacks are taken, and governments have thus to gear up for counter any possible attacks at any place and time. Warning is not effective or made into a built-in mechanism for space of vigilance. As a matter of fact, this uncertainty of time and place in terrorist attacks and the resulting fear are the precise nature of terrorism.

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[21] For some discussions about human rights and natural disasters, see e.g. Todd B. Hilsee, Gina M. Intrepido & Shannon R. Wheatman, *Hurricanes, Mobility, and Due Process: The "Desire to Inform" Requirement for Effective Class Action Notice is highlighted by Katrina*, 80 TUL. L. REV. 1771 (2006); George E. Edwards, *International Human Rights Law Violations before, during and after Hurricane Katrina: An International Law Framework for Analysis*, 31 T. MARSHALL L. REV. 353 (2006).

In sharp contrast, natural disasters are relatively feasible to locate proximately before they take place and possible to issue warnings or even undertake evacuations for affected areas. I do not indicate, however, that natural disasters are always confined in certain narrow areas. There are occasions where natural disasters or serious epidemics cover wider areas. Nevertheless, in natural disasters, the place –wider or narrower– is possibly identified and pinpointed whereas we have no clue about where terrorist attacks would be until terrorist acts are actually undertaken.

3.3.5. Time

In man-made terrorism, tension continues as long as the possibility of terrorist attacks remains real. As a result, the time span for counter terrorist efforts often lasts for long, and we are quite uncertain about when they would be put into an end. Any constitutional or legal authorization of measures against terrorism would thus last for a certain time period and perhaps extend for once or many times.

In the natural counterpart, however, time seems to be rather relatively specific though in some occasions where relief efforts may take much longer. For instance, earthquakes hit us for seconds or minutes, but relief works last months or even years. Hurricane Katrina stayed for a few days or mostly a week, but the damage she brought took us years for recovery. In this regard, authorization of any measures undertaken for emergency efforts in natural disasters can be set in a given time span and reauthorization seems relatively remote.

4. Towards a Dichotomy in Emergency Constitutionalism

The distinctive features of man-made and natural disasters in aspects of enemy, fear, liberty, space and time manifest corresponding constitutional and institutional arrangements in time of emergency. I shall first discuss constitutional issues following by an institutional one.

4.1.Emergency Constitutionalism in Light of a Dichotomy

Man-made terrorism or emergencies render a specific enemy, targeted groups or states in countermeasures, whereas natural disasters leave us damages done by our mother nature and their recoveries. Man-made terrorism creates immeasurable fear –itself as end-goal of terrorists– but natural emergencies create damages –tangible or intangible. Countermeasures against terrorism necessarily involve constraints of civil liberty, which does not often appear in rescuing or relief efforts of natural emergencies. The time and space of terrorist attacks remain unspecific and unpredictable until attacks actually take place. In contrast, although we make hardly precise predictions for natural disasters, there is always a certain time for us to issue warnings in proximate time and likely to locate the place. In my view, these features should render correspondingly distinctive constitutional arrangements in man-made and natural emergencies (see figure 1).

Figure 1: Constitutional arrangements in man-made and natural emergencies

		man-made	nature
Constitutional dualism		constitutional codification necessary	constitutional codification not necessary
Constitutional decision-making framework	Constitutional or Legislative Model	Constitutional model preferred	Legislative model preferred
	Executive or Legislative Model	Legislative model preferred	Executive model preferred

Standard of review	Review	Strict standard	Rational standard
	Compensation	Judicial compensation preferred	Regulatory compensation preferred

Source: by author

4.1.1. Constitutional Dualism

Let us begin with the first debate on constitutional dualism: whether a modern constitutional should formally recognize emergency powers and codify them into the Constitution? The demand for constitutional codification of emergency powers by Bruce Ackerman is in part due to pragmatic necessity in part due to the desire to hold these powers constrained under constitutional frameworks. The rejection to this, particularly by Tribe, is out of strong believes in that these emergency measures must be strictly constrained by existing constitutional frameworks and in no way can be legitimized by necessity.[22]

In light of the above dichotomy, it is evident that man-made disasters and their distinctive features in enemy, fear, liberty, time and space as mentioned above manifests strong needs for their rather strict supervisions. Because the enemy is specific, countermeasures against enemy or suspects are easily oriented as grave constraints of civil liberty and becoming unconstitutionally aggressive. Increasingly heightened and quickly spread fears often lead to mistakes. A greatest degree of

[22] *See infra* Part II.

uncertainties in time and space renders easily requests for extension of authorization and reauthorization for countermeasures and in some cases may go much beyond limits. It is thus better to have constitutional constraints already laid down and made explicit.

The natural disaster regime, in contrast, may better fit what is intended in the argument by Tribe as rescuing or relief measures often requires no special exceptions in the Constitution.[23] Unlike Tribe, however, I argue that measures for natural emergencies need not be as strictly scrutinized as is for man-made situations such as terrorist attacks or threats to attacks.

4.1.2. Constitutional Decision-Making Framework

Constitutional choices regarding decision-making framework include two aspects: 1) whether emergency measures must be prescribed by the Constitution, or may be regulated through legislative means?, and 2) whether in time of emergency, it should be the executive to take the lead or should the legislature continue to be the primary decision maker?

Having recognized the differences in man-made and natural disasters as set up above, I argue that the typology helps find solutions to the above choices. As natural disasters require less scrutiny in their counter measures and their rescuing and relief efforts vary from circumstances to circumstances relying upon very much experts, their responding framework needs not to be codified in constitutions. Instead,

[23] In some cases, however, they might involve certain civil liberty concerns. *See supra* note 21.

measures and mandates through legislative means serve a great extent of flexibility that is needed in natural disaster scenarios. By the same token, executive model better fits natural emergencies as quick and effective responses are essential for damage recovery. Hence, legislation regarding natural emergencies must put a primary focus on mandate to the executive and much more ready to accept in some cases ex post legislative endorsement.

By contrast, for man-made disasters, the rule of thumb is legislative approval and any countermeasure must be authorized in advance and through democratic debates. As illustrate above, countermeasures involved in man-made emergencies often include constraints of civil liberty and target particular individuals or groups. Due to its uncertain nature in time and space, the authorization of countermeasures in man-made disasters is very likely to be abused and exceeded. For these reasons, I strongly argue a constitutional model for man-made emergencies where the legislature maintains the primary decision-makers rather than a supervisor or even rubber stamp.

4.1.3. Standard of Review & the Role of Court

Due to the nature of man-made emergencies whose countermeasures often include constraints of civil liberty and encroachment of authorization, it is necessary for courts to employ stricter standard of review in scrutinizing those group or individual targeted measures. More importantly, particularly in common law system, judges should be able to provide compensations for those groups and individuals whose rights are encroached unconstitutionally. Transitional justice in the context of fighting against terrorism is better realized through judicial management of individual cases.

In natural disasters, however, rescuing or relief efforts often do not include right-infringing techniques, but if in some case they do, rational standard or certain proportional considerations are sufficient in judging their constitutionality. Unlike compensations in man-made emergencies, here compensatory efforts are possibly to be made into part of regulatory regimes that take all risks, hazards, loss and cost for recovery into account. In dealing with individual complaints after natural disasters, regulatory measure are better than judicial ones, and judges must not intervene in this kind of decision where a large scale of public cost and benefit shall be taken and made into balance.

4.2. Institutional Efficiency and Unity

The dichotomy helps us answer to particular constitutional choices, as illustrate above. At the institutional level, however, the role of such dichotomy is considerably limited. Rather, institutional efficiency and unity should prevail.

For efficiency in management, I have no doubt that an all-hazard solution must be adopted. This approach may minimize institutional interfaces in counter-measures and have a clear switch-over departing emergencies from normal times. Institutionally, a single fund may be established dealing with risks of all possible disasters.[24] A single agency may be established for coordination among responsible

[24] One example is the Canadian emergency fund.

agencies. More importantly, this unifying approach is better in the capacity of resources managements. When Katrina hit the United States, counter terrorism measures were being accused of taking away resources that would otherwise have gone to help Katrina relief. An unintended resources competition was happening between natural disaster such as Katrina and man-made emergencies such as fighting against terrorism. Thus, in my view, a comprehensive program that unifies all resources would allocate resources more easily, flexibly and in a much speedy fashion.

5. Conclusion

The 911 terrorist attack and responding measures by the United States and the international community have invited constitutional scholars worldwide to debate about the role of constitutions in emergencies. This paper has examined closely the current debate and argued that the current debate has been based upon a rather monolithic view and thus missed some crucial constitutional and institutional designs.

Against the monolithic view, this paper argues that a dichotomy between man-made and natural emergencies must be recognized in emergency constitutionalism. Man-made and natural emergencies have distinctive features in aspects of enemy, fear, liberty, space and time, which correspond to distinctive constitutional and institutional choices.

In man-made situations, constitutional codification of emergency powers is necessary and a constitutional model of emergency powers is preferred. Moreover, a legislative model that has a primary role in decision making is urged in man-made

emergencies. Countermeasure must be reviewed by heightened standard and the court may have a rather active role in providing compensations.

In contrast, in natural disasters, constitutional codification is not necessary and due to efficiency, time constraints, and expertise, the executive model is preferred where legislatures serve as supervisory role and in some cases renders ex post endorsement. Rescuing and relief measures are reviewed by rational standard and compensation is better provided via regulatory frameworks that take all necessary cost and benefit into consideration.

Although the dichotomy helps us distinguish constitutional choices between man-made and natural disasters, the role of such dichotomy is considerably limited at the level of institutional design. For efficiency in management, an all-hazard solution must be adopted. This approach minimizes institutional interfaces in counter-measures and has a clear switch-over departing emergencies from normal times. This unifying approach is better in the capacity of resources managements.