

# 应名决策

## 法制化研究

宋筱婷

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全国百佳图书出版单位

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## 序言

现代社会是一个风险社会，各类突发事件层出不穷，极大地危害着社会的有序发展和人们的生产生活。如何有效应对突发事件，不仅关系到人民的生命财产安全和社会稳定，更是对一国政府执政能力的重大考验。政府的应急管理能力在应对突发事件过程中发挥着至关重要的主导性作用，而应急决策乃是应急管理的关键环节；因此，应急决策法制化作为具有重大现实意义和理论意义的课题，值得我们认真研究探讨。

2008年颁行的《湖南省行政程序规定》专门规定了：“重要紧急情况必须由政府立即决策的，可以由政府行政首长或者分管副职按职权临机决定，并及时在政府常务会议上通报或者向行政首长报告。”这是创新性的应急决策法规范。

2010年国务院颁布的《国务院关于加强法治政府建设的意见》就如何坚持依法、科学、民主的决策提出了系列要求，包括要规范行政决策程序，完善行政决策风险评估机制，加强重大决策跟踪反馈和责任追究。

2012年党的十八大报告提出，要确保决策权、执行权、监督权既相互制约又相互协调，健全决策机制和程序，建立决策问责和纠错制度，建立健全重大决策社会稳定风险评估机制。

2013年党的十八届三中全会通过的《中共中央关于全面深化改革若干重大问题的决定》强调，要优化政府机构设置、职能配置、工作流程，完善决策权、执行权、监督权既相互制约又相互协调的行政运行机制。

作为决策的重要组成部分，相对于常规决策而言，应急决策也

应当给予同样的关注和重视。作为认真贯彻党的十八大关于全面深化改革战略部署的重要组成部分，这体现了党和国家强化权力运行制约和监督体系，让权力在阳光下运行的决心和勇气。如何在现阶段突发事件高发、多发的实际形式下，切实提高应急决策的科学化、民主化和法治化水平，构建良性权力运行机制，是摆在我们面前不容回避的问题，也是非常重要、非常困难的重大现实课题，学术界和实务界多年来一直在思考探索，取得了一些成果，但深化认识、达成共识、规范行为还有很长的路要走，值得学术界和实务界给予更多的关注。

本书作者宋筱婷博士发挥系统学习过法学和管理学的专业优势，综合运用多种调研方法，运用过程理论与规制理论，从法学、管理学和政治学等多个视角，对突发事件情境下的应急决策系统法制保障有关问题，对应急决策法治体系建设和重大理论问题，进行了系统深入的专题研究，取得了富有参考价值的诸多研究成果。

本书在对应急决策基本概念进行科学梳理的基础上，从主体、程序、行为、监督、责任等五个方面，对应急决策规制理论和制度架构进行了力求系统深入的论述，并运用作者架构的理论分析框架，结合松花江水污染等重大突发事件应急决策的经验教训，尝试进行应急决策实例分析，使得本书的探索努力符合理论与实践结合、重在解决实际问题、能够推动学科发展的高端法学研究的学术要求，其理论与制度创新成果能够带给读者诸多的参考启发。

筱婷从西南政法大学毕业后考入中国人民大学法学院，由我指导攻读法学博士学位。人大的宪法学与行政法专业是国家重点学科，筱婷在这个学术大家庭里，努力学习、刻苦钻研、勤于思考，积极参加专业学术活动，承担完成多项科研项目，还担任人大宪政与行政法治研究中心的财务组负责人，带领团队很好地完成了有关工作任务，其科研和组织能力都得到很大提升，圆满完成了学业，受到了师生的一致肯定。

筱婷是山东姑娘，正如她的名字，一棵青竹，亭亭玉立，身材高挑，心胸宽广，做事情总是充满热情，坚韧且执著，性格既豪爽又文静，坚持原则又不失灵活，文笔既大气又细腻，读博的三年里，老师和同学们都非常喜欢她。博士毕业后，筱婷去了党政机关工作，在认真做好本职工作的同时，还坚持做博士后研究，继续扩展学术视野，培养问题意识，提升科研能力，把学习作为一种生活方式，这是非常值得肯定的。

在筱婷的博士学位论文修改完善出版之际，正值我国全面深化改革和加强法制建设的转型发展关键期，我作为指导教师写了上面几句话，表达欣慰之情和祝贺心意，也诚恳地向社会推荐应急管理和公共治理所需的优秀成果和人才。

衷心祝愿本书出版后能为人们深化认识、达成共识、积极行动，推动应急决策机制和法制不断完善，最终实现法治化目标，发挥积极的指导参考作用。

谨以为序，郑重推荐，共享成果，同闻芬芳，真心祈望，美好期盼。

莫于川\*

2014年2月5日撰写于纽约河滨教堂边寓

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\* 莫于川系中国人民大学教授、博士生导师、宪政与行政法治研究中心执行主任、中国行政法研究所所长，中国行政法学会研究会副会长。

## 摘要

应急决策是应急管理中的关键性环节，任何国家的政府都无法回避；在很大程度上，其考验着一国政府的治理结构和治理能力。因为突发事件应对不仅关系到政府形象，更关系到人民的生命财产安全和社会稳定。一方面，由于突发事件的公众关注度高、破坏性严重、社会影响巨大，对政府的应对效能和法治水平都提出了极高的要求；另一方面，由于突发事件的演化规律非常复杂，人类对于突发事件的发生、演变和可能的危害程度等都缺乏足够的认识。这些客观存在为突发事件应对的集中体现——应急决策造成了巨大的障碍，也对政府在突发事件应对中的应变能力提出了更高的要求。政府在突发事件应对中的应变能力，集中体现了行政管理的权威性、机动性以及行政权对社会整体资源的统一调配能力，这不仅仅应当是行政机关的自发反应，更应当是法律规范与授权的结果。应急决策自身所具有的特殊性，使其与常规法制之间存在冲突和矛盾成为必然，而现有应急法制又限定了人们在突发事件应对中的决策空间；因此，需要对此进行深入、系统的研究。本篇论文在对传统“决策”定义进行批判和继承的基础上，结合中国现阶段的实践情况，对“决策”的内涵和外延进行了扩充和完善，并进一步完善了“应急决策”的概念。综合运用文献分析、比较分析、案例分析、规范分析、社会实证调查统计等研究方法，从法学与管理学、政治学的多领域视角，对突发事件情境下的应急决策系统法制保障问题展开了深入研究。

本书引言指出了研究的目的和意义，并简要概括了目前应急决策的研究状态以及在其他学科中的相关研究进展。本书正文共分

## 七章。

第一章应急决策的基本概念。笔者通过对决策概念、应急概念的渐进式分析，引出了对应急决策概念的认识。通过对实践的总结和对现有法律规范的梳理，以突发事件的发生是否危及国家的安全、存亡为标准，笔者将应急决策分为国家应急决策和行政应急决策两类；并从抽象形式和具体形式两个方面对应急决策进行了外在形式上的划分。在对旧有应急决策的研究进行批判继承的基础上，笔者对应急决策的概念进行了扩充和发展。在笔者看来，应急决策是立足于常规程序决策的基础上，程序决策与非程序决策相结合的复合型决策。应急决策应当是为了应对应急情况的发生、发展而作出的应对性决策，而绝非仅仅是指在紧急情况下所作出的决策。为了对此概念进行充分的论证，笔者从“可知论与不可知论的悖论”、“可控论与不可控论的悖论”两个方面论证了该定义的科学性和合理性。在本章第二小节中，笔者首先从主体、客体和行为方式三个方面归纳了应急决策的构成要素，又进一步归纳了应急决策所应具有的特点，主要包括：程序化与非程序化的并存、风险性、决策后果的传递性、决策绩效评估的长期性、决策过程的互动性以及决策方案的时效性几个方面。在本章余下的篇幅中，笔者将国家紧急权、行政紧急权和公民不服从作为应急决策权的来源进行了进一步的分析阐述，并从基本原则和具体原则两个方面对应急决策所应遵循的原则进行了梳理，使整个基本理论框架更加完善。

第二章应急决策的主体规制。在本章中，笔者对应急决策主体进行了类型化研究。首先，将应急决策权依据其拥有主体的不同，分为立法机关的应急决策权和行政机关的应急决策权，国家元首的应急决策权以及军事机关或党的机关的应急决策权。行政机关的应急决策权又分为中央行政机关、地方行政机关和专门机关所拥有的不同种类的应急决策权。作为补充，还存在着公民和其他组织的应急决策权，但为了防止应急决策泛化的危险倾向，应对其进行严格



的审查和限制。笔者以“决策信用”为基础，建立起相应的应急决策信用评价机制。首先通过对各类法定的应急决策主体（国家权力机关、行政机关、国家元首及其他机关）进行权威性、信息性、专业性、中立性和强制力五个方面的评价，最终确定其所具有的决策信用的高低及其各自在应急决策具体领域中的优势和不足，得出与现有的法律规范价值取向相吻合的结论，进一步论证了该分析机制的科学性和准确性。接下来对各类正在被广泛探讨的、潜在的应急决策主体进行了决策信用评价，为论证其是否具备应急决策主体的应有资质提供依据。

第三章应急决策的程序规制。应急决策的程序规制，是指通过对应急决策作出过程中所需遵循的程序进行规范，以提高应急决策的合法性和科学性。笔者首先从法治、效率和降低风险三个方面阐述了应急决策程序规制的重要性和必要性，并从国家应急决策和行政应急决策两个方面来论述了现有应急决策程序规制的发展状况。一般而言，国家应急决策分为启动程序、处置程序和终止程序三个主要部分；行政应急决策的程序主要包括预警程序、预案启动程序、信息报告程序和信息公开程序四个部分。本章的重点在于以正当程序原则作为其重要的衡量标准，试图以此确立一种必然程序与或然程序的区分，以缓和应急决策中程序性与非程序性的固有矛盾。为了检验该设想，在其后的论述中，笔者通过对听证程序、专家评议程序和信息公开程序的详细分析，论述了其在应急决策中各自存在的意义，以及在不同情境下所应充当的必然程序与或然程序的不同角色。

第四章应急决策行为规制。在本章中，笔者根据不同的分类标准，对应急决策行为进行了系统的类型化分析。根据应急决策行为是否具有抽象的规范性文件的形式，可以将其分为抽象应急决策行为和具体应急决策行为；根据应急决策行为权力来源的不同，又可以将其分为国家应急决策行为和行政应急决策行为；根据应急决策

的行为目标是否对权利形成限制，可以将其分为权利救助型应急决策行为和权利限制型应急决策行为；根据应急决策行为对象的不同，可以将其分为对人的应急决策行为和其他应急决策行为；根据应急决策行为是否对突发事件的应对起到关键性、根本性的作用，可以将其分为核心应急决策行为和辅助应急决策行为。笔者通过对大量案例深入、细致的分析、归类，对其所体现出的应急决策行为进行了深入而细致的分析、研究，进一步完善了应急决策的行为体系。此外，笔者通过对管理学和法学中应急决策行为衡量标准的比较分析，提出了区别其违法与瑕疵的基本标准，以期能对现实产生积极作用。

第五章应急决策监督规制。笔者在本章中首先论述了应急决策监督规制的理论基础和重要作用，并将信息公开制度的确立作为应急决策监督规制得以顺利实现的基础和前提。本章的重点在于系统阐述了我国现有应急决策监督体系的构成、现状以及相应的不足。我国现有的应急决策监督体系主要由立法监督、行政监督、司法监督、社会监督和国际监督五部分组成。其中，立法监督主要针对的是抽象应急决策的监督；而行政监督的对象相对更为广泛，是应急决策监督的主要力量；司法监督尚嫌薄弱，在应急决策的监督领域还有广阔的探索空间。值得一提的是社会监督中的媒体监督，一直以来，理论界对媒体监督在应急领域中的立场和地位存在争议。笔者结合具体案例分析，提出了应区别不同的危机情境来具体衡量媒体监督所处地位的观点，主张媒体的监督地位不能一概而论，而应持有具体问题具体分析的态度。

第六章应急决策责任规制。笔者在本章中首先归纳了应急决策责任规制的现状，主要体现为对应急决策责任规制的重要性认识不够，规范较少；缺乏统一的归责原则以及责任实现形式较为混乱三个方面。笔者认为，应急决策备案制度的确立和完善是应急决策责任规制得以顺利实现的前提和基础。只有在决策信息相对明晰的基

础上，相应的决策行为才能被公正、客观的衡量和评价。笔者通过借鉴民法的相关归责理论，结合应急决策的自身特点，建立了主观与客观相结合的应急决策责任分析模型。模型的基本构成借鉴数学分析中象限的划分模式，以应急决策主体的主观状态为  $x$  轴，应急决策主体的客观行为为  $y$  轴，两个数轴将图例分割成四个分析区域——即四个象限，来对应应急决策行为进行具体分析，以体现法律最终给予的或积极、或消极的评价。为了论证该模型的科学性和合理性，笔者通过“克拉玛依大火案”和“唐山狱警释囚案”这两个案例的对比分析，并结合现实中的法律判决，得出与模型推演法律评价相一致的结论，为该模型在现实中的具体适用打下了坚实基础。

第七章应急决策实例分析：“2005 年松花江水污染事件”之应对。为了更进一步的将本文各章内容有机统一，更形象、深刻地表达本文研究的中心内容——应急决策法制化，笔者特选取了应急决策的典型案例“2005 年哈尔滨水危机”作为分析样本，对其中存在的各类应急决策主体及其所作出的各类应急决策行为进行了类型化分析。本章主要由三部分构成，第一部分是案件简介；第二部分是事件评析，包括文字评析和列表评析；第三部分是由此引发的作者的相关思考。在本章所列的诸多表格中，笔者按照本文的行文顺序，以决策主体、决策程序、决策行为、决策监督、决策责任、分析结论和法律规范佐证七个部分为分析方向，对整个事件应对中所存在的应急决策的相关内容进行了系统的分析和论证，对其中的规律进行总结和思考。

## Abstract

Emergency decision making is a key part in the emergency management. To a certain extent, any government can not avoid it which is a test of a government's management structure and governance capacity. Because emergency does not only contracts the government's image, but also relates to people's lives, property security and social stability. On the one hand, because unexpected events are in a high degree of public concerned, devastating, a huge social impact on the Government's response to the effectiveness and the rules of law have been put forward a high level of demand; on the other hand, because of unexpected events' complex evolution, human is lacking of adequate awareness of the unexpected turns of events, evolution and potential magnitude of harm and these objective existences of a concentrated expression of emergency response. Emergency decision making and creating a huge obstacle also put forward higher requirements of government's emergency ability to cope with the strain. Government emergency response capabilities in response to a concentrated embody the administration of the authority, flexibility, and administrative rights on the resources of society as a whole unified deployment capability, which not only should be a spontaneous reaction of the executive branch, but should be the legal norms and authorization results. Emergency decision making has its own particularity by the make and conventional conflict and contradiction between the rule of law become a necessity, and the existing legal system limits the response of emergency management people in the decision making space; therefore a need to conduct a thorough, systemat-

ic study. This paper on the “decision making” are definition of criticism in political science theory and on the basis of inheritance, combined with China’s current practice situation, in which “Decision making” and the connotation and extension was expanded and improved, and further perfected the “emergency decision making” concept. Comprehensive use of literature analysis, comparative analysis, case analysis, normative analysis, social survey and other empirical research methods, from the law and management science, political science, multidisciplinary perspective on emergency situations of emergency decision making system to protect the rule of law issues in depth study.

The passage can be divided into seven chapters. The introduction research paper points out the purpose and significance, and briefly summarized the current state of emergency decision making research, as well as in other disciplines related to research. The first chapter extracted “the basic concepts of emergency decision making”. The author through the concept of the concept of incremental contingency analysis of the decision making leads to the concept of emergency decision making knowledge. Through the practice of summary and sort out the existing legal norms, to sudden incidents whether threat national security, survival as the standard, the author makes the emergency decision making into the national emergency response decision making and administrative decision making categories; And from the abstract form of and specific forms of two aspects the author divides the emergency decision making by the external forms of land division. In the old criticism of emergency decision making research on the basis of inheritance, the author takes the emergency decision making concept of the expansion and development. In my opinion, emergency decision making is based on the routine procedure of the decision making,

program decision making and non decision making process of combining complex decision making. Emergency decision making should be in response to the occurrence and the development of emergency situations, and development in response to decision making, and does not merely refer to in case of emergency made by the decision. In order to fully demonstrate this concept, the author from the “we can see the paradox of theory and agnosticism,” “uncontrollable controllable theory and the theory of paradox” demonstrated two aspects of the definition of scientificity and rationality. In the second section of this chapter, the author summarized in three aspects of the constituent elements of emergency decision making, first of all from the subject, object and behavior patterns and further refine the emergency decision making should have a distinctive feature, including: process oriented and non procedural co exist, risks and consequences of the transfer of decision making, decision making long term performance evaluation, decision making process of the interaction and decision making several aspects of the timeliness of the program. In the remaining space in this chapter, national emergency powers, the executive emergency power and civil disobedience as the emergency decision making power vested are further analysed and the basic principles and specific principles from the two aspects of emergency decision making to be followed in principle of the comb so that the whole theoretical framework of more perfect.

Chapter 2 is “the emergency decision making of the main regulatory system”. In this chapter, the author carried out the emergency decision making body of the type of research. Firstly, emergency decision making power in accordance with their own different subjects are divided into emergency decision making power of the legislature and the executive authorities of emergency decision making power, heads of state of emergency

decision making power, and military authorities or organs of the party's emergency decision making power. Emergency executive decision making authorities is divided into the central executive authorities, local administrative bodies and specialized agencies owned by different types of emergency decision making power. As a supplement, there are still citizens and other organizations, emergency decision making power, but in order to prevent the dangerous tendency to generalize the emergency decision authorities, they should be rigorous review and restrictions. The author use "making the credit" as the basis, establish the appropriate mechanisms for emergency response decision making credit ratings; first emergency response by the various statutory decision making body (the state power organs, administrative organs, heads of state and other bodies) for an authoritative, informative, professionalism, neutrality and mandatory evaluation of five aspects to finalize their decision making with the level of credit and their respective emergency response decision making in specific areas strengths and weaknesses of existing legal norms derived values consistent with the conclusions of and further demonstrated that the mechanism of the analysis of scientific and accurate. Then all kinds are being extensively explored, the potential of emergency decision making body for the decision making credit evaluations, in order to demonstrate its ability to meet the emergency decision making body provide the basis for the proper qualification.

Chapter 3 is "the emergency decision making process under the system". Emergency decision making process regulation refers to the process of decision making by emergency response required in the procedures followed to regulate in order to improve emergency decision making legal and scientific. The author first of all from the rule of law, efficiency and risk

reduction requirements in three aspects of the emergency decision making procedures set out the importance and necessity of regulation, and from the national emergency response decision making and administrative decision making describe the existing emergency regulation with the development of decision making procedures conditions. In general, the national emergency decision making is divided into startup programs, disposal procedures and termination procedures for three main parts; executive emergency decision making process include early warning procedures, plan to start programs, and information reporting procedures and information disclosure procedures for four parts. This chapter based on the principles of due process focuses on an important measure as an attempt to establish a necessary process and the distinction between contingent procedures to alleviate the emergency decision making process and non procedural nature of the inherent contradictions. In order to test the idea in the subsequent discussion, the author through the hearing process, expert review process and a detailed analysis of information disclosure procedures are discussed in their respective emergency response decision making significance of the existence, as well as in different situations should serve as a necessary procedures and probable program different roles.

Chapter 4 is “the emergency decision making behavior regulation”. In this chapter, the author according to different classification standards, emergency decision making behavior of the system of the type of analysis. According to whether the emergency decision making behavior of abstract normative documents in the form of emergency response, decision making behavior can be divided into abstract and concrete emergency response decision making two kinds of decision making. According to the different sources emergency response decision making behavior, but also emergency



response decision making behavior can be divided into national emergency response decision making and administrative decision making categories. The decision making include the national emergency declared state of emergency, martial law, military control and other categories; administration the right to emergency decision making can be divided into restricted mainly administrative emergency decision making, rights, emergency relief class executive decision making, information search and dissemination of emergency decision making class administration category; of these, restricted the rights of the executive emergency decision making can also be divided into requisition, expropriation and calls, emergency mandatory, emergency arrest and restrictions on personal freedom; the rights of the Chief Emergency Relief class decision making can also be divided into emergency funds, emergency funds, emergency treatment and emergency vote feed, etc. ; information search and dissemination of the decision making in relation to specific types of executives are divided into emergency response monitoring, emergency detention, emergency check ups; and does not belong to the category of regional blockade, emergency evacuation, water and food control, shipping and road decommissioning, suspended emergency and other types of administrative decision making. I analysed a large number of cases in depth, detailed analysis, classification, and its emergency response decision making embodied conduct in depth and detailed analysis, research, and further improve the emergency response system of decision making behavior.

Chapter 5 is “the emergency decision making oversight regulation”. In this chapter the author firstly discusses the regulatory supervision of emergency decision making foundation and the important role in the theory, and information disclosure system, the establishment of regulatory over-