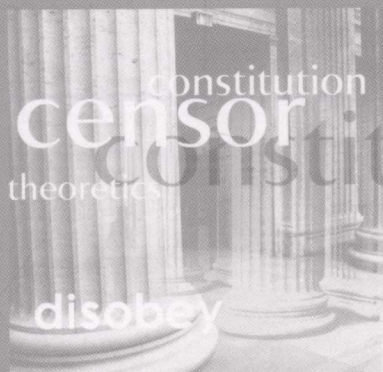


# 宪法与紧急状态

## 《中华人民共和国紧急状态法》 立法论证报告

Constitution and Emergency:  
Legislative report of the Public Emergency Law  
of the People's Republic of China



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立法论证报告

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## 前 言

与德国阿登纳基金会进行项目合作是一件令人非常愉快的事情。几年来,作为项目申请人,我们已经与尊敬的容敏德先生、徐莹女士、谭蓉女士形成了彼此之间的默契,对业已形成的合作模式大家都感到卓有成效。从提出项目申请,到社科院报批,再到正式签署项目合作协议,然后组织专家进行调研和写出符合项目要求的研究成果,最后汇集成册,交由法律出版社出版。作为一项不可缺少的仪式,每年的三月底在法学所召开一次结项成果发布会和学术研讨会。年复一年,周而复始。其中的工作节奏从来也没有被破坏,这可以说是基金会与项目申请人合作关系最“和谐”的体现。按照固定模式,现在又到了向基金会提交最终研究成果的时候了。这又是一个令人兴奋的时刻。因为基金会对我们的信任又一次得到了证明,而我们又如释重负地完成了一年的研究任务,在宪法学和宪政研究领域又推出了一项新成果。

与以往合作有所区别的是,阿登纳基金会驻京办事处的工作人员有所变化。首先是中方雇员谭蓉女士离开了基金会,徐蓉女士接替了她的工作。其次,2008年下半年,容敏德先生离任去智利上任了,阿登纳基金会驻京办事处来了一位新的主人沃尔夫冈·梅耶先生(Mr. Wolfgang Meyer)。梅耶先生一秉其前任的工作作风,与容敏德先生有稍许差异的是脸上的笑容更多了,与人说话的语气更“软性化”了,慢条斯理的谈吐中透露出平和与智慧。容敏德先生离任前,我跟他协商了一下2009年的合作项目,因为2008年年初的南方大雪灾以及“5·12”汶川大地震,如何进一步贯彻实施《突发事件应对法》,如何解决“巨灾”应急中的各种法律问题,成为2008年度政府、学术界和社会公众关注的焦点。于是,我又跟容敏德先生谈起了五年前的老话题,就是要根据2004年“紧急状态入宪”的精神,研究和起草一部《紧急状态法》的专家

建议稿。容敏德先生对此项研究计划表示了赞许,并承诺他在离任之前完成对该项目的审批工作,具体项目执行事宜由新任梅耶先生负责。就此,“宪法与紧急状态”选题成为2009年我与阿登纳基金会合作项目的正式选题。

关于“宪法与紧急状态”的课题,本人从20世纪90年代初就涉足该问题领域。其时,针对1989年国务院在西藏拉萨和北京两次实施戒严、1991年前苏联实施紧急状态命令等法律问题,我与徐高先生开始合作研究宪法与紧急状态问题。我们先后出版了国内第一本紧急状态方面的法学著作《紧急状态法学》(中国人民公安大学出版社1991年版),其后又出版了《外国紧急状态法律制度》、《戒严法律制度概要》等有关宪法与紧急状态问题的研究著作。2003年在全国“非典”肆行的时候,又出版了《“非典”时期的非常法治》等著作。2004年年初,国务院法制办公室着手起草《紧急状态法》,委托上海行政法制研究所和清华大学法学院于安教授起草专家建议稿,我分别参加了上述两个课题组。后来,国务院副秘书长、当时任国务院法制办公室副主任汪永清先生亲自主抓该法的起草工作,我与于安、莫于川教授正式成为该法的起草小组成员。我们基本上参与了该法起草的全过程,虽然后来该法在正式出台时名称修改为《突发事件应对法》,而且在《突发事件应对法》中原来安排在《紧急状态法》中的许多法律原则和法律制度没有得到体现,但是,紧急法治原则、人权保障原则等最主要的紧急状态法律原则都得到了充分体现。不过,由于《突发事件应对法》将立法的工作重点主要集中在如何通过政府履行自身的职责来应对各种突发事件上,所以,如何应对“巨灾”、“动乱”、“战争”等最严重的紧急状态等问题仍然没有明确的法律依据。这一点从2008年“5·12”汶川大地震后的应急与救援活动中缺少必要的法律依据就可以反映出来。因此,从完善法制的角度出发,尤其是从健全有中国特色社会主义法律体系的立场出发,从理论上仍然有必要对《紧急状态法》的立法的必要性和可行性进行深入研究,并在此基础上提出课题组自己的专家建议稿。课题组正是基于上述学术动机,确立了2009年度课题研究的中心任务,即围绕着“宪法与紧急状态”一题,对制定《紧急状态法》所遇到的各种理论问题和实践问

题进行系统地 and 全面地研究。遵循以往的惯例,本项目研究成果以提出《紧急状态法》专家建议稿为最终目的,同时,围绕着专家建议稿,进行立法目的和立法内容的综合分析,力图通过此种研究来更好地揭示宪法与紧急状态之间的法律关系,从而为紧急状态法律制度的健全和完善提供更有力的法理支撑。

在本课题完成之际照例需要感谢的是给予我们一如既往支持的沃尔夫冈·梅耶先生、徐莹女士和徐蓉女士,对他们给予的充分信任表示衷心的感谢。这种信任也是我们继续合作和深化对宪政问题研究的学术信心所在。

莫纪宏

2009年12月26日于北京西直门

## Preface

The Cooperation with the Konrad - Adenauer - Stiftung in the academic program is a pleasant thing. In the recent years, we have reached a tacit agreement on our mutual academic cooperation between Mr. Winfried Jung, Ms. Xuying and Ms. Tanrong and me in much harvest based on the current cooperative model as the following procedures: submitting the application, asking approval of our CASS, signing the cooperative contract, organizing the experts to investigate and engage in research, collecting final results and publishing them by Law Press. As a necessary procedure, our researching group is used to holding a seminar on the program in the middle or at the end of every March. This kind of cooperative method has been maintained until now, in shape of harmonious relationship between the applicant and the Foundation. According to the plan, it is time for us to submit our final result to the foundation. This is an exciting time because the trust of the foundation on us will have been verified once more, and we will finish this year's task with a group of new researching works in the field of constitutional law and constitutionalism.

There has been some changes when some staff left Beijing office of the Konrad - Adenauer - Stiftung in the past two years. Ms. Xu Rong replaced Ms. Tan Rong, and Mr. Winfried Jung, the former director left for the new post in Chile, Mr. Wolfgang Meyer came to Beijing office to substitute his predecessor. Mr. Wolfgang Meyer keeps the working style of his predecessor in more smile and soft voice, full of placidity and wisdom from his elegant speech. I consulted with Mr. Winfried Jung about the program of 2009 before his leaving his post. In 2008, there occurred many

urgent events, for instance, the snow disaster in the South China at the beginning of the year, the big earthquake happened in Wen Chuan on May 12, the governments, the academic fields and the public paid more attention to such legal issues as how to enforce the Responding to Gusty Events Law of the People's Republic of China and how to resolve all kinds of problems in the process of urgently meeting gigantic disaster. I discussed with Mr. Winfried Jung about the old topic referred five years ago, that is, according to the spirit of 'Public Emergency in the Constitution' in 2004, it is necessary to make an expert draft of Public Emergency Law of the People's Republic of China. Mr. Winfried Jung agreed on this plan and promised to approve this program before leaving his post and let the successor implement the concrete plan. Hence, the Constitution and Public Emergency becomes the formal name of the research program in 2009.

The editor has referred to the field of public emergency since the early 1990s. At that time, regarding the situations that the State Council declared to implement Martial Law in both Lasa and Beijing in 1989 and the former Soviet Union performed public emergency order in 1991, the editor, in cooperation with Mr. Xu Gao, began to research relevant issues concerning public emergency. We had published the book named as 'Legal Sciences of Public Emergency' (the Publishing House of the China People's Public Security University, 1991), and the books such as 'Foreign Legal Systems of Public Emergency', 'Summarization on Legal System of Martial Law' and so on. In 2003, during SARS (Serious Acute Respiration Symptom), the editor published another book titled as 'Urgent Rule of Law During SARS'. At the beginning of 2004, the Legality Office of the State Council started to draft the Law of Public Emergency of the People's Republic of China by way of authorizing Shanghai Institute of Administrative Legality and Mr. Yu An, professor of Law School of Qinghua University to work out two expert drafts. The editor was invited to join in the above-mentioned draft groups. After then, Mr. Wang Yongqing, deputy Secretary General of



the State Council, vice minister of the Legality Office of the State Council at that time, took charge of the drafting work by himself, professor Yu An, professor Mo Yuchuan from Law School of the People's University and the editor were invited to act as members of the drafting group. All of us experienced the whole process of the drafting activity. Although the title of the Law of Public Emergency of PRC was changed as the Law of Responding to Gusty Events, and many legal principles and systems in the former law - draft weren't confirmed in the latter law - draft, the principle of urgent rule of law, the principle of protection of human right in time of public emergency were succeeded, however, because legal focus was on the governmental responsibility when the Law of Gusty Events of PRC was drafted, there wasn't any clear legal basis for dealing with the problems in time of gigantic disaster, turmoil and war. Such a phenomenon can be reflected from responding and rescuing activities after Wen Chuan Big Earthquake on May 12, 2008 because of lack of necessary legal basis. Hence, from the standpoint of perfecting legal system, in particular, from the standpoint of completing socialist statute systems in China Characteristic, it is quite necessary to study legislative necessity and possibility of the Law of Public Emergency of PRC and devote the expert draft on the basis of deep research to relevant legislature. Based on the aforementioned motive, the editor consulted with the Konrad - Adenauer - Stiftung to make a decision on researching all kinds of theoretical and practical issues which are possible to be encountered in the process of drafting the Law of Public Emergency. Following the former conventionals, the final result is purposed to provide the expert draft of the Law of Public Emergency of PRC, meanwhile, relied on the expert draft, the research group aims to analyze legislative target and content in order to unveil legal relation between the Constitution and public emergency, and submit more effective jurisprudential support to establish and perfect legal system of public emergency in China.

In time of finishing this year's task, I should as usual express my honest thanks to Mr. Wolfgang Meyer, Ms. Xu Ying and Ms. Xu Rong for their full trust on our group. Their trust is the resource of our confidence of academic research on constitutionalism issues.

Mo Jihong

December 26<sup>th</sup>, 2009, Xizhimen, Beijing

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**第一部分**

**中英文简介**

**Part I**

**A Brief Introduction both in  
Chinese and in English**





## 中文简介

“宪法与紧急状态”项目最终研究成果共分两个部分。第一部分汇集的论文是就《紧急状态法》立法中可能遇到的重大的理论问题和实践问题所进行的深入和系统的研究,这些论文为全面地和准确地理解《紧急状态法》所建立的各项紧急状态制度提供了很好的理论素材和基础性的参考资料,是《紧急状态法》立法过程中必须加以研究和解决的重点问题。第一部分由十二篇论文组成,涉及与紧急状态法律制度相关的一系列理论问题,包括紧急状态立法的重要意义、政府在应急管理中的法律职责、紧急状态下的人权最低标准以及目前在突发事件应对中出现的各种需要通过制定紧急状态法来予以解决的问题。这些论文对于进一步理解我国紧急状态法律制度的特征以及认识制定紧急状态法的必要性有着很好的参考价值。

在“中国紧急状态法的立法状况及特征”一文中,莫纪宏教授详细介绍了中国紧急状态立法的历史演变,指出了新中国紧急状态法律制度经历了一个从军事管制、戒严到紧急状态立法的发展过程,目前已经形成了以紧急状态法、突发事件应对法、戒严法、灾害应对法等为主体的紧急状态法律体系。在该文中,莫纪宏教授还指出了目前我国紧急状态立法所确立的一些紧急状态基本原则和法律制度,包括紧急法治原则、紧急权力制度、紧急状态下公民权利保障制度、突发事件应对中的政府职责、公民和社会组织有参与应急的义务等。与此同时,还基于2004年“紧急状态入宪”的规定,指出了应当通过制定《紧急状态法》的方式来建立与正常状态相对应的紧急权力制度,保证在紧急状态下决定和实施紧急状态的国家机关仍然能够维护宪法的权威,坚持依法办事的法治原则,将尊重和保障基本人权作为决定和实施紧急状态的重