

# Preventive construction and rule of law constraints in counter-terrorism criminal law under the paradigm shift of risk governance: a comparative study on legal logic and constitutional limits

## Abstract

Against the backdrop of the evolving global terrorist threat, the function of criminal law is undergoing a profound transformation from “ex post facto retrospective punishment” to “ex ante preventive intervention.” This “preventive turn” is particularly pronounced in the field of counter-terrorism, where criminal law is being reshaped into a frontline tool within the national security risk governance system. While this functional expansion enhances the state’s capacity for early intervention against terrorist threats, it also creates deep tensions with core rule-of-law values such as legality (*nulla poena sine lege*), culpability, and the principle of proportionality, giving rise to a preventive governance paradox where “law is both a solver of systemic risks and potentially their source.” This paper constructs a dual analytical framework of “risk governance and constitutional constraints” to systematically examine the underlying legal logic and institutional operation of the preventive construction of counter-terrorism criminal law. Through a critical comparative analysis of the American expansive model, the German proportionality-controlled model, and the Chinese state-preventive model, this study reveals that preventive criminal justice is not inevitably destined for limitless expansion but is rather a product of specific institutional choices balancing security needs and constitutional guarantees. The research finds significant differences in the institutional constraints on preventive power across different legal jurisdictions, which profoundly shape the normative boundaries and practical forms of counter-terrorism criminal justice. Employing a combined methodology of legal dogmatic analysis, comparative law research, and empirical case study, this research contributes at both theoretical and practical levels. Theoretically, it achieves a deep integration of risk society theory with constitutional and criminal law principles, offering a new theoretical perspective for understanding the normative nature of preventive criminal law. Practically, through an in-depth analysis of representative cases from multiple jurisdictions, the paper not only elucidates the operational mechanisms of preventive criminal law but also constructs a normative framework of “structurally constrained prevention” for China’s legal system. This framework advocates for precise construction of legal elements at the legislative level, refined review at the judicial level, and strengthened safeguards at the procedural level, thereby channeling the exercise of preventive criminal power into the institutional track of the rule of law, and providing a sustainable path for counter-terrorism governance under the conditions of a risk society that combines security effectiveness with rule-of-law guarantees.

**Keywords:** preventive criminal law, counter-terrorism legal theory, risk governance, constitutional constraints, principle of proportionality, structurally constrained prevention

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## Introduction

### The preventive paradox of counter-terrorism criminal law and a comparative law solution

Since the 9/11 attacks, global counter-terrorism legal practice has exhibited a distinct characteristic of a “preventive turn.” This turn is reflected not only in the forward-shifting of constitutive elements of crimes at the legislative level—advancing the point of criminal liability from the traditional stage of commission to the stages of preparation, planning, and even ideological dissemination—but more profoundly in the paradigm shift of criminal justice philosophy from “retributive justice” to “risk prevention and control.” This preventive turn has been widely discussed in the literature on “pre-crime” and preventive justice.<sup>1,2</sup> When counter-terrorism criminal law shifts its focus of intervention from occurred violent acts to potential violent

possibilities, a fundamental governance paradox emerges: the legal tools designed to safeguard the liberal democratic order may, through their over-expansion, erode the very rule-of-law principles and fundamental rights they are meant to protect. This paradox manifests in contemporary counter-terrorism practice as the weakening of the principle of legality (*nulla poena sine lege*), the dilution of culpability requirements, and the suspension of the principle of proportionality, posing a severe challenge to the criminal rule of law in various countries.

This paper argues that the preventive expansion of counter-terrorism criminal law is not a singular, linear, inevitable process but is deeply influenced by the constitutional structures, judicial traditions, and security cultures of specific nations, resulting in different institutional choices. Therefore, this study adopts a comparative law approach. Through a systematic analysis of three representative preventive

counter-terrorism models—the United States, Germany, and China—it aims to reveal how different systems balance security needs and rule-of-law principles to varying degrees. Kent Roach, in his comparative studies of counter-terrorism law, attributed such differences to the interplay between legislative inertia and constitutional culture in different countries under the “9/11 effect”.<sup>3</sup> This comparative research not only helps transcend the simplistic dichotomy of “security versus liberty” but also offers richer institutional imagination and normative possibilities for contemplating the future development of China’s counter-terrorism criminal law.

## Methodology

Methodologically, this paper combines legal dogmatic analysis with empirical case studies. On the one hand, through a dogmatic sorting out of the normative systems of counter-terrorism criminal law in various countries, it extracts the normative characteristics and institutional logics of different models. On the other hand, through in-depth analysis of representative judicial cases, it reveals the actual operation and potential risks of preventive criminal law in practice. This research approach aims to construct a “structurally constrained prevention” theory that can both respond to the needs of counter-terrorism practice and adhere to the bottom line of the rule of law, contributing Chinese reflections with both theoretical depth and practical value to global counter-terrorism governance.

## Theoretical framework

### Risk society, constitutional constraints, and the normative reshaping of preventive criminal law

#### *From “harm punishment” to “risk prevention”: the theoretical evolution of criminal law function*

Traditional criminal law theory is built upon the foundations of liberalism and individual responsibility. Its core function lies in the ex post facto, equivalent, retributive punishment of acts that have already infringed upon legal interests. However, with the introduction and deepening of Ulrich Beck’s “risk society” theory,<sup>4</sup> the governance logic of modern society has undergone a fundamental transformation: from punishing “past evils” to preventing “future risks.” Regarding the jurisprudential basis of the fight against terrorism, there exists a paradigm debate in academia between the “risk society” theory and the Foucauldian “governmentality” approach. Mythen and Walklate through comparison suggested that the risk society theory better explains how states legitimize their expanding surveillance powers by quantifying and managing future “uncertainties”. In resonance with this, Aradau and Van Munster pointed out that the core logic of this “governing terrorism through risk” lies in the abuse of the Precautionary Principle, i.e., the tendency to take interventionist measures even in the absence of conclusive evidence.<sup>5</sup> From this theoretical perspective, terrorism is no longer viewed merely as isolated violent acts but is understood as a social risk characterized by systematicity, diffusivity, and unpredictability. Criminal law is therefore repositioned as an important component of the national risk governance system, its function expanding from merely “punishing committed crimes” to “preventing future harms.” As Lao Dongyan pointed out, this transformation means public security replaces individual liberty as the prioritized legal interest protected by criminal law, and criminal law faces the risk of alienation into a security law.<sup>6</sup>

This functional shift manifests concretely in normative techniques as the “double forward-shift” of constitutive elements of crimes: first, the forward-shift in the temporal dimension, i.e., by establishing offenses such as preparatory acts and conspiracy, significantly

advancing the point of criminal punishment to planning and liaison stages before the execution of violence; second, the forward-shift in the causal chain, i.e., through the establishment of abstract endangerment offenses (abstract danger crimes, offences criminalizing conduct that poses abstract risks rather than concrete harm) and conduct crimes, extending the object of criminal law regulation from acts directly causing harm to “upstream acts” that merely create conditions for or increase the probability of harm. Although this normative construction enhances the flexibility and proactiveness of criminal law in responding to terrorist threats, it also creates profound tension with the basic principles of traditional criminal law—when the basis of criminal liability shifts from “actual harm” to “abstract risk,” how to ensure the clarity of criminal law, the personal nature of culpability, and the proportionality of punishment becomes a core theoretical challenge that must be addressed.

#### *The constraining function of constitutional order: the dual pathways of substantive rights protection and proportionality review*

Confronted with the expansionary trend of preventive criminal law, the constitutional order assumes a crucial constraining and shaping function. Comparative legal perspectives reveal that contemporary constitutional states primarily realize normative constraints on preventive criminal power through two pathways:

The first is the substantive rights protection pathway, typically represented by American law. This pathway emphasizes using clearly enumerated fundamental rights in the constitutional text—such as freedom of speech and association—to delineate inviolable boundaries for criminal legislation and adjudication. In the counter-terrorism context, courts apply strict scrutiny, requiring the state to prove that its restriction of specific fundamental rights serves a “compelling state interest” and that the means adopted are the “least restrictive.” However, practice shows that in high-pressure situations involving national security, such substantive rights review often faces the risk of being diluted by the logic of “security exceptions,” and judicial deference may evolve into excessive deference to executive power.

The second is the proportionality review pathway, exemplified by German law. This pathway does not rely on the absolutist protection of specific rights but rather employs a structured balancing framework requiring state intervention measures to pass the triple test of suitability, necessity, and proportionality in the narrow sense (balancing). In the jurisprudence of the German Federal Constitutional Court, the principle of proportionality is not merely a judicial review technique but a substantive justice requirement rooted in the constitutional core value of human dignity. The advantage of this pathway lies in its ability to provide a more flexible yet equally rigorous rational constraint framework for the exercise of security power, acknowledging the state’s protective duty while avoiding the either/or dilemma of “absolute rights” versus “absolute security.”

#### *Theoretical synthesis in the Chinese context: the dialectical unity of the holistic view of national security and the rule of law principle*

The preventive construction of China’s counter-terrorism criminal law unfolds under the guidance of the “Holistic View of National Security,” a distinctive Chinese governance philosophy. This view transcends the narrowness of traditional security concepts, incorporating political, economic, cultural, social, and other dimensions of security into a unified consideration, emphasizing the dialectical unity of security and development. Within this framework, counter-terrorism criminal law assumes an important mission to safeguard national political security and social stability, and its

preventive expansion thus gains deep political legitimacy and policy necessity.

Simultaneously, the rule-of-law principle of “governing the country, exercising power, and performing administrative duties in accordance with the law” constitutes an insurmountable normative boundary for the operation of preventive power. The practice of China’s counter-terrorism rule of law demonstrates that the effectiveness and legitimacy of preventive criminal law depend not only on its efficacy in combating crime but also on its ability to meet the basic requirements of the rule of law at both procedural and substantive levels. This necessitates that institutional design must organically integrate the “efficiency logic” of counter-terrorism with the “normative logic” of the rule of law, forming a “governance-oriented rule of law” model that can both effectively respond to threats and adequately protect rights. How to find specific, operable institutional balancing points within this dialectical unity is the core issue this paper will subsequently explore in depth.

### Three preventive models from a comparative law perspective: institutional logic and operational mechanisms

Following 9/11, a wave of counter-terrorism legislation surged globally. As shown in the global study compiled by scholars like Ramraj, although different jurisdictions varied in their specific institutional designs, they universally exhibited common characteristics of the forward-shifting of criminal procedures and the prevention-oriented turn of substantive law, constituting a global “counter-terrorism law effect”.<sup>7</sup>

#### *The American expansive model: judicial deference and the rise of “risk chain” imputation*

The preventive turn in American counter-terrorism criminal law is marked by the Patriot Act and subsequent legislative expansions in the interpretation of the crime of “providing material support to foreign terrorist organizations”<sup>8</sup> Initially aimed at severing terrorist organizations’ funding and material channels, its scope has been continuously expanded in judicial practice, gradually encompassing “training,” “expert advice or assistance,” “personnel,” and even “services”—virtually all forms of substantive aid. In the landmark case *Holder v. Humanitarian Law Project* (2010), the U.S. Supreme Court faced a key dispute: whether providing legal training to human rights organizations aimed at promoting peaceful conflict resolution constituted “material support.” The Court, in a majority opinion, ruled that even if the supportive conduct itself was peaceful or even humanitarian, it could constitute a crime if it objectively had the effect of “freeing up other resources within the organization that can be put to violent ends.” This ruling established a “risk chain imputation” principle: criminal liability no longer required proof of a direct or proximate causation between the defendant’s conduct and specific violent plans but was instead based on a macro, probabilistic “resource substitution effect” reasoning.

This imputation logic was further strengthened in subsequent cases. In *United States v. Mehanna* (2013), the First Circuit Court of Appeals held that the defendant’s act of translating and disseminating online Arabic-language jihadist literature constituted “material support.” The court’s reasoning focused not on the harmfulness of the translation act per se but on the nodal role it played within the “global jihadist ideological dissemination network.” The court believed that by “localizing” extremist ideology and transmitting it to an English-speaking audience, the defendant essentially enhanced the terrorist organization’s “recruitment and radicalization capabilities.” This case marked an important evolution in American preventive

counter-terrorism criminal law: from punishing support for a terrorist organization’s material capabilities to punishing support for its ideological appeal.

A deep-seated feature of the American expansive model lies in the institutional combination of broad legislative authorization and restrained judicial review. Congress, through the use of highly open legal language, grants vast interpretive space and discretionary power to executive and judicial branches; meanwhile, federal courts, in cases involving national security, generally exhibit “heightened deference” to the professional judgments of administrative agencies, often reluctant to intervene substantively in risk assessments on constitutional grounds. While this institutional arrangement affords counter-terrorism operations great flexibility, it also strips criminal law of its traditional function as a “bulwark” of citizens’ rights; individual liberty and security largely depend on the unilateral determinations and discretionary judgments of administrative agencies. However, the American expansion model has recently encountered some judicial brakes. In *United States v. Hassoun* (2020), the court rejected the government’s attempt to indefinitely detain a suspect who had already served his sentence based on “inherent executive power.” This case indicates that even in high-security contexts, contemporary the judiciary require a baseline of proof of “concrete danger” for purely preventive detention; permanent preventive surveillance or detention cannot be imposed on citizens based solely on abstract, unverified “dangerousness.”

#### *The German proportionality-controlled model: rigid constraints by the constitutional court and the “concrete danger” threshold*

In sharp contrast to the American model is Germany’s “proportionality-controlled” preventive model centered on the Federal Constitutional Court. The “objective value order” established by the German Basic Law (*Grundgesetz*) places human dignity at the apex of constitutional values; any state action—including those in the name of security—must not violate this core realm. Through a series of landmark judgments, the Federal Constitutional Court has constructed robust constitutional barriers for preventive state power.

In the 2006 “Aviation Security Act” case, the Constitutional Court faced a law authorizing the military to shoot down a civilian airliner hijacked by terrorists for use as a weapon under extreme circumstances. The Court declared the law unconstitutional for violating the inviolability of human dignity. The ruling clearly stated that the state must not treat innocent passengers on board as “tools to save more people on the ground”; such instrumentalization of persons destroys the moral foundation of the legal order. This judgment delineated an absolute prohibition for preventive measures: regardless of how urgent the security goal, it cannot be achieved at the cost of fundamental human dignity.

More importantly, the Constitutional Court established a strict “concrete danger” threshold for initiating preventive criminal and police powers. In a series of judgments concerning counter-terrorism data retention, online surveillance, and preventive detention, the Court repeatedly emphasized that coercive interventions by the state based on preventive logic must be predicated on “sufficiently specific, imminent, and verifiable indications of danger,” not merely on abstract, general risk concerns. For example, when assessing a law allowing police to conduct preventive surveillance on “potential threats,” the Court required the existence of specific clues pointing to “a particular, impending criminal offense,” not mere speculation based on an individual’s ideological tendencies, religious beliefs, or past associations.

This model, centered on the Constitutional Court and using the principle of proportionality and the concrete danger requirement as review tools, effectively excludes a large number of marginal, speculative “risks” from the scope of criminal intervention. It compels legislators to carefully weigh security gains against rights infringements when designing counter-terrorism measures and to devise the least intrusive alternatives. The German model demonstrates that robust judicial review is not an obstacle to security but a necessary navigation system ensuring security measures do not deviate from the track of the rule of law.

In fact, not only Germany but also the United Kingdom has established boundaries for preventive rights through judicial review in its counter-terrorism legalization process. In the famous *A v Secretary of State* (2004, Belmarsh Case), the highest judicial authority in the UK explicitly rejected the government’s policy of “indefinite, trial-free” preventive detention for foreign terrorist suspects. The court held that even in the face of a severe terrorist threat, such discriminatory treatment based on nationality and indefinite detention was disproportionate and violated fundamental principles.

### ***The Chinese state-preventive model: integration of comprehensive measures and ideological governance***

The preventive construction of China’s counter-terrorism criminal law exhibits distinct features of systematic integration and an emphasis on ideological governance. At the normative level, crimes newly added by the 2015 “Criminal Law Amendment (IX),” such as “the crime of advocating terrorism or extremism” and “the crime of illegally possessing items advocating terrorism or extremism,” explicitly advance the defensive line of criminal law to the stages of ideological dissemination and possession. This marks the formal establishment of a “prevention of both thought and conduct” governance strategy in China’s counter-terrorism criminal law, aiming not only to combat violent terrorist activities themselves but also to curb their ideological foundations and social breeding grounds. The construction of China’s counter-terrorism criminal law system was completed on the basis of absorbing domestic governance experience and learning from international counter-terrorism trends. Professor Gao Mingxuan and others systematically argued for the comprehensiveness and scientific nature of China’s counter-terrorism criminal law, emphasizing the core position of criminal sanctions in the entire chain of terrorist activities.<sup>9</sup>

In judicial practice, this normative logic unfolds through specific cases. Taking the 2014 “Ilham Tohti” case as an example, this Uyghur scholar was charged with the crime of splitting the state, primarily based on his founding of a website, publishing articles advocating the Uyghur people’s right to “self-determination,” and criticizing central government policies. Although the prosecution failed to prove his direct planning or execution of any violent acts, the court held that his speech “created a social atmosphere for splitting the state” and “provided ideological preparation for violent terrorist activities,” thus possessing severe social harmfulness. The adjudicative logic of this case reflects an important dimension of China’s preventive counter-terrorism model: treating specific political and ethno-separatist speech as the “preparatory stage” or “incitement basis” for violent terrorist activities, thereby justifying early criminal intervention.

Beyond criminal justice measures, China has also developed a unique “comprehensive governance” preventive system. This system emphasizes the coordinated linkage of political-legal organs, publicity and education departments, ethnic and religious affairs departments, and grassroots community organizations. It aims to conduct source governance and whole-process management of terrorism-related

risks through legal, administrative, educational, economic, and other means. For example, “de-radicalization” work carried out in specific periods and regions includes not only the legal crackdown on illegal and criminal acts but also positive publicity and education for society, assistance and education for key groups, and guidance for standardizing religious activities. This multi-pronged, co-governance model attempts to build a broader and deeper social prevention network beyond criminal means. For instance, in the case of “Zhang XX Advocating Terrorism and Extremism” published by the Supreme People’s Court, the court clearly stated that the defendant’s mere act of uploading violent and terrorist audio-visual materials to QQ space for others to view constituted the crime of advocating terrorism, even without evidence that the act directly led to subsequent specific violent terrorist activities. This judgment clearly demonstrates that China’s counter-terrorism criminal law has significantly advanced the intervention point to the “information dissemination stage,” reflecting a zero-tolerance stance towards risks.

China’s state-centered preventive model is essentially an institutional system that deeply integrates legal punishment, administrative control, ideological guidance, and social governance. It differs from both the American path, which relies mainly on ex post facto criminal prosecution and broad judicial authorization, and the German path, which strictly relies on judicial review and proportionality constraints. Instead, it exhibits characteristics of “holistic security governance” under the leadership of the ruling party, employing multiple coordinated measures. The efficacy and legitimacy of this model heavily depend on the precise coordination among various measures and their joint adherence to the bottom line of the rule of law.

### **The rule of law costs of preventive expansion: an in-depth risk analysis based on cases**

#### ***The hollowing-out of the principle of legality and the attenuation of legal clarity***

The primary impact of preventive counter-terrorism criminal law on the rule of law lies in its erosion of the “clarity” requirement inherent in the principle of legality (*nulla poena sine lege*). This risk manifests in different forms in the practices of the three countries.

In the United States, concepts like “training,” “service,” “expert advice or assistance” within the “material support to terrorism” provision are extremely vague. In *Holder, Justice Breyer*, in dissent, sharply pointed out that the vagueness of this statute would force doctors, lawyers, and even humanitarian workers into a dilemma: they cannot ascertain whether providing medical services or legal advice to conflict zones would constitute a crime if the recipient is designated a terrorist organization. This “lack of fair notice” essentially deprives citizens of the ability to predict the legal consequences of their actions, violating the core requirement of due process.

In the Chinese context, the challenge to legal clarity is concentrated in the definition of “extremism.” While the Counter-Terrorism Law and the Criminal Law use this concept, they do not provide exhaustive, clear criteria for its determination. In judicial practice involving ethnic and religious factors, which interpretations of religious doctrine or expressions of ethnic customs will be deemed “extremist” often depend on the understanding and discretion of local law enforcement and judicial authorities. This relativity and context-dependency of standards, while providing flexibility to cope with complex realities, also brings risks of inconsistent legal application and difficulties for citizens to predict legal consequences, particularly in culturally diverse and socially sensitive border regions. A deeper

issue lies in the increasingly blurred boundary between “extremism” and “terrorism” in current legislation. When “extremism,” a concept originally belonging to the realm of thought, is directly used as grounds for criminalization without requiring proof of a substantive, imminent connection to specific violent terrorist acts, criminal law essentially accomplishes a dangerous leap from “punishing acts” to “punishing tendencies.” This trend substantially challenges the modern rule-of-law bottom line that thought itself is not a crime. By directly implanting the administrative control logic over thought dangerousness into criminal justice, it may lead to the over-expansion of preventive power, thereby squeezing the space for citizens’ normal freedom of speech and religion.

Such “over-inclusiveness” in definitions has triggered widespread judicial vigilance. Although the UK Supreme Court upheld the conviction in *R v Gul* (2013), the judges strongly criticized the “breadth” of the definition of terrorism in the UK’s counter-terrorism law in their judgment. The court noted that without substantial qualification, any military resistance against a foreign government could fall within the definition of terrorism, granting prosecutors overly broad selective enforcement power, which in practice violates the principle of clarity.

#### ***The crisis of the culpability principle: the migration of the liability foundation from “subjective culpability” to “objective risk”***

Traditional criminal liability theory rests on the dual cornerstones of “no crime without an act, no liability without mens rea.” However, the development of preventive criminal law may lead to a subtle migration of the liability foundation: from pursuing “fault” based on free will to managing “risk” based on behavioral position.

In the American case *United States v. Kourani* (2021), the defendant was charged with providing long-term financial and personnel support to Hezbollah. In proving his subjective intent, the court emphasized the defendant’s “knowledge” that Hezbollah was designated a terrorist organization and the “systematic, continuous” nature of his conduct. However, regarding whether the defendant had the “specific intent” to facilitate any particular terrorist attack, the judgment paid little attention. This reflects a trend: in preventive prosecution, the prosecution only needs to prove the defendant “knew he was dealing with a bad organization,” without needing to prove his intent to facilitate any specific illegal action by that organization. The subjective element is diluted from “pursuing or consciously disregarding harmful results” to “awareness of a risk environment.”

Similarly, in Chinese convictions for “illegally possessing materials advocating terrorism or extremism,” there exists difficulty in determining the subjective element. According to law, conviction requires “knowingly” illegally possessing such materials. But in practice, for situations where individuals possess relevant electronic or printed materials out of curiosity, research, or by chance, there is often a lack of refined evidentiary standards and inference rules for determining their “knowledge” and purpose of possession. If a guilty intent is simply presumed from the fact of possession, it may slide towards objective imputation, impacting the principle of culpability.

#### ***The suspension of the principle of proportionality and the preventive over-severity of punishment***

One of the most direct consequences of preventive logic is that it may lead to a severe disconnect between the severity of punishment and the actual harm caused by the conduct, i.e., “preventive over-severity of punishment.”

The U.S. Sentencing Guidelines contain a “terrorism enhancement” provision; once a case is labeled as “involving international terrorism,” the defendant’s sentencing starting point is substantially increased. In many “material support” cases, defendants engaged only in non-violent support activities like translation or fundraising but may face prison sentences similar in length to those of violent attackers. The purpose of punishment seems no longer primarily to exact retribution for past crimes but to achieve long-term “social incapacitation” based on an assessment of the defendant’s future dangerousness. This practice raises profound questions about the justification of punishment.

In China, the Criminal Law imposes severe penalties for organizing, leading, or participating in a terrorist organization, with a maximum punishment of life imprisonment. For “advocating terrorism or extremism,” serious cases can also be punished with imprisonment of ten years or more. When such penalties are applied to individuals primarily engaged in speech dissemination without a proven direct link to specific violent acts, the public and academia inevitably question whether the punishment fits the crime. In this regard, Professor Zhang Mingkai warned that the sentencing of preventive punishment must be strictly limited by the sentence for the offense; the upper limit of retributive punishment cannot be breached for the sake of achieving general preventive effects, otherwise it will lead to a crisis in the legitimacy of punishment.<sup>10</sup> Overly severe punishment<sup>11</sup> not only may violate the principle of proportionality but could also provoke unnecessary antagonism, thereby weakening the social consensus base for counter-terrorism efforts.

#### ***The chilling effect and the shrinkage of autonomy in social public space***

The most concealed yet far-reaching impact of preventive criminal law lies in its “chilling effect” on civil society and public discourse spaces. When legal boundaries are blurred and risks unpredictable, rational individuals and institutions will choose to minimize risk by actively restricting the scope of their legitimate activities.

In the United States, many human rights organizations and development agencies have explicitly stated that due to the broad deterrent effect of the “material support” law, they have had to cease operations in conflict zones like Somalia and Gaza where designated groups are active, even if their work is purely humanitarian. This deprives local civilians of crucial aid, potentially exacerbating humanitarian crises and social instability, providing fertile ground for extremism.

In China, the widespread implementation of preventive counter-terrorism measures, particularly in ethnic regions, may also inhibit legitimate academic research, cultural and artistic exchanges, social criticism, and religious discussion. Scholars may engage in excessive self-censorship when researching sensitive ethnic and religious topics; media may become overly cautious in related reporting; grassroots officials may adopt simplistic, “one-size-fits-all” approaches for fear of making mistakes. This diminution of social vitality and blockage of communication channels, in the long run, is detrimental to building a resilient, inclusive social community capable of internally resisting extremist ideologies.

#### ***Towards “structurally constrained prevention”: paradigm adjustment and institutional innovation in china’s counter-terrorism criminal law***

Confronted with the multiple rule-of-law risks brought by preventive criminal law, simple contraction or unchecked expansion

are neither wise choices. The key to perfecting China's counter-terrorism rule of law lies in promoting a paradigm shift from "unidimensional preventive expansion" to "structurally constrained prevention." The core of this paradigm is that while acknowledging and leveraging the preventive function of criminal law, it builds multi-layered constraint mechanisms into its design through sophisticated institutional arrangements, ensuring that the exercise of preventive power is characterized by efficacy, rationality, and legitimacy.

***Precise construction at the legislative level: narrowing the scope of intervention with the "dual substantive threshold"***

The establishment of preventive offenses should follow the "principle of ultima ratio" (last resort) and the "principle of minimum necessity." Therefore, it is recommended that in future Criminal Law revisions or judicial interpretations, the constitutive elements of terrorism-related preparatory offenses, assistance offenses, and advocacy offenses be refined to establish a dual substantive threshold for criminalization: "high degree of realistic dangerousness of the act" and "the actor's specific terrorist purpose."

"High degree of realistic dangerousness" requires the prosecution to prove a substantive, verifiable facilitating relationship between the alleged act and the preparation or execution of specific terrorist attacks, not a remote or speculative connection. For example, for "advocacy" acts, it must be proven that the content directly incites or teaches violent methods or is, in a specific context, highly likely to immediately induce imitative behavior. "Specific terrorist purpose" requires proof that the actor subjectively aimed to facilitate or promote terrorist activities, not merely to express certain extreme political or religious views or to harbor abstract sympathy for a terrorist organization. By strictly applying these two elements, criminal law intervention can focus on truly high-risk, high-culpability behavior, excluding a large amount of marginal, controversial behavior from criminal sanctions, preserving reasonable space for citizens' freedom of thought and social interaction.

***Refined judicial practice: guiding rational adjudication through guiding cases and proportionality review***

The Supreme People's Court should fully utilize the system of guiding cases, selecting and publishing a batch of counter-terrorism cases that serve as models in areas such as determination of subjective intent, assessment of act dangerousness, and sentencing calibration. These cases should establish the following key adjudicative rules:

- I. The "Functional Link" Review Rule: In determining whether an act (e.g., financial aid, skills training, information dissemination) constitutes "assistance" or "advocacy," it is necessary to elaborate in detail how the act specifically and functionally enhances the operational capability or social influence of a particular terrorist organization or activity. Avoid conviction based solely on the actor's abstract association with the organization or ideological similarity.
- II. The "Purpose and Context" Distinction Rule: For acts involving translating, researching, or possessing materials related to terrorism, it is essential to strictly distinguish between acts for legitimate purposes such as academic research or news reporting and acts for the purpose of advocating or disseminating terrorism, based on the specific context including the actor's profession, background, behavioral patterns, and scope of dissemination.
- III. The Gradient and Individualization Rule in Sentencing: Clearly require that sentencing must be strictly proportionate to the

actual role of the act in the terrorist activity chain, the specific danger caused (not hypothetical worst-case scenarios), the actor's subjective culpability, and expressions of remorse. For actors who play only minor, auxiliary roles and pose no personal danger, priority should be given to applying non-custodial sentences such as probation or control, reflecting the policy of combining punishment with leniency.

Simultaneously, substantive activation of proportionality review should be promoted in the adjudication of counter-terrorism cases. Judges should consciously analyze and reason in their judgments regarding the suitability, necessity, and balancing (proportionality in the narrow sense) of state intervention measures (especially the forward-shifting of criminalization and severe penalties), transforming the principle of proportionality from a theoretical doctrine into a living judicial practice.

***Strengthening safeguards at the procedural level: countering arbitrary power through multi-layered review and effective defense***

For preventive counter-terrorism cases, precisely because they involve early intervention and relatively flexible evidentiary standards, procedural justice becomes even more crucial to ensure substantive fairness.

- I. Cautious Initiation Mechanisms for Filing Cases and Prosecution: For cases involving only speech, thought dissemination, or marginal supportive acts, public security organs during case filing and procuratorial organs during arrest approval and prosecution initiation should establish internal hierarchical review or inter-departmental consultation mechanisms to strictly assess the necessity of criminal prosecution, filtering out obviously inappropriate or overly controversial cases from the outset.
- II. Strengthening Substantive Protection of the Right to Defense: Ensure the defendant's right to effective legal assistance. For cases involving state secrets, exploring the establishment of a "security-cleared defense lawyer" system could be considered, allowing vetted lawyers to access necessary case materials and conduct substantive defense while protecting state secrets. Simultaneously, the defendant's right to apply for expert assistants to provide opinions on technical or specialized evidence (such as network data analysis, extremist ideology determination) should be guaranteed.
- III. Introducing Independent Socialized Assessment Procedures: For cases where sentencing may have significant social impact or involve complex ethnic/religious factors, introducing procedures similar to "social investigation reports" or "expert consultation opinions" during the sentencing stage could be explored. Inviting experts from fields such as anthropology, sociology, and religious studies to provide professional assessments on the socio-cultural background of the act, the actor's social dangerousness, and potential for rehabilitation could serve as references for judges in sentencing, enhancing the social acceptability and scientific basis of judgments.

***Reflective transcendence of theoretical paradigms: from "controlling risk" to "governing risk"***

Ultimately, the establishment of the "structurally constrained prevention" paradigm relies on deep reflection on the theoretical role of counter-terrorism criminal law. Criminal law should not be simplistically viewed as a "control tool" or "fire extinguisher" for

social risks but should be positioned as a specialized, restrained component within the national “risk governance system.” This implies:

On the one hand, criminal law prevention should adhere to the principle of subsidiarity. The intervention of criminal law is justified only when non-criminal means such as administrative regulation, financial control, and community intervention prove ineffective in controlling specific risks. Legislation and adjudication should consciously leave a large number of low-level risks to other social mechanisms.

On the other hand, the goal of counter-terrorism governance should be to build society’s internal resilience, not merely rely on external suppression. A healthy, just, opportunity-rich society with unobstructed channels for dialogue is itself the best barrier against extremism. Therefore, the application of counter-terrorism criminal law must be coordinated with other policies promoting social integration, economic development, and cultural prosperity, avoiding damage to society’s long-term health and vitality due to over-criminalization.

## Conclusion

### Safeguarding the dignity and resilience of the rule of law in the age of risk

The preventive turn in counter-terrorism criminal law represents a functional adaptation of nation-states facing non-traditional security threats, reflecting the legal system’s effort to respond to social complexity. However, comparative law perspectives clearly reveal that there is no single “correct” path for this turn. The American expansive model demonstrates the retreat of judicial constraint under intense security pressure and its costs; the German proportionality-controlled model proves the possibility and efficacy of safeguarding the rule of law bottom line through robust constitutional review; the Chinese state-preventive model explores a comprehensive path integrating law, policy, and social governance.

Each model contains specific advantages and risks, and its effectiveness ultimately depends on whether, within its specific political culture and constitutional tradition, it can establish a dynamic balance between security needs and rule-of-law principles. For contemporary China, the construction of counter-terrorism rule of law cannot rigidly cling to classical liberal dogma while ignoring grim realistic threats, nor can it blindly imitate the expansionary logic of other countries at the expense of hard-won rule-of-law achievements. What we should pursue is an institutional innovation that requires greater wisdom and courage: a “structurally constrained prevention” system capable of internalizing the efficacy of prevention within the framework of the rule of law, enabling security power to operate rationally within the track of law.

The construction of this system requires legislators to craft legal provisions with high precision, judges to exercise their review duties with professional judgment, law enforcement officials to restrain their power with strict procedural awareness, and the entire society to safeguard the rule-of-law consensus through sustained rational participation. It signifies that the success of the counter-terrorism struggle will ultimately be measured not only by the reduction in terrorist attacks but also by whether a society, in confronting extreme threats, can still preserve its freedom, dignity, and rule-of-law spirit.

In an age where risk has become a defining characteristic, the true test for law may lie not in how thoroughly it can eliminate risks, but in whether it can manage risks without destroying the values that make our lives worth safeguarding. The future of counter-terrorism criminal law lies precisely in the continuous answering and practical exploration of this profound question.

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## Conflicts of interest

The author declare that there is no conflict of interest.

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