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Human rights protection in the context of combating terrorism: problems of finding the optimal balance

Захист прав людини в умовах боротьби з тероризмом: проблеми пошуку оптимального балансу

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Abstract

The article examines the essence and nature of terrorism in the light of the problem of observance and protection of human rights, as well as analyzes the problems that arise in the implementation of anti-terrorist activities. Emphasis is placed on the fact that it is difficult to find a balance in the observance of human rights in the implementation of various anti-terrorist measures by law enforcement agencies and the investigation of crimes related to terrorist activities. It is concluded that the fight against terrorism and the protection of human rights are goals that cannot conflict with each other in a democratic society. They complement and mutually reinforce each other, so when taking measures to stop terrorist activities, states are obliged to adhere to key principles and norms of international law, as well as specific commitments made in connection with participation in international human rights agreements.

Анотація

У статті досліджуються питання сутності та природи тероризму у світлі проблеми дотримання та захисту прав людини, а також аналізуються проблеми, які виникають при здійсненні антитерористичної діяльності. Акцентується увага на тому, що складно знайти баланс у дотриманні прав людини при здійсненні різного роду антитерористичних заходів правоохоронними органами та розслідуванні злочинів, пов'язаних із здійсненням терористичної діяльності. Зроблено висновок про те, що боротьба з тероризмом та захист прав людини - цілі, які не можуть конфліктувати між собою у демократичному суспільстві. Вони доповнюють і взаємно підсилюють один одного, тому при вжитті заходів, спрямованих на припинення терористичної діяльності держави зобов'язані дотримуватися ключових принципів і норм міжнародного права, а також конкретних

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Key words: terrorism, terrorist activity, human rights, restriction of human rights, counteraction to terrorism.

Introduction

Terrorism did not arise today or yesterday, but its scope in the third millennium is not just impressive, it is appalling. A few years ago, many hoped that with the advent of the 21st century, the era of universal peace and harmony that humanity had long dreamed of would finally begin on our planet. Such hopes were expressed not only by ordinary people but also by many famous politicians and statesmen. But, unfortunately, the following events soon convincingly proved that these were just dreams, the realization of which is still quite far. In particular, in the 21st century, the problem of terrorism has become more acute than ever. The new century began with large-scale bloody terrorist attacks with numerous victims: the tragic day of September 11, 2001 in New York or the events of October 2002 in Moscow, regarding "smaller" terrorist acts, the media reported about them almost daily.

In modern conditions, due to the main political, economic, social, and cultural contradictions of national and international life terrorism has been transformed into a large-scale and complex socio-political phenomenon of national (country), regional and international scope.

Nowadays confirm that terrorism, due to its specificity, as an accessible and often effective form of violence, tends to spread, expand, increase the number and sophistication of terrorist attacks. In recent years, there has been an escalation of terrorist activity in European countries. Accordingly, this leads to the formation of an appropriate regulatory framework in the field of counter-terrorism, as well as the establishment of effective cooperation between States and the development of common standards in this area within the European space. Such processes take place in many foreign countries. However, the lack of common approaches to the understanding the essence of terrorism, the possible restrictions on certain human rights and freedoms during emergencies, as well as the proportionality and adequacy of these restrictions to the goal pursued by counter-terrorism States, in various European countries has a negative impact on the coordination of law

зобов'язань, прийнятих у зв'язку з участю в міжнародних угодах з прав людини.

Ключові слова: тероризм, терористична діяльність, права людини, обмеження прав людини, протидія тероризму.

enforcement agencies in combating this negative phenomenon.

Literature Review

The problem of terrorism has long remained open due to the complexity and ambiguity of the phenomenon itself. At the same time, it cannot be said that the problem of terrorism is unexplored. In particular, among the thorough studies should be singled out the works of B. Jenkins (1975), W. Laqueur (1977), J. Alexander (1979), J. Bell (1978), B. Crozier (1974), L. Bonanate (1979), G. Newman & R. Clarke (2008), R. Jacquard (2002) and others.

In addition, there are now many works at the level of monographic research: P. Wilkinson (1987), "Trends in International Terrorism and America's Response", B. Hoffman (2003) "Inside Terrorism", V. Lipkan (2000) "Terrorism and national Security of Ukraine" and V. Antipenko (2005) "The fight against modern terrorism: international legal approaches", etc.

Despite such a large amount of researches on the phenomenon of terrorism, and the unconditional urgency of the problem of human rights in the context of the international legal fight against terrorism, in the legal literature, terrorism and human rights are usually considered separately. Moreover, despite the development at the international level of scientific debate on the restriction of human rights in order to ensure the effectiveness of counter-terrorism activities of States, in the domestic legal literature there are almost no researches on this issue. Meanwhile, in our opinion, this is one of the most relevant theoretical and practical issues in the study of current trends in the fight against terrorism.

Methodology

Any process of cognition is based on the fundamental choice of methods that can play a decisive role in its course and determine its ideological core and purpose. The methodological basis of the study consists of philosophical, general scientific and special legal methods. Only the use of these methods in a

system allowed to obtain complete, objective and promising results from the standpoint of integrated, systematic and other approaches.

The philosophical (dialectical) method, which allowed to comprehensively and fully formulate the main threats of terrorism for human rights, as well as to reveal the main problems of the democratic response to terrorism, became the one of the main methods of scientific research.

The use of the axiological method allowed to substantiate the importance of implementing coordinated actions of States in the fight against terrorism.

In order to analyze and find out the content of the relevant rules of international treaties and acts of international organizations in the field of research, certain methods of interpretation of law were applied.

Results and Discussion

THE CONSEQUENCES OF TERRORISM FOR HUMAN RIGHTS

Nowadays the world has entered a qualitatively new stage of its development, connected with the influence of universal regularities of the process of social transformation. Economic globalization and integration of States into a single world system is a manifestation of this transformation. Globalization leads to the establishment of a single global socio-economic, political and legal space, the formation of a unified information system, the solution of common problems in the field of ecology, socio-economic development, the preservation of peace and the fight against terrorism in all its manifestations and so on (Tymoshenko., Maksymov., Makarenko., Kravchenko., & Kravchenko., 2021, p. 11).

In modern literary sources, it is increasingly possible to find the idea that terrorism at the turn of decades has become a universal disaster that knows no borders. And it really is. It poses one of the most serious threats to international peace and security, and it is a major threat to fundamental human rights, as it aims simply to eliminate human rights, democracy, and the rule of law. And this is confirmed by statistics.

Over the last decade, thousands of civilians have been killed or injured in terrorist attacks, millions have been displaced or forced to flee their homes, many women and children have been enslaved and subjected to violence, including sexual one (Zelinskaya, 2017, p. 491-492).

It has long been recognized that terrorism strikes a direct blow at the values underlying the Charter of the United Nations and several other international treaties, in particular such as: respect for human rights; rule of law; rules of war that protect the civilian population; tolerance between peoples and countries; and the peaceful settlement of conflicts (Office of the United Nations High Commissioner for Human Rights (2008). Therefore, it can be said with confidence that terrorism is certainly a negative phenomenon, an anti-value of both international and domestic law, as it directly affects the most important (fundamental) human rights. Destabilization of the situation in a country or region, undermining peace and security, law and order, and thus the destruction of civil society and democracy as a result of terrorist acts threaten the socio-economic development of states and have a strong negative impact on some groups. As a result, it negatively affects the observance of fundamental human rights.

As the UN Special Rapporteur on Human Rights and Terrorism, Kufa Calliopi, once has remarked: "In fact, there is probably no human right that is not adversely affected by terrorism" (Calliopi, 2004, p. 15). The duty of the state to protect the rights of everyone under its jurisdiction is consistently observed by regional human rights courts and international organizations, including UN bodies working under the human rights treaty. By adopting resolutions against terrorism in accordance with Chapter VII of the UN Charter, the Security Council stated that States should be held accountable for non-compliance with international legal obligations to take active actions against terrorism. States must act against terrorism by all legal means and methods at their disposal. In this regard, V.A. Kartashkin notes, "The world today faces a dilemma: to ensure the security of states and human rights through compliance with the UN Charter and the strengthening of the UN or to combat terrorism and other human rights violations through unilateral action by force and further restriction of fundamental rights and freedoms of man and citizen. A secure world cannot exist without respect for human rights" (Kartashkin, 2003, p. 46).

In his report "Unity in the fight against terrorism: recommendations on a global counter-terrorism strategy" (United Nations, 2006) (A/60/825) Secretary-General of the UN rightly warned the international community that "the protection of human rights is an essential condition for the implementation of all aspects of the counter-

terrorism strategy and stressed that effective measures to combat terrorism and protect human rights are goals that do not conflict with each other, but complement and mutually reinforce each other".

The legal literature usually emphasizes that there are three rather separate areas in which terrorism threatens social and political values, directly or indirectly related to the issue of full realization of human rights and fundamental freedoms: life, liberty, and dignity of the person; democratic society; social peace and public order.

Threat to life, liberty and dignity of the person

The right to life is the basis for all other human rights, while individual freedom and dignity are the ultimate goal of human rights.

Art. 3 of the Universal Declaration of Human Rights (1948) states that everyone has the right to life, liberty, and security of person, and Art. 5 prohibits cruel, inhuman, or degrading treatment or punishment.

According to paragraph 1 of Art. 6 of the International Covenant on Civil and Political Rights (1966) the right to life is an inalienable right of every human being. Cruel, inhuman or degrading treatment or punishment is prohibited by paragraph 1 of Art. 7 of the Covenant. The right to liberty and security of person is enshrined in paragraph 1 of Art. 9 of the Covenant. Similar norms are contained in human rights documents at the regional level.

It should be emphasized that the consolidation of these rights implies not only a negative obligation of states to refrain from violating them but also, they (states) have a positive obligation to take measures to prevent their violation by anyone, including terrorists. Meanwhile, when committing terrorist acts, these rights are violated in the most direct way, because people die, are deprived of their liberty, other suffering is inflicted on them, their property is destroyed, and so on. This reveals the direct link between terrorism and human rights violations. As a pattern, in March 2012, the terrorist Mohammed Mera, a 24-year-old native of Algeria, committed three attacks, murdered seven people - 3 servicemen and 4 students of a Jewish school. 5 people were injured. These events were widely covered in the French and world media. Demonstrations in memory of the victims of this terrorist attack took place in Paris and several other cities in France. Former French President Nicolas Sarkozy has even offered to increase

responsibility for visiting extremist websites (RBC.UA, 2012).

Among the extraordinary examples is the tragedy experienced by the French in early 2015 as a result of the activities of Islamist terrorists. On the morning of January 7, several armed Islamists stormed the editorial office of the famous magazine Charlie Hebdo and opened fire. As a result of this terrorist attack, 12 people were killed: 10 journalists of the publication and 2 policemen. The international reaction to the tragic events in the world was not long in coming - some countries decided to tighten security measures. Others expressed condolences to the French government and people (RFI, 2015). Thus, in both the first and the second cases, there is a clear link between terrorism and human rights violations.

The threat to democracy

In addition to the direct violation of human rights by terrorists, there is also an indirect link between terrorism and human rights violations. This is the case when States take harsh, incompatible human rights actions in response to the threat of terrorism. As K.K. Koufa notes, "an indirect link can be traced in cases where the state's response to terrorism entails the application of strategies and methods that go beyond what is permitted by international law and leads to human rights violations, including, in particular, extrajudicial executions, torture, unfair trials and other forms of unlawful repression that violate not only the rights of terrorists but also innocent citizens" (Kalliopi, 1999).

In addition, terrorism can have the following negative consequences for a democratic society: undermine the foundations of legitimate state power; to put in place ideological and political mechanisms that contribute to the planting of a model of society favorable to terrorists; to prevent citizens from exercising their right to participate in decisions that affect their lives; undermine the principles of pluralism and the democratic order of society by creating unfavorable conditions for the application of constitutional norms; to stop the process of democratic development and democratization of society; to slow down the process of free political, economic, social and cultural development; lead to the destabilization of a democratic society even in cases where terrorism does not pose a real threat to the life of that society; create conditions for the expansion of terrorist activities and the growth of terrorists, etc.

Thus, in countering terrorism, a democratic state faces an inevitable problem. It must effectively combat the terrorist threat to citizens and the state itself, without violating human rights, the democratic process, and the rule of law. On the one hand, a democratic government and law enforcement agencies must avoid the very harsh response that many terrorist groups deliberately seek to provoke to destroy democracy. On the other hand, the government's inability to enforce the law, protect people's lives and property, can undermine its authority and credibility. The fight against terrorism is further complicated by the fact that law enforcement agencies must comply with the restrictions imposed by human rights law, while terrorists are free from such restrictions. In any case, this does not give any grounds for abandoning democracy in the fight against terrorism.

Threat to the social world and public order

Terrorism today is not only a *de facto* daily terrorist attack with a large number of victims but also a large-scale and complex socio-political phenomenon of planetary significance, which has a systemic basis due to the main political, economic, and social contradictions of international life (Bilyanska, 2013).

Terrorist acts inevitably create social and political chaos. Instilling fear and creating conditions conducive to the destruction of the existing social regime is one of the goals of terrorists.

In the long run, the negative impact that terrorism has on the social order can shake the foundations of the state system and pose a threat to the very existence of the state. This is particularly the case when terrorist activities involve drug trafficking, arms trafficking, political assassinations, and other activities of international organized crime, as well as when terrorism manifests itself in the form of fierce insurgency and the violent overthrow of the existing country regime. This puts the country in crisis, destabilizes the system of state power, which, in turn, endangers the international legal order.

The UN, first of all, the UN General Assembly and the UN High Commissioner, play a huge role in the formation of real protection mechanisms against the threat of terrorism. The 60th session of the United Nations discussed the protection of human rights and fundamental freedoms in the fight against terrorism and stated that any measures taken to combat terrorism should be ensured by states in compliance with their

obligations under international law, in particular human rights law.

On an international summit on democracy, terrorism, and security, which was held in Madrid on 10 March 2005, the UN Secretary-General outlined 5 elements of a strategy to respond to the threat of terrorism based on respect for human rights: 1. Protecting human rights in the fight against terrorism; 2. To carry out explanatory work among dissatisfied groups so that they do not choose tactics of terrorist actions; 3. Deprive terrorists of the means to carry out their attacks; 4. Deter states from providing support to terrorist groups; 5. Create potential in the state to prevent terrorism. UN Secretary-General Kofi Annan (2005) also noted that "measures taken by many States violate human rights and fundamental freedoms and warn that human rights violations cannot contribute to the fight against terrorism" (United Nation, 2006).

The special human rights bodies in the UN system pay close attention to the protection of human rights and the fight against terrorism within their respective mandates and resources. For example, in May 2005, the Committee against Torture adopted two decisions that serve as an important guideline for the protection of human rights in the fight against terrorism. Both, the case of *Agiza v. Sweden* and *Brady v. France's*, address the issue of deportation of convicts at risk to their lives and health.

The role of international human rights bodies and international courts has increased, due to various objective reasons, among which the growing importance of effective protection of human rights and freedoms and the need to address issues related to armed conflict and international terrorism. One of the most effective mechanisms for protecting the rights and freedoms of citizens are the activities of the European Court of Human Rights. The analysis of ECtHR decisions is of particular importance, including the application of Art. 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950), in which it is established that in the event of war or other extraordinary circumstances threatening the life of the nation, it is possible for the State to take measures that deviate from its obligations under the Convention, but only to the extent that the urgency of the situation so requires, provided that such measures do not conflict with other obligations of the State under international law. And this even though the Convention as a whole

has a "rigid" anthropocentric and humanistic orientation (Drozdov, 2018).

Quite often, law enforcement agencies in some countries, when confronted with persons accused of terrorist activities, do not always adhere to conventional safeguards. And this becomes the basis for the victims to appeal to the ECtHR for protection and restoration of justice. Thus, since 1961, there has been a fairly rich jurisprudence in which the Court has expressed its views on the treatment of detainees, gave an interpretation of the concepts of "terrorist activity" and "involvement in terrorism." For example, in the decision in the case of *Ireland v. The United Kingdom* (Ireland v. The United Kingdom, 1977), the ECtHR found that during the arrest, further detention and pre-trial investigation of Irish citizens suspected of terrorism, UK law enforcement officials significantly exceeded the powers granted to them. In particular, during interrogations, such means of mental and physical violence as standing under the wall, deprivation of food, drink and sleep, using the noise, which, in essence, is a violation of Art. 3 of the Convention ("Prohibition of Torture") (Council of Europe, 1950). The Court also issued a similar decision in the case of *Aksoy v. Turkey* (Aksoy v. Turkey, 1996).

Based on the case-law of the ECtHR on the application of paragraph 2 of Art. 15 of the Convention, it should be noted that the Court has consistently pointed out the impossibility of restricting, even in the context of special legal regimes, certain rights and freedoms which are absolute and enshrined in Articles 2, 3, 4 (§ 1) and 7 of the Convention, namely life; prohibition of torture; prohibition of enslavement; prohibition of conviction for actions or omissions that did not constitute a criminal offense at the time of their commission, prohibition of imposition of a heavier punishment than that applied at the time of its commission.

At the same time, the ECtHR highlights rights and freedoms that, on the contrary, may be restricted following certain provisions of the Convention, usually in the interests of national security and public order, the economic well-being of the country, to prevent riots or crimes, to protect health or morals or to protect rights and freedoms, other people. Such rights include the right to respect for private and family life, housing and correspondence; freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association; the right to freedom of movement; prohibition of deportation of a foreigner-only for

the execution of a decision made under the law. Thus, the analysis of the case-law of the ECtHR allows us to conclude that the main criteria that guide the Court in exercising control are: a) the nature of the rights covered by the waiver; b) the grounds for imposing a state of emergency; c) the duration of the state of emergency.

Thus, it can be argued that today, scholars and politicians have given much thought to the challenges facing modern Western democracies in the field of human rights. Many opinion polls show that many citizens in some Western countries are aware of the need to empower governments to ensure their security and support the granting of broader rights to intelligence services. Proponents of restrictions on citizens' rights argue that measures taken to counter the terrorist threat are a temporary departure from the principles of liberal democracy that are permissible in an emergency. At the same time, libertarians ruthlessly criticize the oppression of civil liberties. In this sense, the government transforms democracies into police states (Shirokova, 2014, p. 30-31).

When it comes to terrorism, there is a possibility that there may be a serious conflict between two main areas of concepts of human rights and the fight against terrorism: the first concerns the act of terrorism itself; the second concerns those measures that may be taken by official bodies in the process of countering terrorism.

Respect for human rights in carrying out anti-terrorist activities

Modern problems of the democratic response to terrorism

Terrorologists often point out that with a democratic response to terrorism, democracy can be significantly harmed or destroyed altogether by an excessive response from the state. As a rule, with a relatively low intensity of terrorist violence, any restriction of democratic freedoms in society is perceived very negatively, as the use of the unfavorable situation of freedoms in order to increase its interference in the privacy of citizens, facilitate control over their actions and lower the bar of requirements for themselves.

The centuries-old struggle of the progressive forces of society for the fundamental rights and freedoms of citizens has taught us to be extremely negative about any restriction, even temporary and forced. As Benjamin Franklin once remarked: "The one who sacrifices freedom for the sake of peace deserves neither freedom

nor security" (Volokh, 2014). At the same time, the right and obligation of states to use all possible means to protect society from criminal encroachments for the benefit of the latter has been recognized since ancient times. However, often the intensity of terrorist violence forces the state to take decisive action, which can cause ambiguity both within the state and in the international community. Particularly harsh is the reaction to such restrictions in societies that have survived totalitarian regimes.

However, as was noted above, according to the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950), the official imposition of martial law or a state of emergency, or the establishment of another public danger that threatens the life of the nation, may justify the suspension (restriction) of most of the relevant rights and freedoms. Art. 15 "Derogation in time of emergency" says: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law" (Art. 15, Council of Europe, 1950). The Secretary General of the Council of Europe shall be informed of the relevant decision, the measures taken and the reasons for their adoption, as well as their repeal and renewal. Thus, Art. 15 allows for restrictions only if the necessary conditions laid down in the Convention are met and in accordance with the established procedure.

The concept of "militant democracy"

Recently, the very view of democratic measures to protect the state system has changed significantly. According to Professor E. Jesse, the concept of "militant democracy", which is supported in some countries and means the judicious use of force in the rule of law to protect democratic rights and freedoms, is based on the following principles: proclamation and upholding of priority values the majority of the population; reliable state protection of proclaimed values; preventive protection by legal and other means from possible threats (Khlobustov & Fedorov, 2000, p. 91-92).

As we can see, this concept has a preventive character - it provides for the restriction of democratic freedoms in case to protect the priority values of society (Moskalkova et al., 1998). In fact, the focus on the superiority of such

values over individual freedoms and rights is enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950), as well as in the International Covenant on Civil and Political Rights (United Nations Human Rights Office of the High Commissioner, 1966) and Universal Declaration of Human Rights (United Nations, 1948). Thus, the European Convention's rights to freedom of thought, conscience and religion (Art. 9), the right to freedom of expression (Art.10) and the right to freedom of peaceful assembly and association (Art. 11) may be subject to restrictions established by law and the need for a democratic society in the interests of public safety, public order, health and morals, or to protect the rights and freedoms of others. And the last two - also in the interests of national security and in order to prevent riots and crimes. In addition, restrictions on the rights related to freedom of expression may take place (if required by law) in the interests of territorial integrity, protection of the reputation or rights of others, to prevent the disclosure of information obtained in confidence, or to maintain the authority and impartiality of justice. As correctly noted by O.M. Khlobustov and S.G. Fedorov, similar grounds for restriction are established by the European Convention on Freedom of Opinion and Transfer of Information (Khlobustov & Fedorov, 2000, p. 96).

In general, the starting point in resolving the issue of restricting the rights of individuals, especially the right to privacy is the balance of interests of the individual and society. According to A.G. Spirkin, "law is a necessary condition for the exercise of freedom of free citizens in society. But if a person wants to be free, he must limit his freedom to the fact of the freedom of others, and this is his own legal relationship. Law is something sacred because it is an expression of the idea of freedom, the idea of law and order in society" (Spirkin, 2001, p. 602).

In terms of restrictions on personal rights, European states have traditionally emphasized the importance and possibility of police and state interference in a person's private life if there is a greater threat to society. Accordingly, a culture of respect for government in Europe makes it possible to violate the rights of government rather than citizens.

It should be understood that the existing consensus in society in wartime in the face of a large-scale threat of possible restriction or suspension of civil rights and freedoms, in a situation of terrorism is much more difficult and

depends on society's perceived level of threat from terrorism. According to Robert Pifotski, a former member of the Federal Trade Commission, one of the most active defenders of privacy, "September 11 has changed a lot. In a society that protects privacy, terrorists feel like fish in water. And if in order to identify them, it is necessary to give in to this inviolability, the majority is ready to say: "Well, we agree" (Mike., Heather. et al., 2001, p. 41).

The example of the United States and other Western countries in the face of the terrorist threat confirms the rule that violations of civil liberties must be investigated concerning the fundamental freedom of self-preservation and preservation of a political system within which these and other freedoms make sense. This implies that the relationship between terrorism, intelligence, and civil liberties is a matter of balance.

It must also be understood that the fight against terrorism and the protection of human rights are goals that cannot conflict with each other. These are complementary and mutually reinforcing goals, so when taking measures to stop terrorist activities, states are obliged to adhere to key principles and norms of international law, as well as specific commitments made in connection with participation in international human rights agreements. These principles, norms, and obligations define the limits of permissible lawful actions of the authorities aimed at combating terrorism.

Conclusions

Thus, in view of the above, it can be argued that most researchers of terrorism conclude that terrorism today poses the most serious threat to international peace and security, and is therefore a major threat to fundamental human rights, especially natural rights and freedoms. Despite the fact that in this area every state is trying to develop an effective policy to protect its citizens from the threat of terrorism, it is often too severe, because there are violations of fundamental human rights - especially personal, access rights to information, freedom of the press and others, and in emergencies - special services are endowed with broad powers and have access to bank accounts, eavesdropping on conversations, monitor correspondence on the Internet, etc. States forget that by pursuing their counter-terrorism policies, they often violate the constitutional rights of citizens. The activity of the state in the fight against terrorism should consist not only of force, but also of preventive measures, which is extremely important in a legal democratic society.

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