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# The Constitutional Requirements for Averting of a Danger:

The Principles of a State Based on Democracy,  
and the Rule of Law v. Averting of a Danger<sup>\*1</sup>

## 1. Introduction

After the terrorist attacks of 11 September 2001 in the US, countries the world over face new challenges related to terrorism issues. Also, organised crime in the Schengen countries is able to move easily from one country to another. Both of the above will force governments and legislators to think more and more about internal security. There is a continuum with fundamental rights and freedoms at one extreme and internal security on the other. The values representing both ends of the continuum are both essential—internal security and also fundamental rights and freedoms. History has shown that views focusing on either extreme have not been useful from a long-term perspective. For that reason, balance must be achieved, and it is not useful if one value is elevated at the expense of the other value.

The Police Act<sup>\*2</sup> was passed by the Supreme Council of the Republic of Estonia (Eesti Vabariigi Ülemnõukogu) on 20th September 1990 and entered into force on 8 October 1990, before the restoration of Estonian independence. The basics elements of the Police Act remained unchanged until the parliament of Estonia (Riigikogu) enacted the Police and Border Guard Act<sup>\*3</sup> (PBGA), in 2009, and then the Order Protection Act<sup>\*4</sup> (OPA), in 2011. It should be mentioned here that the OPA has not yet entered into force.

In 2006, the Supreme Court of Estonia issued its informal opinion on a draft of the OPA and averting of a danger<sup>\*5</sup>:

The law is based on the concept of a danger and danger-handling. But it is not a suitable basis nor a proper criterion for the Estonian legal system in the field of the protection of order and supervision. [...] The central, basic concept of the draft Order Protection Act is danger, and it handles state

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<sup>1</sup> In Estonian *ohutõrjeõigus*. In German *die Gefahrenabwehr*. The author also uses in the text the term defence against danger as a synonym for averting of a danger.

<sup>2</sup> Politseiseadus. – RT 1990, 10, 113; 2007, 62, 394 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 23.3.2012).

<sup>3</sup> Politsei ja piirivalve seadus. – RT I 2009, 26, 159; RT I, 29.12.2011, 28 (in Estonian).

<sup>4</sup> Korrakaitse seadus. – RT I, 22.3.2011, 4 (in Estonian).

<sup>5</sup> In some occasions the parliament of Estonia (Riigikogu) or Ministry of Justice has involved the Supreme Court in legislative drafting and asked the Supreme Court's opinion of the concrete draft act. That opinion is not binding and usually it is put together by the advisers.

supervision as danger-oriented activities; this is an approach outside our current tradition. Such an approach is possible, but in the Estonian legal landscape it is a new and unfamiliar one, and in our view unreasonable.<sup>\*6</sup>

The question is important because averting of a danger creates both material and procedural rules that restrict fundamental rights. On the other hand, the state is bound by a duty of protection.<sup>\*7</sup> This means that the state must protect people's fundamental rights and not interfere with those fundamental rights excessively. But also it means that the state must protect a person from third-party attack, as well as other risks.

The minimum standard for the rule of law in a democratic state must be defined if one is to understand the nature of averting of a danger. Without this minimum standard, we cannot speak about the principle of a state based on democracy and the rule of law. If averting of a danger meets the relevant minimum standards, it is consistent with, rather than counter to, the rule of law and democracy. However, should the defence against danger not meet the minimum standards, it is appropriate to ask whether the concept of averting of a danger is legitimate and in accordance with the Constitution. The answer to that question presupposes a precise formulation of averting of a danger. Since German legal doctrine served as an example in creation of the OPA and PBGA<sup>\*8</sup>, it is necessary to take German legal doctrine too into consideration.

This article focuses on the demands that the Constitution of the Republic of Estonia<sup>\*9</sup> (hereinafter also 'the Constitution') creates for the PBGA and OPA in the field of internal security and averting of a danger. The scope of the PBGA is narrower (only police activity) than that of the OPA (authorities' every action directed at the protection of public order).

## 2. Internal security through averting of a danger

According to the Constitution, internal security is part of the Constitutional order. The preamble of the Constitution refers to 'unwavering faith and a steadfast will to strengthen and develop the state, [...] which shall protect internal and external peace [...]'. This means that internal peace must be achieved through protection of the legal order and fundamental rights and freedoms and that this peace is the best way to make fundamental rights reality.<sup>\*10</sup> In the legal literature, internal peace is considered to be one of the aims of Estonian statehood, which encompasses both internal political stability and public order.<sup>\*11</sup> Under protection of internal security, which is enshrined in the preamble of the Constitution, the state of Estonia has a duty not only to deal with infringements of law but to strive for their avoidance.<sup>\*12</sup> Avoidance in this context means nothing else than prevention—in other words, the state's proactive activity. The Supreme Court of Estonia has noted that internal peace as referred to in the preamble of the Constitution is one of the Constitutional values and consists of the guaranteeing of social security and protection of the legal order.<sup>\*13</sup> Accordingly, it is possible to distinguish between, on the one hand, the state's proactive activity (prevention of problems) and, on the other, reactive activity (response to an event).

<sup>6</sup> The text is published as M. Ernits. Preventiivhaldus kui tulevikumudel (Proactive administration as a future model). – Riigikogu Toimetised 2008 (17), p. 162 (in Estonian).

<sup>7</sup> P.M. Huber. Risk decisions in German constitutional and administrative law. – G.R. Woodman, D. Klippel (eds). Risk and the Law. Routledge-Cavendish 2008, p. 29.

<sup>8</sup> Korrakaitseaduse eelnõu (eelnõu nr 49 SE I) seletuskiri (Explanatory memorandum to the draft Act of Order Protection (draft 49 SE I)), p. 6. Available at <http://www.riigikogu.ee/?page=eelnou&op=ems&emshelp=true&eid=93502&u=20120331103845> (in Estonian).

<sup>9</sup> Eesti Vabariigi põhiseadus (the Estonian Constitution as passed by a referendum held on 28.6.1992). – RT I 1992, 26, 349; RT I 27.4.2011, 2 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 23.3.2012).

<sup>10</sup> See also K. Jaanimägi. Politsei sisemise rahu tagajana (The Police as a Keeper of Public Peace). – Juridica 2004/7, p. 453 (in Estonian).

<sup>11</sup> R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse (Constitutionalism and the Protection of Fundamental Rights and Freedoms). Tallinn: Juura 2004, p. 92 (in Estonian). On states' duty to protect internal security, see also V. Götz. Innere Sicherheit. – J. Isensee, P. Kirchhof (eds). Handbuch des Staatsrechts Band IV (HStR IV). C.F. Müller, 2003, §85, column number 1 ff.

<sup>12</sup> E.-J. Truuväli *et al.* (eds). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. Teine, täiendatud trükk (Constitution of the Republic of Estonia, Commented Edition, Second, Revised Edition). Tallinn: Juura 2008, p. 35 (in Estonian).

<sup>13</sup> Supreme Court *en banc* decision of 7.12.2009, 3-3-1-5-09, paragraph 31 (in Estonian).

Averting of a danger can be considered to be one of the state's proactive activities, with the aim of ensuring internal security. Averting of a danger is related to supporting, directing, forward-looking, and preventive state activity, which has to take into account and accept Constitutional requirements, European and international law also address the needs of society to ensure public order and security.<sup>\*14</sup> This is part of the legal model for police- and order-related laws and has defence against concrete and abstract danger at its core.<sup>\*15</sup> Therefore, averting of a danger is centred on the concept of danger.<sup>\*16</sup> It delimits the tasks of the police and also sets a threshold for intervention and legitimises infringement of fundamental rights in certain conditions.<sup>\*17</sup> The scope of both the legislator and the executive power's activities depends on the probability of danger, the nature of the protected and threatened good, and the fundamental rights at stake.<sup>\*18</sup> Where the existence of a danger is the premise for legitimate infringement of a person's fundamental rights and freedoms, the competence and authorisation norms should be precisely and carefully defined.<sup>\*19</sup>

There may also be other legal models addressing prevention of threats to good and dealing with prognosis decisions (e.g., the legislator may enact authorisation norms that regulate every concrete situation in life with specific implementation measures). Such a legal model would certainly be more in accordance with the concept of legal certainty: the law and police officers' decisions are clear, precise, and definite, and the legal implications are foreseeable for the addressees.<sup>\*20</sup> But this would entail a closed and rigid system, because the legislator cannot foresee all situations in which a police officer ought to act proactively to prevent, for instance, harm to a person's life or health. It also limits discretion as to whether to act and the kinds of measures to be employed for prevention of damage.<sup>\*21</sup>

Several authors have indicated that Estonia's Police Act<sup>\*22</sup> did not meet many of the important criteria. Criminal proceedings and state supervision procedure were not clearly separated, competence norms were not supported by specific authorisation norms, and often police actions were based only on the competence norms—which were too abstract and therefore rendered it hard to know what was allowed and what was not.<sup>\*23</sup> The Administrative Law Chamber of the Supreme Court has noted that regulation of the use of force by police officers was scanty.<sup>\*24</sup> Those shortcomings indicated that the actions of the executive power could be illegal in specific cases. It gave rise to debate as to whether such regulation would have been in accordance with the Constitution or not. To eliminate the above-mentioned drawbacks, the legislator passed new laws (the PBGA and OPA, referred to above). These laws distinguish between police activities related to criminal proceedings and state supervision procedure (also averting of a danger)<sup>\*25</sup>, and they draw a clear distinction between competence norms<sup>\*26</sup> and authorisation norms<sup>\*27</sup>, with competence norms being supported by specific authorisation norms.<sup>\*28</sup>

<sup>14</sup> F. Schoch. *Polizei- und Ordnungsrecht*. – E. Schmidt-Aßmann (ed.). *Besonderes Verwaltungsrecht*, 14. Ausgabe. Berlin: De Gruyter 2008, p. 132.

<sup>15</sup> *Ibid.*, p. 136.

<sup>16</sup> B. Pieroth, B. Schlink, M. Kiesel. *Polizei- und Ordnungsrecht*. Munich: C.H. Beck 2002, p. 56.

<sup>17</sup> A. Voßkuhle. *Grundwissen – Öffentliches Recht: Der Gefahrenbegriff im Polizei- und Ordnungsrecht*. – JuS 2007/10, p. 908; D. Kugelmann. *Polizei- und Ordnungsrecht*. 2006, Chapter 4, column number 82, and, there cited, D. Kugelmann. *Der polizeiliche Gefahrenbegriff in Gefahr? – Anforderungen an die Voraussetzungen polizeilicher Eingriffsbefugnisse – Die Öffentliche Verwaltung (DÖV)*, Heft 19, 2003, pp. 781–782.

<sup>18</sup> Huber (see Note 7), p. 29.

<sup>19</sup> H. Schwemer. *Põhiseaduse nõuded politseiõigusele (The Constitutional Requirements for the Police Law)*. – *Juridica* 2004/7, p. 447 (in Estonian).

<sup>20</sup> Legal certainty is recognised as one of the general principles of European law. See P. Craig, G. de Búrca. *EU Law: Text, Cases, and Materials*, 5th ed. Oxford University Press 2011, pp. 525, 533–538.

<sup>21</sup> The Supreme Court has declared legal norms unconstitutional because they did not allow discretion; see Supreme Court *en banc* decision of 21.10.2001, 3-4-1-7-01; Supreme Court Constitutional Review Chamber decision of 21.6.2004, 3-4-1-9-04 (in Estonian).

<sup>22</sup> It was in force until 31.12.2009.

<sup>23</sup> Schwemer (see Note 19), p. 444; Jaanimägi (see Note 10), p. 459; O. Kask. *Korrekaitse seaduse eelnõust (On the Draft Act of Order Protection)*. – *Juridica* 2004/7, p. 468 (in Estonian).

<sup>24</sup> Supreme Court Constitutional Review Chamber decision of 10.1.2008, 3-3-1-65-07, paragraph 19 (in Estonian).

<sup>25</sup> Subsection 1 (4) of OPA, §1 (4) of PBGA.

<sup>26</sup> E.g., §§ 30–53 of OPA; §§ 7<sup>15</sup>–7<sup>41</sup> of PBGA.

<sup>27</sup> E.g., §2, §6 (2) of OPA; §3 and §7<sup>1</sup> of PBGA.

<sup>28</sup> *Ibid.*

## 2.1. The concept of danger

Reservation of statutory powers, provided for in §3 of the Constitution, is one aspect of democracy.<sup>\*29</sup> It demands that the legal norms enacted and their consequences be detailed and precise.<sup>\*30</sup> Thus it should be applied also to the concept of danger.

According to the PBGA and OPA, the central concept for police actions is danger, because the specific authorisation norms allow a police officer to apply a measure only when danger occurs. A danger is a situation wherein the objectively assessed facts reveal the probability of an offence taking place in the near future.<sup>\*31</sup> According to German law, danger is a situation in which circumstances, if not prevented from taking their course, could in the foreseeable future be expected with sufficient likelihood to lead to violation of the protected good (public security and order).<sup>\*32</sup> Both the Estonian and the German law understand danger as sufficiently probable violation of the protected good. At the same time, however, the assessment of danger and its temporal dimensions differ between the two systems.

According to the PBGA and OPA, the offence or violation of the protected good must be probable in the near future (*lähitulevik*). In contrast, under German law, it must take place in the foreseeable future (*absehbarer Zeit*). Therefore, a danger does not exist under Estonian law when the probability is of the offence taking place in the distant future, whilst using the temporal criterion of ‘foreseeable future’ ensures that danger is seen as existing when a violation is probable in the longer term. It is understandable for a police officer to intervene at the last minute, because when the threat to good is near, the probability of its occurrence is obviously greater. However, it is questionable whether a preventive measure should be limited with a time-based criterion in such a way, especially in situations wherein very important good is at stake (e.g., life and health). It is also possible to assess the temporal dimension not only when the matter involves the premise of legal norm (a question of danger). It may also be estimated through discretion whether to act or not (a question of legal consequences).<sup>\*33</sup> If the concept of danger is not limited in its composition in the temporal dimension, it is possible to apply discretion and the principle of proportionality for exclusion of all such measures as may not, in the relevant case, be suitable, necessary, or moderate (proportional in the narrow sense of the term). In summary, it is not always necessary to limit the concept of danger in the temporal dimension, but the temporal dimension can be taken into account through discretion. However, it is questionable whether such a legal norm is in accordance with the reservation of statutory powers, if it is not sufficiently precise and detailed.

It is possible through various concepts of danger (real, apparent, and suspected) and levels of danger to make legal norms more precise and detailed.

### 2.1.1. Real danger and apparent danger

For one to distinguish a real danger from an apparent danger, it is important to know the perspective (*ex ante* or *ex post*) from which a police action’s legality must be assessed. Apparent danger is present if the officer was sure, from an *ex ante* perspective, that damage to the protected good is likely but a new danger assessment, made from the *ex post* perspective, shows that no danger exists<sup>\*34</sup>—that is, there was a danger situation when the officer made the assessment but subsequent estimation showed it no longer to exist. In German law, a measure taken is considered to be legitimate when an officer employed it in a situation wherein apparent danger was present.<sup>\*35</sup> It is a matter of debate whether in that situation the measure should be considered legitimate or illegal. On one hand, the measure taken was used in a situation in which no real danger objectively existed. On the other hand, it is also important to note that the facts as known to

<sup>29</sup> See also R. Alexy. *Põhiõigused Eesti põhiseaduses* (Fundamental Rights in the Constitution of the Republic of Estonia). – Juridica, special edition, 2001, p. 36 (in Estonian).

<sup>30</sup> See also Truuväli *et al.* (see Note 12), p. 53.

<sup>31</sup> Subsection 5 (2) of OPA; §7<sup>3</sup> (2) of PBGA.

<sup>32</sup> Schoch (see Note 14), p. 156; F.-L. Knemeyer. *Polizei- und Ordnungsrecht*, 11th ed. Munich: C.H. Beck 2007, p. 63. See also the English-language version addressing the definition of danger, translated by Huber (see Note 7), p. 25.

<sup>33</sup> Averting of a danger involves two kinds of discretion: resolution discretion (*otsuse kaalutus, das Entschließungsermessen*) and selection or choice discretion (*valiku kaalutus, das Auswahlermessen*). See W.-R. Schenke. *Polizei- und Ordnungsrecht*, 4th ed. Heidelberg: C.F. Müller 2005, column number 94; see also Pieroth *et al.* (see Note 16), pp. 74–75.

<sup>34</sup> Schoch (see Note 14), p. 159.

<sup>35</sup> Knemeyer (see Note 32), p. 67.

the officer held at the time when he or she made the decision to act. The purpose of averting of a danger is to prevent damage, not to punish. Also the time available and the importance of the protected good affect the behaviour of an officer.

A legal definition of apparent danger is not set forth in the PBGA or OPA. The Supreme Court in its practice has not recognised clearly the concept of apparent danger. But the Supreme Court has held generally that the legality of administrative action is to be assessed from an *ex ante* perspective.<sup>\*36</sup> In view of the above-mentioned (i.e., from an *ex ante* perspective), it may also be possible to distinguish between real and apparent danger.<sup>\*37</sup> Resting on such a distinction are also the legality of the police action and questions of compensation. That is why it is necessary to distinguish between apparent and real danger.

The question of compensation for damage is one of the major problems with the notion of apparent danger. Should the damage be compensated for, or not? If there is to be compensation, should it be in full or only limited in its extent?

Neither the PBGA nor the OPA includes specific rules for claims of compensation for damage. The legislator's clear intention was that compensation for damage take place on general grounds.<sup>\*38</sup> When a measure is applied in a situation wherein apparent danger exists, the damage is caused by a lawful administrative act or measure. According to the State Liability Act (SLA), a person may claim compensation, to a fair extent, for proprietary damage caused by a lawful administrative act or measure that in an extraordinary manner restricts the fundamental rights or freedoms of said person.<sup>\*39</sup> Therefore, a person may in such a case claim compensation only when the administrative measure or act caused extreme restriction to his or her fundamental rights and freedoms. The Supreme Court has held that a person may claim compensation for damages on the above-mentioned grounds when a lawful administrative act or measure has seriously restricted the fundamental right to property that is inviolable and equally protected.<sup>\*40</sup> However, the compensation for damage is to be claimed only to a fair extent. Unless the law provides otherwise, compensation shall not be claimed to the extent to which the restriction of fundamental rights or freedoms was caused by, or the restriction was in the interests of, the aggrieved person; special treatment of persons is prescribed by law; the person can receive compensation elsewhere, including from insurance; or the issue of payment of compensation is regulated by other acts of law.<sup>\*41</sup> In granting of compensation, the benefit gained by the public authority or the advance in public interests that is a result of the restriction of fundamental rights and freedoms, the gravity of the restriction, the unforeseeability of damage, and other relevant circumstances shall be taken into consideration.<sup>\*42</sup> When we accept the above logic also in cases of apparent danger, it may be alleged that a person can claim compensation for damage that was caused by a measure stemming from apparent danger, but only with narrow scope and in limited circumstances. Such an interpretation may not always be in accordance with the principle that the damage should be subject to compensation especially in a situation wherein it later becomes clear that no real danger existed.<sup>\*43</sup>

### 2.1.2. Suspected danger

If the probability of a danger's materialisation is unknown and the officer only has doubts about the matter, it is a suspected danger.<sup>\*44</sup> In that case, the officer is not sure about the danger, so it is necessary to clarify the situation further. In general, this is done through a clarification measure, which usually does not intensively restrict fundamental rights and freedoms and helps to clarify whether the danger exists or not.

<sup>36</sup> Supreme Court *ad hoc* panel decision of 29.1.2010, 3-3-1-72-09, paragraph 18; Supreme Court Constitutional Review Chamber decision of 21.5.2002, 3-3-1-29-02, paragraph 12; 18.6.2002, 3-3-1-33-02, paragraph 11; 5.11.2008, 3-3-1-49-08, paragraph 11 (in Estonian).

<sup>37</sup> See also §5 (2) of OPA; §7<sup>3</sup> (2) of PBGA.

<sup>38</sup> Explanatory memorandum to the draft Act of Order Protection (see Note 8).

<sup>39</sup> Riigivastutuse seadus (State Liability Act), §16 (1). – RT I 2001, 47, 260; 2006, 48, 360 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 23.3.2012).

<sup>40</sup> Supreme Court Civil Chamber decision of 24.11.2009, 3-2-1-123-09, paragraph 12.

<sup>41</sup> Subsection 16 (2) of SLA.

<sup>42</sup> Subsection 16 (3) of SLA.

<sup>43</sup> Section 25 of the Constitution states that everyone has the right to compensation for moral and material damage caused by the unlawful action of any person.

<sup>44</sup> Knemeyer (see Note 32), p. 68.

It should be mentioned that the German legal literature also discusses the possibility of applying such clarification measures in a situation wherein very important good (e.g., life or health) is at stake.<sup>\*45</sup> Question arises because it may not be in accordance with the concept of averting of a danger while the core of it is to avert existing danger not to clarify whether the danger exists or not. Also the prerequisite for such a measure (suspicion of danger) may not be defined well enough to justify intensive restriction of fundamental rights and freedoms, for which reason it may not be in accordance with the Constitutional requirements.<sup>\*46</sup>

The PBGA does not provide a legal definition of suspected danger; instead, it regulates various authorisation norms that entitle an officer to find out whether danger exists or not. When the officer will implement a measure to clarify whether there is a danger, he or she is not sure about the danger and only has doubts about it. This is nothing else than a suspected danger. By contrast, the OPA regulates the legal definition of suspected danger: ‘Suspected danger is a situation wherein the facts revealed show on the basis of objective assessment that the probability of offence is not sufficient but there is reason to suppose that the offence is not precluded.’<sup>\*47</sup>

In Estonian law, the officer is authorised to take measures when suspecting a danger: inform the public of suspected danger<sup>\*48</sup>; disclose personal data<sup>\*49</sup>; detain a person, question him or her, and require documents<sup>\*50</sup>; summon a person to an office<sup>\*51</sup>; verify a person’s identity and bring him or her to an office for identification<sup>\*52</sup>; process personal data with equipment<sup>\*53</sup>; process and require data that a communication company has in its possession<sup>\*54</sup>; prohibit residence<sup>\*55</sup>; stop a vehicle<sup>\*56</sup>; impose security controls<sup>\*57</sup>; examine a person, item of movable property, or possession<sup>\*58</sup>; to take possession<sup>\*59</sup>; and use compulsion.<sup>\*60</sup>

Thus the Riigikogu has regulated a broad range of authorisations applicable when there is danger suspected. Some of the above-mentioned authorisation norms restrict fundamental rights and freedoms very intensively—e.g., examining a person’s clothing and body cavities restricts his or her physical integrity and free self-realisation intensively, controlling a person’s movable property restricts his or her right to property intensively, and entering a person’s residence and examining it restricts his or her private and family life. It is also problematic to allow use of compulsion in a situation wherein the existence of danger is unclear. Such authorisation norms may not be in accordance with the principle of proportionality and democracy. The purpose of such a measure would be questionable when it may have no useful results. Suspicion of danger is a phase before danger, and the officer has no solid facts as to the probability of harm.<sup>\*61</sup> Also it is questionable whether the concept of suspected danger in the given situation is precise and detailed. It is unclear also when the officer has a right to act and to restrict a person’s fundamental rights and freedoms and what the legal consequences of this are. In conclusion, whether an officer should have such extensive measures available for clarification of whether danger exists is problematic.

<sup>45</sup> Schoch (see Note 14), p. 161.

<sup>46</sup> See also Subsection 2.2 of this article.

<sup>47</sup> Subsection 5 (6) of OPA.

<sup>48</sup> Subsection 26 (1) of OPA.

<sup>49</sup> Subsection 26 (2) of OPA.

<sup>50</sup> Subsection 30 (1) of OPA, (3); §7<sup>16</sup> (1), (3) of PBGA.

<sup>51</sup> OPA §31 (1) of OPA; §7<sup>17</sup> (1) of PBGA.

<sup>52</sup> Subsections 32 (1), (6) of OPA; §7<sup>18</sup> (1), (6) of PBGA.

<sup>53</sup> Subsection 34 (1) of OPA; §7<sup>21</sup> (1) of PBGA.

<sup>54</sup> Subsection 35 (1) of OPA; §7<sup>21</sup> (1) of PBGA.

<sup>55</sup> Subsection 44 (1) 3) of OPA; §7<sup>31</sup> (1) 3) of PBGA.

<sup>56</sup> Subsection 45 (1) of OPA; §7<sup>32</sup> (1) of PBGA.

<sup>57</sup> Subsection 47 (1) 3) of OPA; §7<sup>34</sup> (1) 3) of PBGA.

<sup>58</sup> Subsections 48 (1) 2), §49 (1) 5) of OPA, §51 (1) 2); §7<sup>35</sup> (1) 2), §7<sup>36</sup> (1) 5), §7<sup>38</sup> (1) 2) of PBGA.

<sup>59</sup> Subsection 50 (1), (2) of OPA; §737 (1) 2), (2) of PBGA.

<sup>60</sup> Subsection 76 (1) of OPA.

<sup>61</sup> Explanatory memorandum to the draft Act of Order Protection (see Note 8), p. 23.

### 2.1.3. Levels of danger

According to the PBGA and OPA, the danger levels are distinguished through the value of the protected good.<sup>\*62</sup> Estonian law knows significant danger, urgent danger, and present danger.<sup>\*63</sup> Significant danger is a high probability of harm to a person's life, physical integrity, and freedom; to high-value proprietary benefit; to public safety; or to the environment, or other particularly serious offence.<sup>\*64</sup> Urgent danger is a high probability of harm to a person's health, to the high value of material goods, or to the environment, or, again, other serious offence.<sup>\*65</sup> Urgent danger lies between significant and present danger,<sup>\*66</sup> where present danger is a situation wherein the offence is already taking place or there is a high probability that it will begin immediately.<sup>\*67</sup> Although no specific levels are set for the danger to life or body, common danger, and imminent danger, it may still be possible to interpret the content of significant, urgent and present danger broadly (e.g., the concept of significant danger may also comprise a danger to a person's life or body). Thus the different levels distinguished for danger make the general concept of danger more precise and detailed and allow the legal consequences that arise to be seen.

## 2.2. General clauses and the principle of legal certainty

It is possible to distinguish between a general clause and standard measures.<sup>\*68</sup> Both types of legal norms legitimate interference with fundamental rights and freedoms. The purpose of a general clause is to provide the legal basis for interference in fundamental rights and freedoms to prevent so-called unforeseen dangers.<sup>\*69</sup> It is a measure intended for atypical danger situations, and its application is broader.<sup>\*70</sup> If there is no standard measure but a danger exists, the officer is entitled to consider whether to act, and how.<sup>\*71</sup> In contrast, standard measures too create a legal base upon which one may restrict fundamental rights and freedoms but they are more precisely specified than are terms of a general clause.<sup>\*72</sup> Thus the standard measure serves the interests of legal clarity.<sup>\*73</sup> Speaking against the use of a general clause is its lack of legal certainty: it may not be defined adequately for interference in fundamental rights and freedoms to be justified. Greater abuse of authority may arise when an officer applies a general clause. Both the PBGA and the OPA recognise the concept of a general clause<sup>\*74</sup>; therefore, its existence is one of the major problems.

The principle of legal certainty can be considered one part of the rule of law.<sup>\*75</sup> The Supreme Court has pointed out that the principle of legal certainty demands that a person be able to foresee the legal consequences of his or her acts adequately.<sup>\*76</sup> The Federal Constitutional Court of Germany affirmed that the general clause was in Germany sufficiently well-defined and in accordance with the rule of law since its development through the decades of legal practice and theory have sufficiently clarified and explained its

<sup>62</sup> *Ibid.*

<sup>63</sup> Comparison with German law: It knows present danger (*gegenwärtige Gefahr*), significant danger (*erhebliche Gefahr*), urgent danger (*dringende Gefahr*), danger to life or body (*Gefahr für Leib oder Leben*), common danger (*gemeine Gefahr*), and imminent danger (*Gefahr im Verzug*). See F. Schoch. Grundfälle zum Polizei- und Ordnungsrecht. – JuS 1994, p. 670; Schenke (see Note 33), pp. 41–42.

<sup>64</sup> Subsection 5 (4) of OPA; §7<sup>3</sup> (3) of PBGA.

<sup>65</sup> Subsection 5 (3) of OPA.

<sup>66</sup> Explanatory memorandum to the draft Act of Order Protection (see Note 8), p. 23.

<sup>67</sup> Subsection 5 (5) of OPA; §7<sup>3</sup> (4) of PBGA. See also the explanatory memorandum to the draft Act of Order Protection (see Note 8), pp. 23–24.

<sup>68</sup> Schoch (see Note 14), p. 150; Pieroth *et al.* (see Note 16), p. 111.

<sup>69</sup> Pieroth *et al.* (see Note 16), pp. 106–107; Schenke (see Note 33), p. 22. See also the explanatory memorandum to the draft Act of Order Protection (see Note 8), p. 49.

<sup>70</sup> Schoch (see Note 14), p. 242. On the general clause structure, see also Schoch. Bürgerliches Recht in der Fallbearbeitung. – JuS 1994, Part VI, p. 570.

<sup>71</sup> Pieroth *et al.* (see Note 16), pp. 106–107.

<sup>72</sup> For details on standard measures, see Schenke (see Note 33), p. 60.

<sup>73</sup> Schoch (see Note 14), p. 242.

<sup>74</sup> OPA §28, §29; PBGA §7<sup>13</sup>, §7<sup>14</sup>. See also the explanatory memorandum to the draft Act of Order Protection (see Note 8), pp. 51–52.

<sup>75</sup> See also The Constitution of the Republic of Estonia, Commented Edition (see Note 12), pp. 119, 121–122.

<sup>76</sup> Constitutional Review Chamber of the Supreme Court decision of 31.1.2007, 3-4-1-14-06, paragraph 23.

content, purpose, and scope.<sup>\*77</sup> The arguments of the Federal Constitutional Court of Germany are insufficient in the context of Estonia since the legal theory and practice related to averting of a danger are poorly formed and still very elementary and young. The Supreme Court found in a case to do with the constitutionality of post-sentence detention that with concept of sufficiently defined legal norms the hypothesis of the legal norm and the legal consequences must be clear especially in a situation wherein the legal norm allows intensive infringement of fundamental rights and freedoms.<sup>\*78</sup> Every general clause allows evaluative interpretation in a situation in which substantial fundamental rights are at stake—the right to free self-realisation<sup>\*79</sup>, private and family life<sup>\*80</sup>, etc. Also, judicial control over an officer's activity may be limited when the measure is only slightly based on the general clause.<sup>\*81</sup> On the other hand, the legislator cannot foresee everything and enact all of the specific regulations that are always needed, because actual situations of danger vary too greatly.<sup>\*82</sup> In a situation wherein no legal norm exists that allows action but there objectively exists a real probability of harm occurring in the near future, the state does not fulfil its duty of protecting a holder of fundamental rights.<sup>\*83</sup> It should be pointed out that the purpose here is not to punish but to prevent harm. In such a case, the officer implementing a measure has a right of discretion and it shall be exercised in accordance with the limits of authorisation, the purpose of discretion, and the general principles of justice, in account of the relevant facts and in view of legitimate interests.<sup>\*84</sup> Therefore, action under the general clause should be a last resort and applied only in emergency situations wherein very substantial good is at stake. Still, activity based on a general clause may not be clear, distinct, or definite, because too much room is allowed for evaluative interpretation in the field wherein fundamental rights are restricted. This raises the question of whether the general clause is accordant with the principle of legal certainty.

### 2.3. Judicial control of prognosis decisions

One feature of the principle of a state based on democracy and the rule of law is that the individual institutions (the legislature, executive bodies, and courts) perform their activities on the principle of separation and balance of powers.<sup>\*85</sup> The Supreme Court has noted that the administrative court system is tasked not only with resolving disputes between a person and the state but also with controlling the activities of both the Riigikogu and the executive power in order to implement the principle of separation and balance of powers.<sup>\*86</sup> The Riigikogu has decided to link police law and the state supervision procedure with defence against danger.<sup>\*87</sup> As defence against danger is a typical administrative system that restricts fundamental rights and freedoms, judicial review of executive-body activity is one of the main pillars for implementation of the principle of a state based on democracy and the rule of law. A system without judicial control is inherent to what is known as a police state. On the one hand, the court must be able to verify whether the relevant officer's conduct was consistent with the norms of competence and authority. At the same time, the court should be able to examine whether the legal norms in question are consistent with the basic law or Constitution.<sup>\*88</sup>

Preventive measures are based on the prognosis decision. The officer who implements a measure is not sure whether event X will occur or not. But the officer has established facts A, B, and C, which together

<sup>77</sup> BverfGE 54, 143/144 f. §29 of the Law on the Duties and Powers of Regulatory Agencies (OBG) of Nordrhein-Westfalen. See also Schenke (Note 33), p. 22.

<sup>78</sup> See the Supreme Court of Estonia *en banc* decision of 21.6.2011, 3-4-1-16-10, paragraph 66 (in Estonian).

<sup>79</sup> See §19 of the Constitution.

<sup>80</sup> *Ibid.*, §26.

<sup>81</sup> For more in-depth discussion of judicial control, see Subsection 3.3.

<sup>82</sup> M. Niemeier. Nõuded õigusriiklikule politseiõigusele – proportsionaalsuse põhimõte ja Euroopa õigus (Requirements for Police Law: The Principle of Proportionality and European Law). – *Juridica* 2004/7, p. 461 (in Estonian).

<sup>83</sup> For more on the duty of protection, see O. Lepsius. The problem of de-individualisation in the risk society. – G. R. Woodman, D. Klippel (eds). *Risk and the Law*. Routledge-Cavendish 2008, pp. 46–48.

<sup>84</sup> *Haldusmenetluse seadus* (Administrative Procedure Act), §4. – RT I 2001, 58, 354; 23.2.2011, 3 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 23.3.2012).

<sup>85</sup> The institutional principle of separation and balance of powers is enshrined in §4 of the Constitution and the functional in §14. See also Constitution of the Republic of Estonia, Commented Edition (see Note 12), p. 64.

<sup>86</sup> Supreme Court of Estonia *en banc* decision of 21.6.2011, 3-3-1-22-11, paragraph 29.2 (in Estonian).

<sup>87</sup> See Section 2 and the explanatory memorandum to the draft Act of Order Protection (see Note 8), pp. 7–9.

<sup>88</sup> Subsection 15 (2) of the Constitution: 'The courts shall observe the Constitution and shall declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution.' See also Constitution of the Republic of Estonia, Commented Edition (see Note 12), pp. 163–164.

indicate the probability of arrival at the event. The key question of the prognosis decision is how to come to an accurate prognosis of the future. Thus legal theory and practice utilise a concept of danger that generally consists of three dimensions: a time dimension (near or distant future, also *ex ante* and *ex post*), a spatial dimension (protected good and value), and probability (high, intermediate, or low).<sup>\*89</sup>

Whether the concept of danger is a question of legal consequences or of fact-finding is a matter of some debate. The answer to this question is important because the degree and extent of judicial review depend on it. For example, a judgement of the Supreme Court is based on the facts established by the judgement of a lower court and the Supreme Court does not establish the facts that constitute the cause of an appeal. Since in general the Supreme Court does not take up and evaluate the evidence, it cannot establish facts. The existence of danger shall be a question of legal consequences and conclusions, not one of facts.<sup>\*90</sup> The concrete circumstances (e.g., a person's behaviour) are a factual issue and can point to danger.

Judicial review of executive power cannot remain merely formal, controlling only formalities. Measures that are taken on the basis of a prognosis may also very intensively infringe fundamental rights and freedoms.<sup>\*91</sup> Purely formal judicial review remains illusory and would not guarantee real protection. Therefore, the scope of judicial review should cover the content and also material legality (whether, where a danger existed, also the measure was exercised in accordance with the limits of authority, the purpose of discretion, and the general principles of justice).<sup>\*92</sup> The judicial review consists of analysis and control over those three dimensions: the time dimension, the spatial dimension, and probability. At the same time, the court can consider only those facts that were known and present when the officer rendered the decision (*ex ante* perspective), not those facts and circumstances actualised after the officer activity (*ex post* perspective).<sup>\*93</sup>

One should take into account also a second level when judging the rightness of a prognosis decision—the view of a person who is not tied to or connected with the situation (a third party). In Estonian law, this is referred to as the perspective of an average objective law-enforcement officer. The evaluation of the facts should be objective and based on social experience. Evaluation is objective when all necessary facts indicating that harm is probable are established. Thus, occurrence of harm should be probable in the view of an average law-enforcement officer.<sup>\*94</sup> Social experience, therefore, refers to such a person's life experience, including knowledge of his or her specific area of expertise or activity.<sup>\*95</sup> In particular, the officer's everyday activities, previous training, and professional skills should be considered. It is disputable whether the later assessment should be based on the perspective of an average law-enforcement officer or an average person. Under German law, a situation of danger is assessed through the lens of a putative objective observer's knowledge.<sup>\*96</sup> The threshold in evaluation from an average person's perspective is lower than that for the average law-enforcement officer. An average person does not deal every day with the protection of public order, and his or her training and skills may be insufficient and inadequate in the field of averting of a danger. Assessment of danger situations through a 'professional-standard' criterion allows a more accurate prognosis, and the threshold for later analysis of the measure's legality is higher. Therefore, the professional-standard criterion will provide better protection of fundamental rights than will assessment from an average person's perspective.

When an officer performing administrative functions in defence against danger is authorised to act on the basis of discretion, the court shall only verify whether the officer's activity was in compliance with the limits and purpose of discretion, the principles of proportionality and equal treatment, and other generally recognised principles of law.<sup>\*97</sup> Judicial review does not include judgement of whether the measure applied was expedient or advisable.<sup>\*98</sup>

<sup>89</sup> There are also different concepts; see R. Poscher. *Gefahrenabwehr. Eine dogmatische Rekonstruktion*. Berlin: Duncker & Humblot 1999, pp. 114–125.

<sup>90</sup> H. Maurer. *Allgemeines Verwaltungsrecht*. Munich: C.H. Beck 2002, p. 109.

<sup>91</sup> See also Sections 3.1.1, 3.1.2, and 3.2.

<sup>92</sup> Supreme Court Constitutional Review Chamber decision of 13.10.2010, 3-3-1-44-10, paragraph 15 (in Estonian).

<sup>93</sup> Supreme Court Constitutional Review Chamber decision of 2.6.2010, 3-3-1-33-10, paragraph 12; 13.11.2009, 3-3-1-63-09, paragraph 16 (in Estonian). See also Schoch (see Note 63), p. 667.

<sup>94</sup> Explanatory memorandum to the draft Act of Order Protection (see Note 8), p. 22.

<sup>95</sup> *Ibid.*

<sup>96</sup> Poscher (see Note 89), p. 123.

<sup>97</sup> On discretion, see Maurer (Note 90), §7. K. Pikamäe. *Kaalutusvigadest (Abuses of Discretion)*. – *Juridica* 2006/2, p. 77 (in Estonian).

<sup>98</sup> Schoch (see Note 14), p. 164.

Finally, if judicial review encompasses all of the above-mentioned criteria, it will be not only formal but also material. Such an approach will guarantee a person whose rights and freedoms may be violated a real and an effective right of recourse to the courts. It also allows fulfilment of the principle of separation and balance of powers.

### 3. Conclusions

Internal security is one of the Constitutional values. Internal security and the duty of protection mean that the state is also obliged to act not only reactively but also proactively. One way to act proactively is to prevent harm to the protected good. Averting of a danger is one of the preventive legal models. It should be noted that the activities of administrative authorities cannot be solely based on prevention, because it is not practically possible to prevent all harm that may occur in the future. This would also require measures that very intensively restrict fundamental rights and freedoms. Therefore, it should be deemed reasonable to find a balance between reactive and proactive activity. Finding that balance depends merely on concrete time and space.

Reservation of statutory powers is one expression of democracy—one that demands that the legal norms enacted be detailed and precise and that the legal consequences be foreseeable. If the concept of danger is limited in three dimensions (time, space, and probability) and also delimited in terms of real, apparent, and suspected danger and by levels of danger, the behaviour of the authorities will not be restricted unduly. Also, the behaviour of authorities is more predictable in these terms, presenting a situation that allows better protection of fundamental rights, because the legal norm is more precise and detailed and thereby in accordance with reservation of statutory powers.

Indisputably, the terrorist attacks on the US World Trade Center and organised crime in the Schengen area have led the legislator more and more to consider internal security and, through this, expansion of the measures that allow acting in a situation wherein there is only suspicion of the existence of danger (i.e., suspected danger). The Riigikogu has enacted authorisation norms that cover a broad scale and thus allow acting when suspected danger exists. It is disputable whether such expanding authorisation is in accordance with the Constitution (e.g., examining a person's clothing and body cavities etc.). When it is not precisely clear whether the danger is present, a situation can arise in consequence wherein such a measure and restriction is not necessary in a democratic society and may distort the nature of the rights and freedoms restricted. At the core of averting of a danger is not the prevention of dangers, only protection. Restriction of fundamental rights shall not lead the democratic state to become a state what recognises no limits to its authority. Application of various degrees for danger will provide more detail-level regulation and help to guarantee that interference with fundamental rights is moderated.

The general clause is one of the main problems with averting of a danger. The main question is whether it can be precise and definite enough to be considered constitutionally valid. The scope of adjustment may be too broad and extensive, which may not be in accordance with the principle of legal certainty, because people are not able to foresee adequately the legal consequences that their acts may have. That is why it is disputable whether such a clause is in keeping with the rule of law.

The judicial review of averting of a danger is very important, because this defence is a material basis for restriction of fundamental rights and freedoms. Therefore, legislative and executive actions should be formally and materially subject to review by the judiciary. Estonia has implemented a system of administrative courts that are charged with resolving disputes between persons and the state (administration). The judiciary must be able to review whether the activity of the administration was formally and materially legitimate. The courts must be able to take a position on the existence of a danger as well as to assess the rightness and accuracy in the prognosis decision.

In conclusion, all of the above-mentioned elements set minimal standards for averting of a danger. That is why also the OPA and PBGA should take those minimum standards into consideration, if it wants to be in accordance with the principle of a state based on democracy and the rule of law.