

Law that is an excuse for unjustifiable action

WHEN Minister of Public Works Thulas Nxesi sought to justify the expenditure by his department of R240 million on renovations to the president's private residence, he reached for the National Key Points Act.

And when the chairman of the Parliamentary Portfolio Committee on Correctional Services, Vincent Smith, sought to justify the destruction of photographs of warders beating a prisoner, who later died, he too resorted to the National Key Points Act.

He argued that the photographers had committed a crime by taking a photograph at a "national key point". The correctional services officials, he said, were merely enforcing the act.

The invocation of the National Key Points Act by members of parliament and public officials to justify the unjustifiable is not only a sad twist of history, but leads us down a rabbit hole of absurdities.

The National Key Points Act was passed in 1980 to give the minister of defence very broad authority to "declare" any place in South Africa a national key point "if it appears to the minister at any time that any place or area is so important that its loss, damage, disruption or immobilisation may prejudice the Republic..."

The act not only allowed the minister to decide which locations should be declared key points (whether state- or privately-owned); but also to enforce security measures at such places (whether at the cost of the state or the private owner) and to allow for the appropriation of funds into a special account for securing key points.

The act is vague about what constitutes a declaration of a national key point - requiring only that the minister of defence inform the owner in writing that the property or properties or facilities have been declared a key point. There is no requirement for the minister to inform Parliament, or the public, about the declaration of a key point, nor does the minister have to account for his or her decision to make any place one.

It is also not specified whether or how records should be kept of which places



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OPINION

The National Key Points Act creates criminal offences relating to key points declared as such without anyone's knowledge

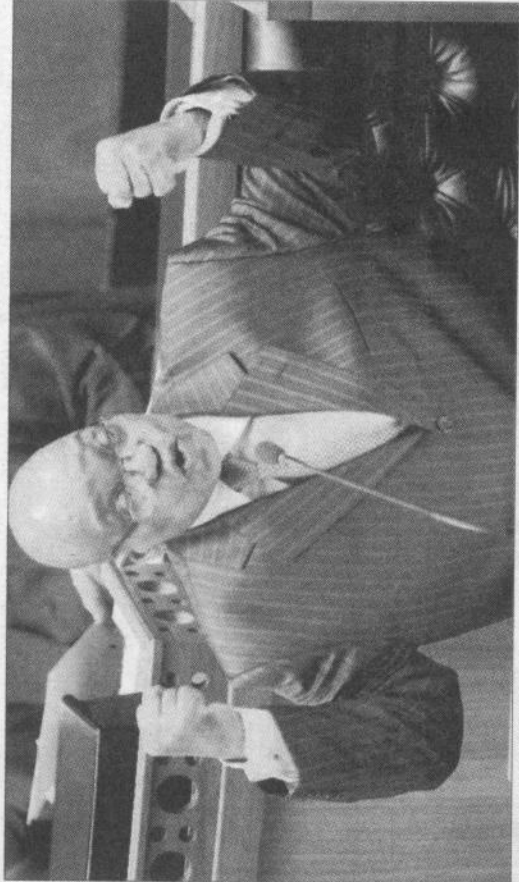
have been declared national key points. There is also nothing in the act that says the identity of national key points is to be kept secret, and therefore no apparent basis on which to refuse public access to such a list, if indeed it exists.

In 2004 the president (Thabo Mbeki) signed a proclamation (in terms of Section 97 of the constitution) passing authority of the act from the minister of defence (Mosiuoa Lekota) to the minister of safety and security (Charles Nqakula). This was in recognition of the fact that the security situation in South Africa had dramatically changed since the 1980s.

External military or "terrorist" threats to sensitive installations (like nuclear facilities and power plants) were no longer of primary concern. In 2007 the minister of safety and security released a bill aimed at updating and revising the National Key Points Act. However, the bill is still in an early draft and the apartheid-era act still in force.

What this means is that in terms of the law the minister of police could, for argument's sake, decide that his own house was a national key point. He would be obliged to tell no one that he had declared it a key point, and could theoretically go about spending money from the special account (provided for in the act) on the house to secure it without having to justify why.

While, according to the act, the account would be audited by the auditor-



President Jacob Zuma speaks in Parliament about the Nkandla saga. The writer says that the National Key Points Act is being used to shield politicians and state officials who may be involved in corruption and other crimes.

general, the AG would presumably not be able to question the minister's decisions or allocation of funds. Under apartheid, the act thus allowed the minister of defence to do as he pleased without having to be held accountable.

It is this absence of accountability for the decision to declare places national key points and spend public funds that means the act is antithetical to democratic accountability, and probably unconstitutional. It offers unscrupulous politicians enormous scope to decide what exactly constitutes an illegal or criminal act in relation to a national key point, additionally highlighting the absurdity of the existence of such a law in a democracy.

Smith alleged that taking photographs of national key points was a criminal offence - yet there is no reference in the act to this being an offence - and there exist no regulations to the act in which this may have been specified. If there are such regulations, they are not publicly available or accessible.

It is for this reason that constitutional law expert Professor Pierre de Vos has argued that the National Key Points Act "is almost certainly" unconstitutional, given that it creates criminal offences relating to key points, but we have no idea which properties have been

declared key points and therefore are unable to comply with the law, because we are not allowed to know what the law has prohibited. "On this ground alone, these provisions cannot stand."

Yet it is precisely the fact that key points are unknowable that makes it the perfect excuse for otherwise unjustifiable acts. It is also far from clear why a prison, in the current dispensation, would be declared a national key point at all. Prisons are by their very nature secure facilities; and the Department of Correctional Services is not only responsible for securing them, but also allocates a significant portion of its budget each year to do so. So it seems odd for the minister of police to be given additional powers to ensure that prisons are secured and safeguarded.

It is troubling that the act has not been repealed or revised and is now being used to shield politicians and state officials who may be involved in corruption and other crimes. Indeed, it is shameful that an apartheid-era act that so clearly undermines the rule of law is used by our public representatives and government to once again undermine transparency and accountability.

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