



KEY PAD: The National Key Points Act, used by Minister of Public Works Thulas Nxesi, left, to justify R206 million in public funds being spent on President Jacob Zuma's private Nkandla residence, is antithetical to democratic accountability and probably unconstitutional, says the writer.

PICTURE: SANDILE NDLOVU

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Obscuring the 'key point' is a dangerous, unethical game

It is a worry that the National Key Points Act is being used to protect politicians and state officials who could be involved in corruption and other crimes, writes **Chandre Gould**

WHEN Minister of Public Works Thulas Nxesi sought to justify the expenditure by his department of R206 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, excused 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 who had captured the scene had committed a crime by taking photographs at a "national key point". The Correctional Services officials, he said, were merely doing their job of 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, or whenever he considers it necessary or expedient for the safety of the republic or in the national interest".

The act not only allowed the minister of defence 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 national key points.

Perhaps intentionally, or by chance, the passing of the act was a shot in the arm for the private security companies who were contracted to provide guards to secure the numerous national key points (as Julie Berg and Vavariro Gabi have argued in a paper for the African Policing Civilian Oversight Forum (<http://apcof.org.za/publications/default.asp?offset=20>)).

The act is vague about what constitutes a declaration of a national key point – requiring only that the minister of defence inform the owner of a national key point in writing that their 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 a "key point".

It is also not specified whether or how records should be kept of which places have been declared national key points.

There is also nothing in the act that states that 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 then-president Thabo Mbeki

signed a proclamation (in terms of section 97 of the constitution) passing authority for 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

oretically 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-general, the auditor-general 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 that the act is antithetical to democratic

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 rather odd for the minister of police to be given additional powers to ensure that prisons are secured and safeguarded, since this is already the job of the minister of correctional services and his department.

It is worth remembering that concern about the act also arose in 2006 when it was invoked to declare harbours national key points. At the time, Jane Duncan, then-director of the Freedom of Expression Institute, pointed out to the media that the Promotion of Access to Information Act trumped the National Key Points Act.

This was confirmed by the safety and security spokesman at the time, Trevor Bloem, who was quoted by the Independent Online as saying that: "The National Key Points Act does not deny access to information. The Promotion of Access to Information Act does not exclude national key points."

It is therefore painfully ironic that public officials are relying on this law now, when in 1990 the ANC's chief representative to the US, Lindiwe Mabuzza, identified the law as having been used by the apartheid government to "put down black demonstrators" (see <http://tech.mit.edu/V110/N24/colloqn.html>).

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 current public representatives and officials of government to once again undermine transparency and accountability.

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