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The National Key Points Act

1. Introduction

One of the first tasks of Parliament after the 1994 democratic elections was to examine, and in most instances repeal, the hundreds of pieces of legislation that had underpinned apartheid. Racially discriminatory laws were swiftly dealt with, as were those that created the bantustans and homelands. Almost simultaneously, new legislation was drafted to replace some laws which could not simply be amended to bring them in line with the new constitutional era. In addition, new 'omnibus' Acts were passed to deal comprehensively with police, defence, schools, children, the environment, etc.

The key consideration was to ensure that all the laws on the statute book, whether or not they predated the Interim Constitution of 1993, or the Constitution of 1996, were consistent with our new constitutional values. However, one set of laws seems to have escaped this cleansing process: those dealing with certain security issues. The National Key Points Act 102 of 1980, which is presently being invoked to justify secrecy regarding the expenditure of around R200-million on President Zuma's private residence at Nkandla, falls into this category.

2. The Act

By the late 1970s the apartheid government was becoming increasingly concerned about the possibility of acts of sabotage being carried out within South Africa's borders. To counter this threat, legislation was introduced in 1980 which would allow the Minister of Defence to declare any place or area (which included any building or premises) to be a 'national key point', and to impose certain security requirements on it.

The Minister could make such a declaration if he or she was satisfied either that the place or area was "so important that its loss, damage, disruption or immobilization [might] prejudice the Republic" or if he or she considered it "necessary or expedient for the safety of the Republic or in the public interest". One of the more draconian aspects of the law was that, once a place had been declared a national key point, the owner thereof was required "at his own expense" to provide for its security to the Minister's satisfaction.

The Act went on to give the Minister wide-ranging powers to take security steps on behalf of recalcitrant owners and to recover the cost from them; to issue various orders to the owners of key points; to enter any property declared a key point; and to require any person to furnish him or her with information about any place or area, whether or not it had been declared a key point. In addition, it prescribed the usual range of penalties, both fines and imprisonment, for contravention of its provisions.

There has never been certainty about how many national key points there are, how many existed before 1994, and how many have been added by the present government. No list has ever been published, but it is likely that there are more than the public might suspect[1]. They include facilities such as power-stations, harbours, airports, factories producing ammunition and explosives, oil refineries, and some important government properties such as Parliament and the Reserve Bank's buildings. But it appears that all prisons may also be key points[2], as well as military bases.

3. Misusing the Act

It is reasonable enough to argue that there are

certain facilities which, in the public interest, require heightened security. No-one seriously expects to be able to walk unhindered into a nuclear power-station, or to have free run of an airport. However, as with all security legislation, two questions immediately arise.

Firstly, how does one reasonably balance the real need for security with the public's rights to freedom of movement and to information? Secondly, what happens when the authorities use their powers in terms of such legislation for ulterior purposes?

3.1. Keeping Things Secret

There is always a tendency for politicians and officials to overuse security legislation; a 'better safe than sorry' attitude applies. The trouble is that this default position very quickly results in the public's rights being compromised. We have recently seen evidence of this attitude with the passage through Parliament of the Protection of State Information Bill, one clause of which sought to overrule the Promotion of Access to Information Act – the law on which our overall right to information rests[3]. The net effect of this would have been that, in any matter remotely connected to a security question, non-disclosure would have become the norm, eviscerating the constitutional right to information.

A practical example of this approach occurred a few years ago when the then Defence Minister refused to answer questions about the number and cost of flights undertaken *over the previous 12 months* by the presidential jet. She claimed, absurdly, that releasing such information would endanger national security. Likewise, the ministerial handbook – which apparently provides for expenditure of over R2 million per minister for motor vehicles every few years – is a 'classified document', and can therefore not be examined by the public which pays for those vehicles.

Clearly, such an attitude results in a whole swathe of state activity and expenditure being removed from normal channels of accountability and scrutiny. This outcome, while obviously suiting some politicians and officials, is highly corrosive of democracy.

3.2. Hiding Criminality and Corruption

A more acute problem, perhaps, arises when secrecy legislation is employed to prevent the investigation of corruption and criminality. According to the Institute for Security Studies, the National Key Points Act was invoked in January this year by the chair of Parliament's Correctional Services Committee to justify the destruction of photographs that showed warders assaulting a prisoner who later died. The argument was that it was unlawful to have taken photographs in a national key point.

Now, of course, the Act is being used to justify the non-disclosure of details concerning the expenditure at Nkandla. Public Works Minister Thulas Nxesi acknowledges that internal investigations have revealed evidence of irregular expenditure, but he will not say who was responsible for it, who benefited from it, and whether it involved only the R70-million spent on a 'security upgrade' or whether it included work on non-security aspects. Indeed, Mr Nxesi has also avoided giving an explanation as to why the government was at all involved in spending the remaining R130-million on someone's private residence.

Ironically, as *Business Day* pointed out in an editorial[4], since the Act requires the owner of the key point to bear the cost of security improvements, and since from the time this scandal first broke it has been stressed that Nkandla is Mr Zuma's private residence, it is not clear why Mr Nxesi's department was involved at all, even in the security side of things. But it is certainly most convenient, under the circumstances, to have access to the blanket of secrecy offered by this hangover from the apartheid period.

4. The Act's Constitutionality

One of the few encouraging aspects of the Nkandla saga is that the Deputy-Minister of Public Works, Jeremy Cronin, has publicly questioned the constitutionality of the National Key Points Act. Anyone with a feeling for the core values of our Constitution will immediately realise that some of the Act's provisions belong to the previous era, and have no place in a constitutional democracy.

For example, the days are past when a minister could blithely, by declaration and without providing reasons, deprive someone of their property rights; likewise, no minister can simply order a person to take steps in regard to his or her own property. At the very least, a process of notice and consultation would need to be followed, and

the minister's stipulations would have to be objectively justifiable. It is also likely that the provision whereby the owner of the key point is required to see to its security at his or her own expense would constitute unfair discrimination.

The Act also falls foul of the principle of legality, an important aspect of the rule of law. Because no list of key points has been published it is not possible for the public to know where, or what, they are, and to behave accordingly. This vagueness and uncertainty renders legal compliance effectively impossible. As Professor Pierre de Vos has pointed out[5], we "are unable to comply with the law because we are not allowed to know what the law has prohibited."

Prof de Vos also argues that the "vast discretionary powers" to make regulations that the Act bestows on the minister constitute an undue delegation of powers by Parliament: the "Act bestows law making powers on a member of the executive, powers which the Constitution requires the legislature to exercise."

5. Conclusion

It is a truism that governments rarely let go of security legislation. In Zimbabwe, for example, the state of emergency imposed by the Smith regime in 1965 was lifted only in 1990, ten years after independence. These statutes offer an easy way of 'running the country' without having to account or explain, or worry that poor planning, bad decisions or downright corruption will come to light. For most governments these laws are just too useful, too convenient, to even consider repealing them. It is only when a test-case presents itself that the courts get the chance to subject these legal throw-backs to constitutional scrutiny and rule on their constitutionality.

In the meantime, we have to hope for more of the candour exhibited by Mr Cronin. He has now proposed that the results of the public works department's investigation could be revealed to a closed sitting of the relevant parliamentary committee. It would need to be closed, he says, in order to avoid 'breaking the law' - *"The problem is, we can't break the law, even if it's an apartheid law. It's covered by the National Key Point Legislation... that's our dilemma in wanting to be as transparent as we can around the matter."*[6]

Strangely enough, the Act itself contains the answer to Mr Cronin's dilemma. Section 10(2)(c) makes it an offence for anyone – including a deputy-minister – to furnish any information relating to security measures at a key point without being empowered to do so by the Minister. All Mr Nxesi and Mr Cronin need to do, therefore, is to request such permission from the Defence Minister, and then they will be free to tell us exactly what was spent on Nkandla, what it was for, and who ultimately footed the bill.

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[1] The Right2Know campaign quotes figures from the SA Police Service to the effect that there are presently 185 key points, up from 118 in 2007.
[2] See http://www.polity.org.za/article/obscuring-the-key-point-2013-02-04
[3] This clause was amended by the Ad Hoc Committee dealing with the Bill after concerted pressure from opposition MPs and civil society groups, including CPLO.
[4] 1st February 2013 "A government with something to hide".
[5] http://constitutionallyspeaking.co.za/why-the-national-key-points-act-is-unconstitutional-and-invalid/ 17th April 2013
[6] http://news.iafrica.com/sa/853968.html