

## **Nkandla and affirmative action**

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IMAGINE your neighbour plans to have his driveway paved while he and his family are on holiday. He pays a construction company in advance, and leaves behind a set of instructions on how to do the job, including an address and description of his driveway.

Imagine, also, that he has an enemy who gets wind of this and decides to play a mischievous trick on him: she finds and replaces his instructions with a description of your driveway, which is right next to his. Imagine, finally, that you also go away on holiday and your neighbour returns to find your driveway has been paved instead of his.

This is how political and moral philosopher Robert K Fullinwider in his book, *The Reverse Discrimination Controversy*, illustrates the complexities of so-called compensatory justice.

Your neighbour has suffered financial harm through no fault of his own, and is entitled to compensation or reparation of some sort. Evidently the culprit is his enemy, she should pay. But what if her identity remains unknown? In these circumstances, are you under a moral obligation to pay compensation, or to help undo the wrong?

You would be unlikely to protest if it were possible to magically strip the surface from your driveway and move it to your neighbour's without changing your driveway from its previous condition — leaving you no better or worse off than before the harm was inflicted, while restoring to your neighbour the benefit to which he is entitled.

But stripping a driveway costs money, and it is not possible to return it to its previous condition without another resurfacing. The reality is, compensating your neighbour would leave you worse off.

Some argue that, nevertheless, you are morally obliged to pay because you have benefited from harm done to someone else without being entitled to this benefit. They invoke the intuitively plausible moral principle that "he who benefits from a wrong must help pay for the wrong".

Mr Fullinwider, however, objects: this would be tantamount to pretending that there is no moral difference at all between you and your neighbour's enemy. Yet, the enemy, through her immoral actions, gave up her right not to suffer the harm necessary to compensate your neighbour; you, on the contrary, had no choice in the matter — you didn't know, and had no means of avoiding the benefit accrued.

You therefore have the right not to be harmed for the purpose of your neighbour's compensation. Mr Fullinwider proposes a new principle: only "he who knowingly and willingly benefits from a wrong must help pay for the wrong".

I cannot help but wonder whether President Jacob Zuma and/or the top echelons of the African National Congress (ANC) recently had the pleasure of reading Mr Fullinwider. It certainly appears so.

For Zuma's response — and that of several government agencies — to the demand by the public protector and the opposition that he must #paybackthemoney, because he "unduly benefited" from the spending on his private homestead at Nkandla, is premised on the claim that he didn't know about it and therefore had no way of avoiding the benefit accrued to him. Why should he pay back the money if he didn't personally order the spending?

Despite attempts to mitigate the effect on public opinion of some of the specific disclosures — by insisting, for instance, that the construction of the swimming pool, cattle kraal and chicken run all had security rationales — none of the official government reports on Nkandla try to deny the undeniable: R246m for security upgrades at the president's private home is exorbitant, public money has obviously been misappropriated and misspent and, consequently, a wrong has occurred.

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For example, the ministerial task team's report of 2013 notes large cost overruns, high consultancy fees, and prima facie evidence that supply chain management rules were disregarded, all of which points to the "possibility" of overpricing and collusion.

The report of Parliament's joint standing committee on intelligence (on the task team report) speaks of "high costs" and recommends that the allocation of tenders and appointment of contractors should be probed by the auditor-general in order to detect any "abuse" or "unlawful conduct".

The Special Investigating Unit (SIU) argues that the scale of construction at Mr Zuma's residence in certain cases far exceeded security requirements, and amounted to "indefensible extravagance". Its report is the most specific of all, putting the loss to the public purse at R155,324,516.49.

Mr Zuma finally, after considering the intelligence committee and SIU reports in his report to Parliament in August last year, admits "whilst a legislative framework exists, it was either deficient in certain respects, wholly ignored or miss-applied (sic)".

There's hardly any disagreement, then, that a wrong has been committed, one from which the president materially benefited. Public Protector Thuli Madonsela's report is the clearest on this (the president "benefited unduly"), and the SIU concurs — at least insofar as through the illicit increase of the scope of the works undertaken, "the value of the president's residential complex was enhanced (and) the president or his family were enriched".

The joint standing committee on intelligence task team report and Parliament's ad hoc report on Nkandla do not explicitly contest this assessment.

What all the state institutions do contest is that the benefit was intentionally and willingly obtained on Mr Zuma's part. This insistence makes the analogy with Mr Fullinwider's driveway example complete.

"Attempts to lay the responsibility for the upgrade at the door of the president are misdirected and malicious," says the Department of Public Works, which has accepted responsibility. The Parliament ad hoc committee adds that "it is clear that the president did not request the upgrades" and that there is "no

evidence that the president in any manner influenced" the executive authorities performing them.

The SIU in large part blames Mr Zuma's personal architect, Minenhle Makhanya (declaring him, in essence, to be the "enemy" in Mr Fullinwider's analogy); and Mr Zuma says, in his parliamentary answer, that he did not know how much various components of the upgrade had cost and adds in an interview that "he did not take a penny" of taxpayers' money.

Mr Zuma, although he has benefited from the wrong committed at Nkandla, is not liable to help compensate the public purse, because he did not do so knowingly and willingly, and had no way of avoiding it.

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So, what's wrong with using the Fullinwider argument in this way? Let's put the factual question of how much Zuma knew and whether he could have avoided the spending aside, and suppose the ANC's defence is true. Here's the rub: Mr Fullinwider uses the principle he derives from his driveway example to argue against the preferential hiring of black candidates over whites in the context of affirmative action policies.

We must not ask, he says, whether a white candidate benefited from wrongs done to blacks in the past, and can therefore ethically be obliged to make up for those wrongs by ceding this job, scholarship, or place at university, to a black competitor. We must rather ask whether the white candidate deliberately took advantage of these benefits, or refused to avoid them. If she did not, then, even though she is not entitled to these benefits, we have no justification to take away her right to equal consideration and to harm her — just as we have no justification to harm you in order to compensate your neighbour for his misfortune.

The ANC, despite its manifest use of the Fullinwider principle in defence of Mr Zuma, would probably not want to follow him in this argument. Affirmative action and black economic empowerment (BEE) are morally justified on the ANC's political platform.

Yet, if the ANC objects to the driveway argument and to the Fullinwider principle on the grounds it can be used to argue against BEE, then it cannot,

without inconsistency, use this principle to justify Mr Zuma's refusal to pay for Nkandla.

If, on the other hand, it does not object to the driveway argument, then it needs to show why affirmative action is justified despite the argument's validity. Consistency is not merely a logician's fetish: public representatives who justify one action with a moral principle, but refuse to apply the principle to another action, lose moral, political, and intellectual credibility. If they do not object to the driveway argument, they need to show why affirmative action is justified despite its validity.

In any case, the ANC has some intellectual work to do. Is there anyone left, after Pallo Jordan has deserted public discourse, who can do it?

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