

Resurgence of tribal levies

Double taxation for the rural poor

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People in the former homelands waged a successful battle against the imposition of 'tribal levies' during the anti-apartheid struggle. Recently, however, there has been a resurgence of traditional authorities demanding annual levies. Those who refuse to pay cannot access government grants and identity books. This article argues that recent laws bolstering the powers of traditional leaders have contributed to this resurgence. It argues that the laws undermine the citizenship rights of the poorest South Africans as well as their ability to hold traditional leaders to account. It suggests that the laws have been ambiguously worded in an attempt to disguise the fact that they are inconsistent with the Constitution. It rebuts the argument that annual tribal levies are consistent with and justified by customary law, by describing their colonial and apartheid genesis.

RESURGENCE OF TRIBAL LEVIES

A series of rural consultation meetings¹ about the Traditional Courts Bill (TCB) was held between 2008 and 2010 in former homeland provinces. In these meetings the resurgence of traditional leaders extorting tribal levies was raised as a serious problem, with very severe consequences for poor people, in particular women who are struggling to eke out an existence for themselves and their children. In meeting after meeting the point was made that people who are not 'up to date' with their annual tribal levies and other ad hoc levies or taxes are refused letters from the tribal authority or traditional council, confirming that they are known and bona fide community members. These letters are important in rural areas where people do not have the types of formal physical or postal addresses required on many government forms. Without these official

'confirmation of address' letters they cannot apply for child support grants, pensions, identity documents or even open bank accounts. People complained further that they do not receive report-backs about how the money collected through levies is spent. They expressed concern that the levies do not benefit the local communities from which they are collected. Speakers referred to tribal levies as a system of double taxation, targeting the 'poorest of the poor'.

Similar problems surfaced in all the former homeland areas. This article focuses mainly, however, on Limpopo province, where fieldwork was undertaken in September 2010. During that research we were informed of the serious consequences facing people who do not, or cannot, pay their levies. In a village near Elim we were told of an unemployed woman who had been invited to apply for a job with the South African Police Services. The application required that she provide her address or submit a form stamped by the local tribal authority vouching that she was a

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community member. However, the tribal authority refused to stamp the form because there was no record that her family had paid annual levies in recent years. She was unable to raise the 'back-pay' of R140 demanded by the tribal office and so, despite meeting the requirements for the job, she was unable even to apply.²

Barbara Oomen, in her book *Chiefs in South Africa* describes similar incidents to those raised in the consultation meetings. In one incident, community members proposing development initiatives at village council meetings 'were not questioned about the developmental or organisational aspects of the projects ... but merely whether they were known to the chief and had paid the R100 tribal levy raised for the coronation and the building of the chief's villa'.³

AMBIGUITIES IN POLICY AND LAW

The extortion of tribal levies and taxes was a flashpoint for anti-Bantustan and anti-chief mobilisation in the former Lebowa and Gazankulu Bantustans during the 1980s.⁴ There was strong resistance to recurrent demands that poor rural people 'pop out' innumerable levies, and vociferous complaints that the funds collected were not properly accounted for. The scale of protest, which included recurrent attacks on the tribal police responsible for levy collection in some areas,⁵ combined with United Democratic Front (UDF) calls for an end to the 'double taxation' of homeland dwellers, led to traditional leaders muting their demands for levies during the early 1990s. Many rural dwellers stopped paying levies from that time, assuming that they were no longer lawful after the transition to democracy.

Seemingly recognising that experience, the 2003 White Paper on Traditional Leadership provides:

The authority to impose statutory taxes and levies lies with municipalities. Duplication of this responsibility and the double taxation of people must be avoided. Traditional leadership structures should no longer impose statutory taxes and levies on communities.⁶

The Traditional Leadership and Governance Framework Act (Framework Act), enacted in 2003 pursuant to the White Paper, was more ambiguous. It does not address directly whether or not traditional councils or chiefs have the authority to impose levies. It does however state in section 4(2) that:

Applicable provincial legislation must regulate the performance of functions by traditional councils by at least requiring a traditional council to-(a) keep proper records, (b) have its financial statements audited, (c) disclose the receipt of gifts,

and in s(3)(b):

meet at least once a year with its traditional community to give account of the activities and finances of the traditional council *and levies received by the traditional council*. (emphasis added)

This provision seems to be the basis on which Khosi Fhumulani Kutama, the chairperson of the National House of Traditional Leaders, stated in a 2007 affidavit in the *Tongoane*⁷ case that the Framework Act recognises the 'established practice of collecting traditional levies'. He added that '[m]ost provincial [traditional leadership] laws have retained this long established practice'. Elsewhere in his affidavit he states that historically traditional leaders could levy traditional taxes, and cites the Constitution's recognition of the 'institution, status and role of traditional leadership according to customary law'.⁸

On first reading, his statement seems to contradict the White Paper, as do the provincial laws to which he refers.⁹ However, on a closer reading, the Limpopo¹⁰ Traditional Leadership and Institutions Act differentiates between statutory taxes and 'monies which in accordance with the customary laws of the traditional community concerned are payable to the traditional council'.¹¹ Section 25 of the Limpopo Act provides that a 'traditional council may, with the approval of the Premier, levy traditional council rates' and that 'any tax payer who fails to pay the levy may be dealt with in accordance with the customary laws of the traditional community concerned.'

Limpopo is the only province in South Africa that has this kind of wording in its new traditional leadership law. The KwaZulu-Natal, Mpumalanga and Free State provincial laws are silent on tribal levies. Northern Cape, North West, and the Eastern Cape provincial laws ban them. They provide that '[a] traditional council may not impose any levy on any member of the traditional community or on any section of the traditional community.' Revealingly, however, these three provinces also provide that '[a] traditional council may request members of a traditional community or section of a traditional community, to make a voluntary contribution.'

The seeming contradictions between the White Paper, the national and provincial laws and Kutama's statement need to be contextualised by other sections of the White Paper, which recommend that '[t]ribal councils as they existed before colonialism, and which were based on custom, should be established and renamed "traditional councils"'. They 'will exercise the powers and perform the functions conferred upon them in terms of customary law, customs and statutory law' and will 'continue to generally administer the affairs of the community in accordance with custom and tradition.' The White Paper also provides that traditional councils 'should play a role similar to that previously played by tribal authorities prior to 1994.'¹²

Yet, prior to 1994 tribal authorities played an equivalent role to local government in the former homelands (although their legitimacy was often highly contested). The White Paper adds that traditional councils 'will, however, not discharge the functions currently assigned to municipalities.' The contradictory statements in the White Paper illustrate both the department's dilemma and, in my view, its attempted 'solution'. The dilemma is how to accommodate traditional leaders' demand that their pre-1994 governance role be restored,¹³ and yet retain the system of elected local government required by the Constitution. The 'solution' appears to be that, instead of giving traditional leaders direct statutory powers of taxation and local government

as they demand, the government will bolster their ability to push the limits of the open-ended 'customary law arena' in relation to governance and taxation powers.

If one reconsiders the White Paper's statement about levies in the light of subsequent events, the inherent ambiguities in its wording become more apparent:

The authority to impose statutory taxes and levies lies with municipalities. Duplication of this responsibility and the double taxation of people must be avoided. Traditional leadership structures should no longer impose statutory taxes and levies on communities.

The word that now jumps out is 'statutory'. The door is left open for non-statutory, 'customary' or 'voluntary' levies. While double taxation is to be 'avoided', there is no direct prohibition of non-statutory, customary or 'voluntary' tribal levies. The Framework Act and the provincial laws are similarly deeply ambiguous. Nowhere does the Framework Act provide traditional councils with the authority to collect tribal levies and taxes, yet it refers to the need for provincial legislation to regulate the way in which traditional councils account for tribal levies.

LAW, THE BALANCE OF POWER AND THE POWER OF DEFINITION

The pivotal question is this: what is the content of unwritten customary law with regard to tribal taxes and levies? And how, and by whom, are disputes about its content resolved? It is difficult for ordinary people to challenge chiefly versions of customary law in tribal courts overseen by traditional leaders, or in formal courts which are precedent-driven and rely on past judgements that upheld colonial and apartheid versions of customary law, in which hut taxes and tribal levies were a motive force. And, as Bennett has remarked,

[I]n spite of the failings of the official version of customary law, mere availability of information has had the effect of creating a de facto presumption in its favour. Litigants are entitled

to object, but in practice this right seldom amounts to much, because in the heat of litigation, time and money militate against undertaking a possibly inconclusive search for the living law.¹⁴

The danger of ossified rule-based versions of customary law trumping the citizenship rights envisaged by the Constitution is exacerbated when statute laws such as the Limpopo Act explicitly authorise traditional councils to impose 'customary' levies and duties, and to punish offenders in tribal courts.

Moreover, section 21 of the Framework Act provides that disputes concerning 'customary law or customs' must, in the first instance, be resolved 'internally and in accordance with customs' by community members and traditional leaders. If a dispute cannot be resolved internally it must be referred to the relevant House of Traditional Leaders (HTL). If the HTL is unable to resolve the dispute, it must be referred to the premier of the province, who must resolve it after having consulted the parties and the provincial house of traditional leaders. Thus a person complaining about chiefly distortions of customary law would have to take the issue up in forums dominated by traditional leaders and their organisations. The manifold problems facing litigants who seek to challenge abuse of power by traditional leaders or distortions emanating from them 'internally' i.e., in traditional courts, would become insurmountable were the Traditional Courts Bill to be enacted in its current form [see Mnisi Weeks in this edition].

The nub of the issue is that all of the legislation, provincial and national, appears to be deliberately ambiguous, making it very difficult for ordinary people to work out what the law says and how to challenge the resurgence of tribal levies. The in-built ambiguity also complicates possible legal challenges to both the practice and the laws themselves, requiring careful research and evidence to head off some of the rebuttals and loopholes that appear to have been built into the policy and legislation.

TRIBAL LEVIES AND CUSTOMARY LAW

According to the Constitution, the power to legislate and impose taxes vests in national, provincial and local government, and is subject to stringent legislative and procedural requirements, none of which has been met by the Limpopo Act.¹⁵ Legal experts have advised that traditional councils cannot levy taxes, as they are not a sphere of government expressly mandated to do so by the Constitution.

Kutama's position, however, appears to be that tribal levies and taxes are authorised by the Constitution's recognition of customary law. He makes the case that traditional leaders have inherent customary law powers to tax their 'subjects'. In this vein it could conceivably be argued that the express provisions in the Constitution authorising national, provincial and local government to introduce taxes do not mean that other bodies are prohibited from doing so where alternative legal authority exists.

It is thus important to look at the origins of current levies and taxes and the extent to which they derive from 'custom' as opposed to prior colonial and apartheid laws. The 'customary law' justification also raises a series of questions concerning the extent to which current levies and taxes are consistent with the reciprocal nature of past customary practices. It raises the problem of transposing practices developed in one context (where traditional leaders were not supported financially by government and fulfilled a range of hands-on day-to-day functions) to another (where traditional leaders are paid salaries, and may be lawyers or Members of Parliament living in distant cities). Moreover, the Framework Act reinforces and cements the controversial Bantu Authority boundaries derived from apartheid.¹⁶ This makes it impossible for rural people to hold traditional leaders to account by withdrawing their allegiance.¹⁷ It also centralises power to senior traditional leaders and away from co-existing multilayered traditional institutions such as headmen and village councils. Key questions that arise concern the impact of laws such as the Bantu Authorities Act and the Framework Act on

indigenous accountability mechanisms, and whether tribal taxes and levies can be said to remain 'customary' once laws are introduced that undermine age-old indigenous accountability mechanisms that mediate power.

Another fundamental question is whether tribal levies are in fact 'taxes', as opposed to 'voluntary contributions', in which case the limitations on taxation power imposed by the Constitution would not apply. This is relatively straightforward however, as once sanctions for non-payment are imposed (as all the consultation meetings report) it becomes clear that tribal levies are neither voluntary contributions nor donations, but instead constitute a form of taxation. Closely related to this question is that concerning the manner in which the 'voluntary contributions' mentioned in the Eastern Cape, North West and Northern Cape provincial laws are approved by those to whom they apply, and whether there are adequate checks and balances to ensure that such approval is freely given. There is a long-standing practice of groups of African people agreeing to finance specific development projects by clubbing together to raise funds. Historically this was the primary mechanism that black people used to purchase land. Indeed, white farmers in arguing for the 1913 Land Act to be more stringently applied complained to the Beaumont Commission that black people had an unfair advantage in the land market because they routinely clubbed together to outbid individual white buyers.¹⁸

Colonial and union laws governing 'native' taxation included provision for a tribe or community to apply for permission to levy a 'special rate' to finance specific projects such as buying land, building a school or sinking a well. Such 'voluntary' special rates had to be approved at a community meeting and were only possible in relation to specific projects.¹⁹ Once approved at community level, the special rate was referred to the Minister of Native Affairs for approval and was then published in the government gazette along with the restricted time period for collecting the rate, the name of the tribe and the purpose of the special rate. A study of special rate notices by Kathryn Blair²⁰ shows, however, that over time there was a noticeable shift away from

'special rates' being collected for specific projects towards special rates being used to finance on-going tribal administration over multi-year timeframes.

Blair shows that initially special rates were not legally defined to constitute taxation in the same way as taxes imposed by government, but that the 1925 Native Taxation and Development Act was subsequently amended to enable punishment of special rate defaulters as tax evaders. In other words, what began as voluntary contributions for specific agreed purposes became, in practice, a tax to finance the running costs of Bantu Authorities. The various homeland governments subsequently introduced legislation that built on this history, but in many cases removed the formal protections and requirements that had existed in law, if not in practice. For example, the Lebowa Tribal Taxation Act of 1975 removed the requirement for community approval of a proposed rate. The only explicit requirements for the enactment of a tribal rate were the approval of the Lebowa Minister of Finance and publication of the rate in the Lebowa Gazette. Neither a special purpose nor the approval of the majority of the tribe was mentioned in the Act. After 1977 Lebowa gazette notices stated merely that the money collected would be used 'for the general administration of the tribe', instead of the more specific purposes published in earlier gazettes, such as 'the purchase of ploughing units' or 'the building of Bakenberg High School and Secondary School.'²¹

During a recent research trip to Limpopo, people near Elim described the historical origins of current annual levies. Both men and women said that annual levies started with the 'call-in cards' that migrant labourers had to get stamped by the chiefs every year when they renewed the annual contracts that locked them into the migrant labour system. They said that migrants were dependent on the chief's signature for the renewal of their annual contracts and that signature was dependent on the migrant paying an annual tax that started at R1,50 but increased rapidly over the years. Over time, people explained, the 'call-in card' levy was extended to all families, whether they included a migrant

labourer or not. Various people said that by the 1980s the annual tax had increased to R160 per family per year and was collected by tribal police going door-to-door, demanding payment.

However, during the anti-Bantustan rebellions of the late 1980s residents began to attack the tax collectors and drove them out of their villages. The system fell into abeyance and only re-emerged recently. Many people said they got away with refusing to pay the annual levy until recently, but are now forced to pay, because without stamped 'proof-of-address' letters they cannot obtain ID documents for their children, apply for pensions and social grants, or even obtain driver's licenses.

CONCLUSION

The history and contested nature of tribal levies provides clear evidence of the distorting impact of past discriminatory laws and practices. In addition, recent laws such as the Framework Act and the provincial laws enacted pursuant to it are fundamentally at odds with the consensual character of customary law – and appear to have sparked the re-emergence of levies. People are forced to pay levies, not on the basis that they have agreed to them, but because otherwise they are deprived of access to their entitlements as South African citizens. They are put between a rock and hard place not by customary law, but because of the state's choice to enact laws that reinforce Bantustan boundaries and apartheid precedents. Despite the state's attempts to cloak the new laws in ambiguity, the levy provisions in the Limpopo Traditional Leadership and Institutions Act are manifestly vulnerable to constitutional attack.



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NOTES

1. The Law, Race and Gender Unit, together with the LRC and other NGO and CBO partners held community consultation workshops on the TCB in Madikwe (North West), Nelspruit, East London and the Eastern Cape. During 2008 the LRC had convened community consultation workshops in Qunu in the

Eastern Cape, and in Pietermaritzburg with the Rural Women's Movement. The provincial consultation meetings culminated in a large national workshop of 100 rural delegates from around the country in Johannesburg in November 2009. Since then further meetings have been held in North West, Eastern Cape and KwaZulu-Natal.

2. Group interview in Bungeni village 1st September 2010.
3. B Oomen, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era*, Oxford, James Currey, 2005, 140.
4. P Delius *A Lion Amongst the Cattle: Reconstruction and Resistance in the Northern Transvaal*, Johannesburg, Ravan Press 1996, 162-3; E Maloka, 'Populism and the politics of chieftaincy and nation-building in the new South Africa' *Journal of Contemporary African Studies* 14 (2) (1996), 177.
5. Interview with Shirhami Shirinda December 2010.
6. White Paper on Traditional Leadership, 2003, 43.
7. *Tongoane and Others V Minister for Agriculture and Land Affairs and Others*, CCT 100-09 [2010] delivered on 11 May 2010.
8. Kutama's affidavit in the CD ROM of Court papers (paras 40.3, 17.3, 40.2, 23.2) that is included in A Claassens & B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act*, Cape Town, UCT Press, 2008.
9. Most of these laws were enacted in 2005 and 2006 pursuant to the national Traditional Leadership and Governance Act 41 of 2003, which created a framework for mandatory laws to be introduced by the provinces.
10. Kutama's province.
11. Section 24(a) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005.
12. White Paper on Traditional Leadership, 2003, 46, 47.
13. Status Quo report on Traditional Leadership and Institutions, 1999.
14. T Bennett, *Customary Law in South Africa*, Cape Town, Juta 2004, 49.
15. Christina Murray and Megan Herzog, forthcoming.
16. Section 28 deems pre-existing tribal authorities established and delineated in terms of the Bantu Authorities Act to be the traditional councils of the future, provided that they meet new composition requirements.
17. P Delius, Contested terrain: land rights and chiefly power in historical perspective, Claassens & Cousins (eds.) *Land, Power and Custom*, 231-235; A Claassens, Power, accountability and apartheid borders: the impact of recent laws on struggles over land rights, in Claassens & Cousins (eds.) *Land, Power and Custom*, 286-290.
18. Beaumont Commission report 1916, cited in TRH Davenport and KS Hunt (eds.), *The Right to the Land*, David Philip, 1974, 41.
19. S 15 of the Native Taxation and Development Act, 1925.
20. K Blair, *Tribal levies and Proclamations levying a special rate*, March 2010, [Available at www.lrg.uct.ac].
21. A Gardea, *Analysis of relevant legislation and regulations in the Bantu Authorities era case studies: Lebowa and KwaZulu*, August 2010, [Available at www.lrg.uct.ac].