THE RESURGENCE OF TRIBAL TAXES IN THE CONTEXT OF RECENT TRADITIONAL LEADERSHIP LAWS IN SOUTH AFRICA

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ABSTRACT
The imposition of ‘tribal levies’ was a flashpoint for the anti-Bantustan rebellions of the 1980s. Rural people objected to traditional leaders demanding excessive levies that were not adequately accounted for. The Constitution authorises only the three levels of government to tax, and circumscribes taxation power in various ways. Yet rural people report a resurgence of demands for tribal levies in all the former homelands, and in 2005, the Limpopo Traditional Leadership and Institutions Act provided for the imposition of ‘traditional council rates’. This article describes the upsurge of tribal levies in the context of the ambiguity of recent laws and policy in respect of traditional leadership and tribal taxation. It argues that tribal levies are inconsistent with the Constitution and that they derive from colonial and apartheid laws and distortions, rather than from customary law per se. It focuses on Limpopo Province.

I INTRODUCTION
This article asks how it has come about that less than 20 years after the transition to democracy and the end of the Bantustans as separate ‘states’ there is a law in Limpopo that authorises traditional councils to demand tribal levies once again. Tribal levies were a flashpoint of the anti-chief and anti-Bantustan rebellions that swept through the areas which make up Limpopo Province today.

The article situates the Limpopo Traditional Leadership and Institutions Act 6 of 2005 in the context of a wider package of new laws that effectively resuscitate old apartheid tribal authority boundaries and give traditional leaders far-reaching powers within the former homelands. The laws are both deeply familiar from our apartheid past and consistent with new global trends to outsource the governance of marginalised sections of society. It is ironic that in the era of constitutionalism and ‘human rights’ it is the law that is used to reinstate bifurcated citizenship for the rural poor.

In this context the article discusses the tensions between the new laws and the requirements of the Constitution of the Republic of South Africa, 1996, which promises equal citizenship for all South Africans. It argues that the

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1 Thanks to Monica de Souza, also of LRG, for her research assistance.
2 The Traditional Leadership and Governance Framework Act 41 of 2003; the provincial laws enacted pursuant to it; the Communal Land Rights Act 11 of 2004; the Traditional Courts Bill of 2008 [B15-2008].
unwritten and open-ended nature of customary law is the buffer that law makers have relied on in their attempts to mediate the contradictions between the new laws and the Constitution. The laws are justified by reference to the recognition of ‘traditional leadership according to customary law’ in the Constitution.3

Essentially, what the new laws do is bolster the power of traditional leaders to unilaterally define the content of customary law and then rule according to it. This is an inherently unstable enterprise, however, as rural people have long disputed the veracity of the versions of custom used to prop up autocratic chiefly power. Moreover, the Constitutional Court has repeatedly stressed that customary law is ‘living law’ which ‘evolves as the people who live by its norms change their patterns of life’.4 The Court has contrasted living customary law with the codified version of official customary law inherited from colonialism and apartheid. In the Bhe judgment it rejects ‘official customary law’ as a ‘poor reflection, if not a distortion of the true customary law’. It holds that ‘[t]rue customary law will be that which recognises and acknowledges the changes which continually take place’.5 This indicates that that the content of customary law must be sought in actual practice as opposed to apartheid precedents or chiefly pronouncements.

The article starts by describing the resurgence of tribal levies in recent years and recording the views of some rural residents about this resurgence. It goes on to discuss recent writing about global trends in outsourcing governance. Thereafter it looks briefly at the South African context in which the new laws were enacted. It examines the factors that have led to an African National Congress (ANC) government enacting such laws.

It then describes how the package of new laws fits together. This is necessary because the impact of the laws is difficult to understand in isolation from one another. Thereafter it discusses the in-built ambiguity which characterises the new laws and the implications that this has for rural people. It discusses the vexed question of who determines the content of customary law and the impact of the new laws on the balance of power in rural areas. It examines and rejects the argument that annual tribal levies can be justified as consistent with customary law by describing their colonial and apartheid precedents. It argues that annual levies are a form of taxation and, as such, are inconsistent with the constitutional framework governing taxation which provides that only elected government at the national, provincial and local level has the authority to tax. Moreover the Constitution prescribes specific procedures governing money bills and the exercise of taxation power. Traditional leaders are not elected and tribal levies do not conform to the constitutional requirements circumscribing the exercise of taxation power.

3 Section 211(1).
4 Alexkor Ltd v The Richtersveld Community 2004 (5) SA 460 (CC) para 52.
5 Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa 2005 (1) SA 580 (CC) para 86.
In effect, rural people are forced to subsidise the unfunded mandate that government has, once again, given to traditional leaders in respect of governing the former homelands. Finally, I acknowledge the complexity of the dilemmas facing government in the absence of effective local government in former homeland areas, but conclude that recent laws take us in the wrong direction and are vulnerable to constitutional attack.

II RESURGENCE OF TRIBAL LEVIES

A series of rural consultation meetings about the Traditional Courts Bill [B15-2008] (TCB) was held between 2008 and 2010 in former homeland provinces. In these meetings the resurgence of the extortion of tribal levies by traditional leaders was raised by rural delegates as a serious problem, with 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 addresses required on many government forms. Without these official ‘confirmation of address’ letters people cannot apply for identity documents, pensions, child-support grants 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’. Many said that they had to pay Value Added Tax (VAT) and income tax like other South Africans, but unlike other South Africans they also have to pay annual taxes to traditional leaders.

A woman from Nongoma in KwaZulu-Natal said:

Levies have to be paid towards the chief’s car and house. Yet the chief receives a salary every month. Everyone in the community must pay including widows and mothers that receive child care grants. No receipts are issued for levies paid.7

At the Mpumalanga meeting in 2009 a man from Nkomazi referred to:

this tribal tax called nagane. We don’t want to be taxed twice. We pay 14% already. Chiefs get cars, stationery for the office and salaries for the staff. So what do they use the tribal tax for? It is still being taken to this day.8

6 The LRG Research Unit, together with the Legal Resources Centre (LRC) and other non-governmental organisation (NGO) and community-based organisation (CBO) partners convened the workshops.

7 Translation and transcription by M Cele of a Traditional Courts Bill Workshop organised by LRG Research Unit, LRC & Rural Women’s Movement (RWM) in KwaZulu-Natal (28 to 30 October 2008) 164. See meeting report <http://www.lrg.uct.ac.za/publications/other/>.

8 This refers to the national VAT of 14 per cent included in the purchase price of goods and services.

9 Translation & transcription by T Charles with S Mnisi of the Traditional Courts Bill Workshop organised by the LRG Research Unit, LRC & TRAC Mpumalanga in Mpumalanga (3 to 4 June 2009) 181–2. See meeting report <http://www.lrg.uct.ac.za/publications/other/>.
Another man from Nkomazi said:

The thing is that we in South Africa, we are one. We who live in the rural areas and in the towns and in the townships and in the farms. We are all South Africans. When we vote we use the same ballot papers. But then why do we remain outside democracy? … Now we have voted and we have a parliament which allows us to talk … We don’t want to be double taxed. It seems like there are two governments in South Africa.10

The resurgence of tribal levies in Rakgwadi Limpopo was described in a 2008 submission to the Justice Portfolio Committee about the Traditional Courts Bill:

Tribal levies have been controversial in Rakgwadi for a long time. The extortion of excessive levies by our kgosi, who was also finance minister of Lebowa sparked an uprising in 1986 because people were fed up with paying large sums of money that were never properly accounted for. Our rallying cry was that rural people should not suffer double taxation – they should be equal to other South Africans.

With the change of government we believed that the problem of tribal levies was a thing of the past. Imagine our surprise when suddenly our kgosi demanded a R50 levy to buy himself a car in 2004. Rakgwadi is a large area composed of 23 villages of which Tsimanyane, where the hospital is based, is only one. We are talking about a lot of money. He also demanded R20 to cover the costs of the 50-year celebration of the tribe arriving at Rakgwadi.

Many of us objected and refused to pay – we said that compulsory tribal levies are unconstitutional. To add insult to injury our kgosi began to use the kombi … as a taxi. We wrote to the Premier of Limpopo to complain and to ask for clarification. He sent two officials from his office who deal with traditional affairs. They told us that tribal levies have been brought back by a new law, and there is nothing we can do. We must pay. We asked for a copy of the new law and they told us they had no copy to give us or even show us.11

When this man approached me to help him track down this mysterious law I discovered, to my amazement, that the officials were correct. The Limpopo Act authorises traditional councils to levy ‘traditional council rates’ and provides 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’.12

III  GLOBAL TRENDS: OUTSOURCING GOVERNANCE

It is helpful to situate the events unfolding in South Africa, and the contestations underway, within the context of wider global trends. Franz and Keebet von Benda-Beckman et al13 highlight the global pattern of governments increasingly outsourcing large areas of law-making, together with various governance tasks, especially those dealing with marginalised sections of the

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10 Ibid 183.
12 Limpopo Act s 25.
population. They raise important questions concerning the particular forms of inequality and exclusion created by the increasing plurality of legal orders and governance structures, and in particular the impact of plural governance structures in creating differential citizenship rights for different segments of the population.

The authors note that the marginalised in outsourced areas, in our case the former ‘homelands’ in South Africa, ‘are virtually excluded from decision-making processes and are governed over, rather than being participants in government’. Von Benda-Beckmann et al point out that these plural governance roles are often guided and legitimised by alternative legalities and legal forms. They, and John and Jean Comaroff, highlight the irony that the current global preoccupation with ‘constitutionalism’ and the ‘rule of law’ exists simultaneously with, and tends to mask, concomitant processes of states’ ‘outsourcing’ power and legal authority to other structures. Another study by the von Benda-Beckmans and others highlights the role of law in ‘creating and organising spaces of inequality’ while it ‘simultaneously creates and legitimizes these inequalities beneath a neutral and professional discourse’.

Closely related to processes of outsourcing governance are territorialising strategies that contribute to the stratification of citizenship within set-apart geographical boundaries. Sikor and Lund write that:

By making and enforcing boundaries, by creating a turf, a quarter, a parish, a soke, a homeland etc., different socio-political institutions invoke a territorial dimension to their claim to authority and jurisdiction.

The imposition of controversial tribal boundaries is central to contestation in South Africa about the setting apart of insulated zones of customary authority for ‘senior traditional leaders’. The new traditional leadership laws, which will be discussed in part IV, entrench disputed tribal boundaries that coincide with the former homelands as the jurisdictions within which traditional leaders are authorised to apply open-ended ‘customary law’. In a 2007 affidavit the then director general of the Department of Provincial and Local Government stated in defence of one of the laws:

14 Ibid 10.
15 Ibid 16.
16 Ibid 11.
17 Ibid 2.
22 Tribal authorities (previously bantu authorities) served as the unit of local government within the former homelands and were contiguous within them.
The traditional councils have clearly defined areas of jurisdiction. Those who find themselves in those areas must adjust to the rules and traditional practices of that area.23

More recently Yunus Carrim, the deputy minister responsible for the establishment of the Department of Traditional Affairs, stated:

Under the Cooperative Governance and Traditional Affairs Ministry a new Department of Traditional Affairs is being established to signal the importance the new administration gives to the institution of Traditional Leadership. Clearly, traditional leaders have space to play an important governance and developmental role in traditional authority areas which include over 14 million people.24

Yet traditional council boundaries and chiefly versions of customary law are deeply disputed in many areas, especially in relation to the position of women, the imposition of tribal levies, the selling of land allocations and unilateral mining and investment deals. Rural people are increasingly demanding a voice in the definition of custom at both the local level and in the parliamentary processes where the boundaries are entrenched and the meta-rules are set.

IV  THE SOUTH AFRICAN CONTEXT IN WHICH THE LAWS WERE ENACTED

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.25 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,26 combined with United Democratic Front (UDF) calls for an end to the ‘double taxation’ of homeland dwellers, resulted in traditional leaders muting their demands for levies during the early 1990s. Many rural dwellers stopped paying levies from that time – assuming that they had become unlawful after the transition to democracy in 1994.

The opposition by traditional leaders to the new Constitution and to the extension of elected local government into the former homelands after 1994 has been described by Lungisile Ntsebeza27 and others and will not be repeated

24 Speech by deputy minister of Cooperative Governance and Traditional Affairs Yunus Carrim at the Traditional Councils, Local Government and Rural Local Governance Summit, Durban (5 May 2010).
26 Interview with Shirhami Shirinda (December 2010).
here. Barbara Oomen\(^{28}\) has discussed the successful interventions by the traditional leader lobby to thwart the early attempts of the South African Law Commission to repeal laws such as the Native (Black) Administration Act 38 of 1927 and the Bantu (Black) Authorities Act 68 of 1951. These laws provided traditional leaders with countervailing statutory authority to that being given to elected local government in rural areas, and were jealously guarded. Reports such as the 1999 *Status Quo Report on Traditional Leadership and Institutions*, undertaken by the then Department of Constitutional Development, and the 2006 *Baseline Report* of the Longitudinal Study conducted by the Human Sciences Research Council (HSRC) in partnership with the Centre for Applied Legal Studies (CALS), document the distress of traditional leaders that their power was being challenged or simply disregarded by rural residents and their repeated demands that their contested authority be buttressed by law, as it had been in the past.\(^{29}\)

The traditional leader lobby, including both the Congress of Traditional Leaders of South Africa (Contralesa) and the National and Provincial Houses of Traditional Leaders, has been extraordinarily astute and tenacious in lobbying government for increased salaries, resources and statutory powers, assisted no doubt, by the high numbers of traditional leaders who are members of Parliament.\(^{30}\) The new laws are in large measure the outcome of their success.

But there are other factors too, which are likely to have contributed to government’s willingness to accede to their demands. These include the intractable levels of poverty in former-homeland areas, and the weakness of and disillusionment with elected local government generally. Local councillors are accused of being corrupt and inaccessible in much the same way as traditional leaders were when backed by the apartheid state.\(^{31}\) Moreover, as Jeff Peires points out, although councillors are supposed to be elected, very few rural people know or understand how specific people come to be their councillors. He attributes this to the system of proportional representation and the party list system.\(^{32}\)

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\(^{30}\) While they have been successful in acquiring salaries for traditional leaders and the resources attached to the National and Provincial Houses of Traditional Leaders, they have been less successful (and intent?) on acquiring the resources necessary for the running costs of tribal authorities, including salaries for staff and for headmen and councillors who do the bulk of the day-to-day work in these offices. This will be discussed below as the justification often put forward for the extortion of levies to cover such running costs.


At a structural level, part-time ward councillors have to cover constituencies that are dauntingly big in rural areas, often including several old tribal authority areas. Their offices are poorly staffed and much further away than the local tribal authority offices built during the apartheid era. The only easily accessible and visible local infrastructure in many former-homeland areas is thus the tribal authority office, staffed by clerks, cleaners and tribal police who are paid government salaries, albeit at very low rates.

The ANC is a pre-dominantly urban organisation, whose links with the Bantustan uprisings of the 1980s were via the UDF, and even the UDF was only tangentially involved in the scale and spread of the popular revolts that brought the Bantustan governments to their knees. When ANC leaders interact with rural areas they tend to rely on old connections or high status people, many of whom acquired their positions and resources during the Bantustan era, as their point of entry. As a result, the former Bantustan elites are rehabilitated, as the only available infrastructure in deep rural areas, and moreover as people fighting hard and passionately to retain their turf, notwithstanding the intractable poverty which characterises it.

In addition, there is the emotive issue of custom and tradition, with repeated charges by traditional leaders that Parliament has betrayed African values and traditions by adopting ‘white man’s law’ and pre-empted the possibility of being able to solve ‘African problems in an African way’. Various commentators have noted that concessions to traditional leaders tend to take place during pre-election periods. The assumption seems to be that traditional leaders have the capacity to deliver the rural vote and thus alliances with them at election times are of paramount importance. This seems a strange assumption given that the strongest support for the ANC in the 1994 elections came from rural areas that had mobilised around an anti-Bantustan agenda and rallied behind the demand for equal citizenship in a united South Africa. Further, government has been reticent in advertising the content of the new laws to rural people, and stands repeatedly accused of secretly negotiating these laws with traditional leaders behind closed doors.

33 Ibid 110.
36 For example see Peires (note 32 above) 110–2; Oomen (note 28 above).
37 The Communal Land Rights Act 11 of 2004 (described in part V) was struck down by the Constitutional Court in Tongoani v Minister of Agriculture and Land Affairs 2010 (6) SA 214 (CC) because a foreshortened parliamentary process was used, instead of one involving the provinces. The memorandum to the TCB (also described in part V) describes it as having been drafted in consultation with the National House of Traditional Leaders. The only consultations listed in the memo involved traditional leaders. Recently the Bill was withdrawn from Parliament and referred
The core law in the package of new traditional leadership laws is the Traditional Leadership and Governance Framework Act 41 of 2003. Section 28 of the Framework Act deems existing tribal authorities to be traditional councils provided that they comply with new composition requirements. The requirements are that 40 per cent of the members of a traditional council must be elected and 30 per cent must be women. Section 28 entrenches the controversial tribal authority boundaries established in terms of the Bantu Authorities Act. These were established virtually wall-to-wall throughout the former homelands despite fierce resistance in many areas.38

The primary impact of the Framework Act is to entrench apartheid structures and boundaries as the ‘officially recognised’ traditional structures and boundaries of the future. In and of itself the Framework Act does not provide traditional leaders with much direct power. However, s 20 of the Framework Act specifies that national or provincial government may enact laws providing a role for traditional councils or traditional leaders in relation to a wide range of issues including (but not limited to) land administration, health, welfare, the administration of justice, safety and security, economic development and the management of natural resources. It is thus other laws, such as the Communal Land Rights Act 11 of 2004 (CLRA) and the Traditional Courts Bill, that provide traditional leaders with substantive powers, rather than the Framework Act per se. In addition, provincial laws were enacted pursuant to the Framework Act between 2005 and 2007 to give effect to the schema put in place by the national legislation.

The traditional leader lobby initially opposed the Traditional Leadership and Governance Framework Bill [B58-2003] and threatened to lead a boycott of the general election the following year. They said that the Framework Bill provided too little power to traditional leaders. Subsequently, the draft Communal Land Rights Bill [B67-2003] (CLRB) was amended in October 2003 to provide traditional councils with land administration powers and to enable traditional councils to represent ‘communities’ as the owners of communal land. The sting in the tail of the CLRB, however, was that tribal authorities had to meet the new composition requirements set out in the Framework Act (i.e. have 40 per cent of their members elected and include 30 per cent women), in order to qualify as land administration committees. In areas where tribal authorities failed to comply with the new composition requirements, the CLRB provided that land administration committees must be elected.

38 See note 22 above; G Mbeki South Africa The Peasants’ Revolt (1964); A Luthuli Let my People Go! (1962) 180.
The carrot of power over land, together with the stick of threatened exclusion, played a major role in breaking a political deadlock between the ANC and the Inkatha Freedom Party (IFP) in KwaZulu-Natal during the build-up to the 2004 national elections. Inkatha had strenuously opposed the Framework Bill and had called for traditional leaders to boycott the proposed traditional council elections for the 40 per cent component. Most traditional leaders in the province broke ranks, however, and went ahead with the traditional council ‘elections’ as the means to convert the tribal authorities of the past into the traditional councils of the future. This contributed to a split in the IFP’s important ‘traditionalist’ support base, which changed the balance of power between Inkatha and the ANC in the province.

Provincial politics are important in the context of laws dealing with traditional leadership powers because many of the old homeland laws can be repealed only at the provincial level. The Framework Act is exactly what its name implies – national legislation that creates the framework for provincial laws that spell out the detailed implementation of its vision in the different provinces. These provincial laws repeal many of the old apartheid laws that underpinned the power of chiefs within the Bantustans.

In 2010 the CLRA, which had formed a crucial part of the ‘deal’ with the traditional leader lobby, was struck down by the Constitutional Court following a long drawn out legal challenge brought by four rural communities. The Act had never been brought into operation prior to that judgment despite having been enacted in 2004.

Another controversial measure is the Traditional Courts Bill, which gives individual traditional leaders far-reaching power to determine the content of customary law within their now entrenched apartheid boundaries. The Bill vests statutory power in the presiding officer of a traditional court, who must be a recognised senior traditional leader or his delegate, and makes it an offence not to appear before a customary court once summoned by the presiding officer (clause 20(c)). Decisions of the court (i.e. the traditional leader) have the legal status of rulings made by the magistrates’ courts. Traditional leaders, as presiding officers, are given the authority to order far-reaching sanctions including, controversially, unpaid labour by any person within their jurisdictional boundaries (clause 10(2)(g)). The person need not even be a party to a dispute before the court. Of perhaps even greater concern is clause 10(2)(i). This authorises the court to deprive an accused person or defendant of benefits that accrue in terms of customary law or custom.

39 Traditional council elections have still not been held in Limpopo, seven years after the Framework Act came into effect. Where elections have been held, these have not been particularly successful. In the Eastern Cape, the election process was fraught with problems – an Eastern Cape MEC openly acknowledged that the incorrect process was followed and that communities were not notified of the elections. In KwaZulu-Natal, research conducted by Jean Redpath & Michael O’Donovan has shown that on average there was a 2.2 per cent voter turnout at the elections in areas where election results were available. See LRG Research Unit ‘Law, Custom and Rights’ (July 2010 & August/September 2011) <http://www.lrg.uct.ac.za/publications/law/>.

40 See clauses 5, 8, 9, 10 & 11 of the Bill.
entitlements to land are one such benefit, community membership is another. Effectively, the court is authorised to revoke a person’s customary rights to land, and even strip a person of their community membership.

The unilateral nature of the legal power vested in traditional leaders is inconsistent with the consensual character of customary law and bypasses in-built indigenous accountability mechanisms that militate against abuse of power. The TCB fails to acknowledge, let alone recognise, the role played by council members in the mediation of disputes, or by lower structures of indigenous authority such as headmen and village councils. The layered nature of customary institutions is well documented in academic literature as is its central role in mediating and balancing power. Leaders are forced to take into account the views and deliberations of other levels of authority which provide people with alternative forums in which to express their views. The power of different levels in the traditional hierarchy expands and contracts depending on the confidence people have in leaders at the different levels. Unpopular or dictatorial traditional leaders will find sub-groupings referring fewer and fewer issues to them, and instead dealing with issues internally at lower levels. Secession was historically a primary mechanism of accountability in customary systems.

However, once fixed jurisdictional boundaries are imposed by the state, and traditional leaders are given centralised statutory authority within those boundaries, the dynamics of indigenous accountability are fundamentally undermined. The TCB empowers traditional leaders, including those whose legitimacy and jurisdictional boundaries are challenged locally, to demand that their opponents appear before them, and to strip those opponents of their land rights and community membership.

VI THE AMBIGUOUS NATURE OF LAW AND POLICY IN RELATION TO TRIBAL LEVIES

The 2003 White Paper on Traditional Leadership provides that:

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.


43 White Paper on Traditional Leadership and Governance (GG 25438 of 10 September 2003) 43. This white paper was published by the Department of Provincial & Local Government in General Notice 2336.
The Framework Act, enacted 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 s 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

(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.\(^{44}\)

This provision seems to be the basis on which Khosi Fhumulani Kutama, the then chairperson of the National House of Traditional Leaders,\(^ {45}\) stated in a 2007 affidavit in the *Tongoane*\(^ {46}\) 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’.\(^ {47}\)

On first reading, his statement seems to contradict the white paper, as do the provincial laws to which he refers. However, on a closer reading, the Limpopo 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’.\(^ {48}\) 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, which is Kutama’s province, is the only province in South Africa that has this kind of wording in its new provincial 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’.\(^ {49}\) Revealingly, however, these three provinces also

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\(^{44}\) Emphasis added.

\(^{45}\) Kutama was removed as chair of the National House of Traditional Leaders in the latter half of 2010, as a result of a vote of no confidence in his leadership. He has been replaced by Kgosi Pontsho Phopolo Maubane. See ‘New Chair for House of Traditional Leaders’ *Times Live* (29 January 2011) <http://www.timeslive.co.za/local/2011/01/29/new-chair-for-house-of-traditional-leaders>.

\(^{46}\) Affidavit of Fhumulani Kutama in the DVD ROM of Court papers (paras 40.3, 17.3, 40.2, 23.2) included in Claassens & Cousins (note 23 above).

\(^{47}\) Limpopo Act s 24(a).

\(^{48}\) Traditional Leadership and Governance Act 4 of 2005 (Eastern Cape) s 30; Northern Cape Traditional Leadership, Governance and Houses of Traditional Leaders Act 2 of 2007 s 24; North West Traditional Leadership and Governance Act 2 of 2005 s 28.
provide that ‘[a] traditional council may request members of a traditional community, or any section of a traditional community, to make voluntary contributions’.  

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’.  

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, 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 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.

50 Eastern Cape Act (ibid) s 31; Northern Cape Act (ibid) s 25; North West Act (ibid) s 29.  
51 White paper (note 43 above) 46–7.  
52 Ibid 47.  
53 Ibid 43.
VII  Are Tribal Taxes Constitutional?

The Constitution grants plenary taxation power only to national Parliament, and even so imposes strict requirements and procedures in relation to ‘money bills’. Provincial legislatures and municipal councils are granted limited taxation powers and revenue collection by local government is particularly tightly controlled and subject to oversight by national and provincial government. These controls are set out in laws such as the Municipal Fiscal Powers and Functions Act 12 of 2007, the Local Government: Municipal Finance Management Act 56 of 2003, and the Local Government: Municipal Property Rates Act 6 of 2004.

Given the strict procedures and laws governing taxation at national, provincial and municipal level it is striking that traditional councils are not authorised either by the Constitution or by national law to tax or to demand levies. There is no explicit provision in the national Framework Act authorising levies or taxation power, and certainly no provision of the Constitution or existing law enables a province to ‘delegate’ taxation power to another body as the Limpopo Act attempts to do. Moreover, the terms of the ‘delegation’ in the Limpopo Act do not comply with the types of restrictions and procedures governing municipal taxation, the most basic of which is prior representation by those affected. At face value the levy provisions in the Limpopo Act are unlikely to pass constitutional muster. The issue extends beyond the Limpopo Act however, to the de facto extortion of tribal levies and taxes in other provinces where the provincial laws are silent on this issue.

Kutama’s position, and the position implicit in the white paper, appears to be that tribal levies and taxes are authorised by the Constitution’s recognition of customary law. Kutama 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. In the light of the apparently purposeful ambiguity of the white paper and the Framework Act part IX asks if customary law provides possible alternative legal authority for ‘non statutory’ tribal levies.

VIII  Law, the Balance of Power and the Power of Definition

A pivotal question then becomes: 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 judgments that upheld colonial and apartheid versions of customary law, in which hut taxes and tribal levies were a motive force. And, as Tom Bennett has remarked:

54 It should be noted that there have been no provincial gazette notices issued with respect to traditional council rates, as required by s 25 of the Limpopo Act.
In 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.\textsuperscript{55}

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 punish tax and levy defaulters in tribal courts.

Moreover, s 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. If the House of Traditional Leaders 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.

The fact that all the legislation, provincial and national, appears to be deliberately ambiguous makes 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 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.

A province that appears to have attempted to proactively confront the contradictions facing rural people is KwaZulu-Natal. Towards the end of 2008 the KwaZulu-Natal Department of Local Government and Traditional Affairs (DLGTA) commissioned the Maurice Webb Race Relations Unit of the University of KwaZulu-Natal to facilitate a consultative process on tribal levies and taxes in the province. One of the objectives of the process was to examine the legal validity of tribal taxes and levies, another was to assess whether they comply with the constitutional human rights framework. A draft report builds on an earlier survey of provincial tribal taxes and levies undertaken by the Unit and provides an unusually detailed account of levies and taxes in the current day.\textsuperscript{56} The report notes that neither the Constitution nor the Framework Act confers taxation powers on traditional leaders and that levies

\textsuperscript{55} Bennett (note 41 above) 49.

\textsuperscript{56} Maurice Webb Race Relations Unit ‘Draft report on the consultative process on communal contributions paid in traditional communities within KwaZulu-Natal’ (2009) unpublished report.
are therefore illegal.\textsuperscript{57} It describes the dilemma of the provincial department in that, notwithstanding this fact, levies are routinely demanded and paid, yet no systems can be put in place to regulate them, as they are unlawful.

The report cites the fact that in October 2008, the Standing Committee on Public Accounts (SCOPA) came out strongly against the collection of tribal taxes and levies on the basis that they fall outside the ambit of the Public Finance Management Act 1 of 1999 which governs the spending of public funds.\textsuperscript{58} It also notes (and questions) the insistence by traditional leaders that tribal taxes are customary, and their determination that they be retained.

The report indicates that the DLGTA is uncomfortable in its dilemma and unsure about how it should proceed. Nevertheless, senior officials told Paulus Zulu (the director of the Unit, who was responsible for research that forms the basis of the report) that while they would prefer that payments to traditional authorities be done on a voluntary basis, ‘decisions about which payments/fees should be retained or abolished should be left to the communities and their traditional structures (i.e. traditional councils and local houses of traditional leaders) to take through their traditional systems’.\textsuperscript{59}

In effect, this leaves the contradictions to be resolved at the local level, within power relations that favour traditional structures. A key factor tipping the balance of power in favour of traditional structures is that – as explained above – ‘proof of address’ letters can be obtained only from them, and in many areas this has become the primary means of extracting tribal levies. People cannot access basic citizenship rights such as identity documents and social grants unless they submit to paying tribal levies. The legality of this requirement by government institutions and banks requires interrogation. Informants from Limpopo say that previously such letters could be obtained from other offices, including local government and municipal councillors, but that the system has been steadily tightened up over the last few years and now even banks and traffic offices issue forms requiring a ‘tribal stamp’ as proof of address.

**IX ARE TRIBAL LEVIES DERIVED FROM, AND AUTHORISED BY CUSTOMARY LAW?**

The ‘customary law’ justification for tribal taxes makes it 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. It 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.\textsuperscript{60} 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

\textsuperscript{57} Ibid 8–9.
\textsuperscript{58} Ibid 9.
\textsuperscript{59} Ibid 41, citing a discussion with senior officials in June 2009.
\textsuperscript{60} Ibid 15, it is noted in the report that ‘it is in rare instances that the reciprocity operates’.
paid salaries, and may be lawyers or members of Parliament living in distant cities).

The report notes the controversy around levies charged to enable purchase of cars for traditional leaders:

In colonial days, a traditional leader had the privilege of the community buying him a ‘horse’ (hence the inkosi’s car is referred to as Ihhashi lenkosi) … This issue was subjected to serious scrutiny at some of the workshops …. However, at other workshops such as at EMajuba, Umzinyathi and Uthungulu, there were strong feelings from some traditional leaders that the practice should continue … On the other hand, civil society participants were of the view that traditional leaders received a salary and should be able to finance the buying of their own cars.61

It is argued that the ‘justification for current payments and tributes which evolved largely under apartheid and colonial times is hard to sustain’ referring to distortions that resulted in ‘caricatures of traditions and customs that were used primarily to justify extraction of revenues from residents by traditional leaders’.62

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’ or user fees, in which case the limitations on taxation power imposed by the Constitution would not apply. This question is relatively straightforward in relation to annual tribal levies, 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 are concerns regarding 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 adequate checks and balances exist to ensure that such approval is freely given. There is a long-standing practice of groups of black 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 in South Africa. Indeed, white farmers in arguing for the Natives’ (Black) Land Act 27 of 1913 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 out-bid individual white buyers.63

61 Ibid 23.
During apartheid the practice of joint contributions towards development projects was often the only way that isolated rural people could obtain schools and clinics and was harnessed and reinforced by ‘rand for rand’ school building schemes in which government matched community contributions in most former homelands. However, this ‘tradition’ of community contribution has often been used to justify the extortion of tribal levies in contexts where – unlike the practices that they are said to resemble – there is no public meeting to ‘agree’ on projects identified, where the money collected is not publicly accounted for, and the money is used to benefit the chief’s personal interests as opposed to those of the community.  

(a) The origins of annual tribal levies

The Native Taxation and Development Act 41 of 1925 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. 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 Blair 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 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 previous 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 Rates Act 2 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 the 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.

64 Van Kessel & Oomen (note 25 above) 567; Oomen (note 28 above) 173.
65 Native Taxation and Development Act s 15.
published in earlier gazettes, such as ‘the purchase of ploughing units’ or ‘the building of Bakenberg High School and Secondary School’.  

The process of the transformation of ‘special rates’ as agreed contributions for specific developments into brutally enforced tribal levies to finance the running costs of bantu authorities, can be traced via laws enacted by the Union and homeland governments. The legislative history proves that there is nothing ‘customary’ about the origins of annual tribal levies.

(b) Accounts from Elim

During a 2010 research trip to Limpopo, people in villages near Elim described their experiences of the annual levies of the 1980s. They remembered 1982 as a particularly heavy year for levies. There was a levy for the funeral of the chief, for a car for the new chief, for a tractor, and towards the costs for building a new house for the chief. In response to people’s complaints that the tractor wasn’t working, that the house was not being built, and that the money was not accounted for, the tribal authority decided to stop breaking down the levy into component parts. From then on they simply charged a lump sum of R160 per family per year. The money was collected by tribal police going door-to-door, demanding payment. Those who could not pay, or who refused to pay, were jailed at the tribal authority offices. Anyone who could not produce a receipt was taken in, including women. A group of women described how the chief’s wife intervened at one stage when many women were locked up in the small jail. She said they should be released because people couldn’t raise the outstanding money while they were in jail.

They recounted the story of a man who had sued the tribal authority for his injuries when he was beaten for non-payment of tax. Soon after that, they said, residents began to attack the tribal police when they went door to door demanding money. That was the beginning of the end according to them, and for many years the chief did not dare demand tribal levies. Now the current chief has started again, but at least the amount is only R20 per family per year as opposed to the R160 it had been during the 1980s. They added that these days no one comes to collect the money. Instead the tribal authority simply waits until someone in the family needs a proof of address letter – they know that people will then have no option but to pay all the back levies they owe.

People in the village meetings also described their understanding of the origins of annual tribal levies in their area. Both men and women said that annual levies started with the ‘call-in cards’ that migrant labourers from this area had to get stamped by the chiefs every year when they renewed the annual contracts that locked workers into the migrant labour system. They said that migrants were dependent on the chief’s signature for the renewal of their contracts and that signature was dependent on the migrant paying an

68 Meetings were held with people at the villages of Bungeni, Mahatlani, Nonvula (all three on 31 August 2010), Ribongwani (1 September 2010), and Rungolani (2 September 2010).
annual tax that started at R1.50 in the distant past but increased rapidly over
the years. Initially only migrants had to pay. Various old men showed us their
‘passes’ with the yearly stamps from the 1960s, 1970s and 1980s.

A group of women said that in their view, it was those migrant levies that
gave chiefs a taste for how much money could be raised from communities,
and soon enough all families were required to pay annual levies, regardless
of whether they included a migrant labourer or not. According to Ineke van
Kessel and Barbara Oomen, writing about the then Northern Transvaal, the
abolition of the pass laws in 1986 meant that chiefs lost their income from
stamping annual labour contracts, as well as the form of control that it enabled
them to exercise over their migrant subjects. ‘Faced with diminishing control,
chiefs frequently reacted by imposing new taxes that enabled them to make
up for lost revenue’.

It is significant that in both periods the primary mechanism for the extrac-
tion of levies has not been anything intrinsic to ‘customary’ systems, but has
instead derived from wider laws and policies that bolster the power of tradi-
tional structures at the direct expense of the fundamental citizenship rights
of rural people. In the first place it was the pass laws and the migrant labour
system that locked black South Africans into tribal subject status whether they
wanted it or not, and currently it is the licence granted to traditional councils
to be the sole arbiters of whether rural South Africans have the addresses
that qualify them as citizens of South Africa. Those ‘addresses’ derive from
the tribal membership registers kept by traditional councils, and continuing
membership is dependent on being up-to-date with tribal dues. Once again
the basic rights of people living in the former homelands are made subject to
chiefs vouching for their tribal affiliation.

X THE UNFUNDED MANDATE GIVEN TO TRADITIONAL COUNCILS

The government is undoubtedly faced with practical difficulties in relation
to finding ways to verify and confirm the identity of rural people living in
the former homelands. Part of the problem is that local government offices
are simply too far away from most rural people and councillors too thin on
the ground in the large rural wards that have been established. One of the
legacies of apartheid is that the infrastructure of tribal authority offices was
established at a much ‘lower’ level – there are many more tribal authorities
in former homeland areas than there are local government councillors and
offices.

The government has taken advantage of this proximity to off-load a range
of tasks onto tribal authorities and traditional councils. In Limpopo, people
explained to us that they could not hold funerals unless they were up to date
with their outstanding annual levies. The municipal mortuaries send mourn-

69 Van Kessel & Oomen (note 25 above) 566.

70 Until tribal authorities hold elections as required by the Framework Act they are not deemed to
be traditional councils. Tribal authorities in Limpopo therefore have not yet become traditional
councils.
ers to the tribal authorities to get identity letters before they will release the bodies. In some cases too, the death certificate can be obtained only from the tribal authority.

Chiefs explain that they need levies to finance the running costs of tribal offices so that they can perform their functions and issue address letters effectively. The Maurice Webb Race Relations Unit report explains that in KwaZulu-Natal traditional leaders justify the collection of taxes and levies as the means through which wages and salaries to staff and contributions to councillors are paid. In Ribungwane Village in Limpopo, the tribal secretary explained that from 2010 the government began to subsidise more salaries within the office but prior to that the tribal authority relied exclusively on the levies collected to pay salaries.

Annual levies are the most controversial of the various forms of ‘tribute’ extracted from residents in KwaZulu-Natal. While chiefs justified levies as a means of paying for salaries, running costs and tribal police – ‘generally none of the participants was able to say specifically what the tribal levy was for’.

The impediments in the way of finding out which costs government pay contribute to the difficulty of holding tribal authorities and traditional councils accountable in relation to the proportion of annual levies that go towards tribal office running costs.

In any event rural people should not have to subsidise the costs of services that cannot be provided by local government because of policy decisions concerning the scale of municipal wards in former homeland areas, or the failure of local government. Moreover, until the last few years, proof of address letters could be obtained from institutions other than tribal authorities and traditional councils, such as local councillors, local government offices, schools and clinics.

XI  DILEMMAS REGARDING THE ROLE OF TRADITIONAL LEADERS AS PUBLIC SERVANTS

After the transition to democracy in 1994 the government did not stop paying the salaries of traditional leaders. Instead, it has increased their salaries substantially over the intervening years, especially in relation to its relative neglect of running costs for tribal offices. Once traditional leaders are paid as public servants the issue of their role and function arises, which raises the related issue of a regulatory framework to govern their activities.
Simultaneously, there are serious shortcomings in the reach of local government in rural areas. One of the report’s concluding recommendations is that government should explore the possibility of proclaiming traditional councils local government agencies.\(^{76}\)

This is the route that government adopted with the Framework Act, which provides for ‘service delivery agreements’ between municipalities and traditional councils. Effectively traditional leaders are potentially authorised to become a fourth tier of ‘more local’ local government. The problem with this approach, however, is that while it may seem a good marriage of the scarce resources in many rural areas, it makes rural people’s access to government services dependant on their acquiescence to a primary tribal identity and renders them vulnerable to tribal taxes.

It has particularly serious consequences for the large numbers of people who during apartheid successfully managed to evade tribal authorities. Even the apartheid government recognised that it could not force all rural dwellers into the ascribed apartheid map of neatly abutting ‘tribes’. Thus the Bantu Authorities Act provided not only for ‘tribal authorities’ but also for ‘community authorities’ (these were introduced via the Black Laws Amendment Act 42 of 1964) to accommodate groups of ethnically diverse land purchasers, the occupants of ‘mission’ farms and others who had always had elected leadership as opposed to hereditary chiefs.\(^{77}\) The Framework Act phases out all such ‘community authorities’ at the same time that it reinforces tribal authorities. Recently, traditional leaders have been appointed in two community authorities – Daggakraal in Mpumalanga and Tsengiwe in the Eastern Cape. The implication is that even people living in community authority areas are to be forced within the ‘tribal’ paradigm, and their access to identity documents, social grants and government services mediated by traditional leaders. This is likely to buy government and residents decades of intractable disputes given the history of such areas.

**(a) Land allocation and khonza fees**

Using traditional leaders as a fourth tier of government in the former Bantustans would create other serious problems as well, particularly in relation to access to and distribution of land. In many areas, access to land is dependant on paying *khonza* fees, which the Maurice Webb Race Relations Unit report describes as a particularly pervasive form of tribal tax. If traditional councils were to be empowered as local government agencies, one of the first issues on the table would be their role and functions in respect of land allocation.

The powers of traditional leaders in respect of land allocation is one of the most disputed areas of ‘customary law’,\(^{78}\) particularly in relation to the increas-
ing problem of traditional leaders ‘selling’ land allocations and attempting to justify the sales as customary tribute or khonza fees. This gives rise to serious disputes in which community members allege that not only have traditional leaders failed to preserve the land base of the community, they have changed its composition by bringing in large numbers of ‘outsiders’ for profit. The scale and seriousness of the problem is reflected in a 2007 resolution adopted at the ANC national conference in Polokwane to:

[...]

Instead of attempting to give effect to this resolution, the new laws create a platform for traditional leaders to argue, as they did in the Tongoane litigation, that informal land sales and khonza fees can be justified as part of customary law.

The basis of the new laws appears to be that chiefly power, as opposed to actual practice, is the starting point and defining feature of customary law.

XII CONCLUSION

In many former homeland areas, tribal offices are the only accessible point of entry to authority, and customary dispute resolution processes offer the only effective access to justice. Moreover, vernacular systems are familiar to people and have a range of positive attributes, including their inclusive nature. Many of the people who come to rural consultation meetings and complain about tribal levies and abuse of power by traditional leaders are deeply rooted in such vernacular systems and are fundamentally supportive of the benefits and affirmation that indigenous systems offer rural people. What they oppose is the distortion and manipulation of ‘custom and tradition’ in ways that prop up unaccountable traditional leaders and elicit abuse of power. The legacy of apartheid in the former Bantustans has undermined the legitimacy of many traditional leaders and weakened indigenous accountability mechanisms that would otherwise enable ordinary people to hold leaders to account.

A fundamental mechanism of accountability is the consensual character of vernacular systems. Their meaning and vitality depends on their ongoing relevance in people’s lives established through mutual dependence, voluntary affiliation and shared norms and values. Instead of attempting to build on and support the consensual and participatory nature of customary systems by strengthening the capacity of rural people to hold leaders to account, the new laws have chosen to fall back on colonial and apartheid precedents. The drafters have failed to grapple with the complexities of living customary law,

79 Resolution 10 under ‘Rural development, land reform and agrarian change’ adopted in 2007 at the 52nd National Conference of the ANC.

80 See affidavits by Kutama, Khunou & Mahlangu in DVD ROM with Land Power and Custom (note 23 above).
and the transformative potential inherent in recent efforts by rural people to reconcile indigenous and constitutional values.\textsuperscript{81}

To the contrary, they have strengthened the unilateral power of traditional leaders to define and apply custom within disputed apartheid tribal boundaries. Custom is no longer derived from affiliation and ongoing interactions between people, but imposed through law and geographical boundaries. Moreover, implicit in recent law and policy statements is the latitude for traditional leaders to push the limits of their open-ended ‘customary authority’ to include ‘inherent’ governance powers. This appears to be the route adopted for finding a way around the new constitutional framework that provides for elected government and no taxation without representation.

Inevitably, under such circumstances the new laws are ambiguously worded, making it very difficult for rural people to decipher their intent, let alone work out what they can do on a day-to-day basis to challenge the re-imposition of tribal levies. The laws have an immediate negative impact on the balance of power in rural areas that frames the contexts within which practice unfolds and living customary law is made. Rural people are caught within the pincer movement of laws such as the Limpopo Act on one side, and the requirement that ‘proof of address’ letters be issued by traditional councils on the other.

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 a 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 Act are manifestly vulnerable to constitutional attack.