

**TRADITIONAL GOVERNANCE AND RECOGNITION:
WHY IS IT STILL ELLUDING THE REHOBOTH
BASTER SEVENTEEN YEARS AFTER
INDEPENDENCE?**

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DECLARATION

“I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LL.B is my own original work and I have not used any other sources than those listed in the bibliography and quoted in the references.”

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SUPERVISOR’S CERTIFICATE

I, Prof M. O. Hinz hereby certify that the research and writing of this dissertation was carried out under my supervision.

Supervisor’s signature

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ABSTRACT

The Rehoboth Baster community consists of round about 30 000 – 35 000 members and is largely inhabiting the town of Rehoboth and surrounding farms and villages in central Namibia. On the 10th day of October 1992 the then Baster Kaptein (Chief) Diergaardt declared the Baster people as an indigenous people of the Republic of Namibia and therewith demanded all rights to which autochthonous and indigenous peoples are entitled to according to international practice and conventions.

The Baster leadership also attempted to apply for recognition as a traditional group however their application was dismissed on the grounds that they do not possess communal land. In February of this year the new Baster Kaptein successfully joined the UNPO (Unrepresented Nations and Peoples Organization. Events since independence in 1990, the 1992 declaration, the dismissed application for traditional recognition and their membership to the UNPO prompted and motivated the author to pursue this topic. The basic question posed by the author is, what is the traditional status of the Baster community in a seventeen year old independent Namibia?

The departure is from the meaning inherent in “Traditional Governance” and “Traditional Recognition”. What do these concepts first of all mean in a Namibian legal context and secondly what does it mean for the Rehoboth Baster community? This paper operates from the assumption that being a nation built on customs, traditions and strong values, the Namibian Government is tasked with promoting and indeed ensuring the protection and profession of culture within Namibian society.

As mentioned, in a Namibian legal context, the author took up the task to explore Namibian legislation that give meaning or that gives flesh to understanding Traditional Governance and Recognition. Here the author conducted a book research by consulting the Traditional Authorities Act since its conception in 1995 to its current form as from 2000. Other Namibian statutes consulted included the Namibian constitution, the Communal Land Reform Act and the Rehoboth-Self Government Act (as repealed).

The author found that the legal system on the specific research subject has seen many changes. Changes that have mostly created an obstacle for traditional recognition of the Baster people.

The second leg of the research statement and objective was to get an idea of what the Baster people wanted. The Baster community has at times after independence proclaimed their preference or idea of “self-determination”. The author needed to establish whether the “traditional recognition” and the “traditional governance” sought by the Rehoboth Baster community encompassed the notion of self-determination. Also the aim was to find out whether the idea of a traditional authority for the Rehoboth Basters is widely supported amongst the community. To achieve this, the author undertook an empirical research conducting interviews with some community members in the town of Rehoboth. It became clear that the community is obviously divided on the issue. Some support the notion others regard the Baster people as almost distinct.

The bottom line however remains that there are a traditional group with traditional roots, custom and values, and who wishes to be recognized as such. Should they as Namibians want to subscribe to the Namibian national laws then surely the Namibian State should work towards achieving this goal.

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1. INTRODUCTION

1.1 Background and Objective

“Independence of multi-ethnic societies does not necessarily bring benefits to all the ethnic groups in these societies.” This was said by Dr Yvo J. D. Peeters¹, international counsel for the Rehoboth Baster Community before the International Covenant on Civil and Political Rights (ICCPR).

The Rehoboth Baster people as an indigenous community in Namibia have since independence embarked on an on-again-off-again plight to receive self-determination, return of their communal land and recognition as a tradition authority. Their battle grounds have been drawn from seeking restitution in Namibian domestic courts, in the international arena via the United Nations and to the extent of joining the ruling political party, SWAPO, in the hope of a favourable consideration by the Namibian government. Their battle continues.

The Baster community through its leadership joined the Unrepresented Peoples Organization on the 04th of February 2007 and was admitted on the 12th of February 2007. The aim of the mentioned organization is to assist Nations and Participants to express their needs and grievances in legitimate forums and by effectively ensuring a community of support, to advance the fulfillment of the Participating Nations and Peoples by effective non-violence. By this action the Rehoboth Basters again proclaimed their willingness to renew their ongoing campaign for formal recognition as a community and ultimately the survival of their culture.

These events prompted the writing of this dissertation in exploring the current *status quo* of the Rehoboth Baster community. As a member of the Baster community the “campaign” has always been for me a distant reality, lacking proper understanding not only outside the Rehoboth community but also within or amongst the Rehoboth community members themselves.

¹ ICCPR Communication 760/1997

It was thus against this background that I intended to explore the Baster communities' plight with the objective to;

- a. Understand the basis and origin of the Baster campaign for recognition,
- b. Establish the merits applicable to the Baster case and explore the legitimacy thereof under the current Namibian legal instruments including the Namibian Constitution,
- c. To seek or alternatively to hypothatise a solution to the problem, if possible.

A superficial understanding of the problem would highlight a community fighting to exist, formally, within Namibian traditional culture. Thus a campaign aimed at receiving formal recognition as a traditional group. An in-depth understanding would unearth wider complications such as traditional land, ideals of self-governance or self-determination, statutory restrictions and constitutional protection or the lack thereof.

As is canvassed in the table of contents, this dissertation undertakes to explore all these concepts under various headings and subheadings in an attempt to explain the BASTER PEOPLES' situation, to propagate the legitimacy thereof and to find a recommendation, in the author's perspective, to the problem.

1.2 Methodology

As indicated earlier in this paper the research approach was two fold, a desk research and as well some empirical work.

As the basic problem is aimed in getting answers on why the Rehoboth Baster community can not be elevated to the status of a traditional authority, a thorough analysis was needed of the current Namibian legal text that provide for the establishment of traditional authorities.

In specific, research on the appropriate interpretation is needed, when looking at the statutory provisions dealing with the appointment of traditional leaders and the establishment of traditional authorities. In achieving said undertaking, the author looked at the Namibian position in terms of traditional authorities before independence, immediately after independence and then after the advent of the Traditional Authorities Act and its subsequent amendments.

The intended desk research would not have been complete without looking at traditional governance and traditional recognition of traditional communities under our supreme law, the Constitution and also under some international legal instruments.

The Baster situation has as well been part of Namibian common law, and thus prompted the author to look at the common law status as far as the legitimacy of the Rehoboth communities' claim to their communal area or land. This would however not be an in dept look but just a consideration of the important aspects of the relevant case law.

The empirical research took me to the town of Rehoboth, some 90 kilometers from the capitol city. A town that can not be said to have seen much progress and in the words of one of my interviewees, "has seen better days but needs the appropriate political will".²

I opted to structure my field research in having specific questionnaires for three target groups. The first group should reflect the views of the current elected Rehoboth Baster community leadership. Here I was looking at the Captain (Kaptein) and his Council as is still elected according to the Baster Paternal Laws³. At first I encountered problems with scheduling an interview with the current Captain Mr John McNab. Without the fortunate intervention (pulling of strings) by my father, I do not know how I would have managed to get an interview. It turned out that after the Captains Council succeeded in getting membership on the UNPO (Unrepresented Nation and Peoples Organization)⁴ in February 2007, an impression was created mostly in the Namibian media that the Rehoboth Basters "*again*" took the Namibian Government to the United Nations. One of

² Field note 7 of 08 September 2007

³ Rehoboth Baster communities Constitution as promulgated on the 31st of January 1872

⁴ The UNPO is a democratic membership organization founded on the 11th of February 1991 in The Hage. The organization represents Human rights issues in national and international forums.

the Namibian daily's for example had the front page heading of "*Basters verkla Regering by V.N.*"⁵ which translates as "*Basters reported Government to the UN*". The Captain thus explained why they viewed the interview with suspect, as the incorrect impression can easily be created, because as in the media there was no report to the UN (United Nations) but to a completely different body.⁶ The Baster leadership was as a result weary of any interviews unless it has been properly verified.

The interview was inclusive of both the Captain and one Council member, on their request. The aim of this interview was to get the idea from the community leaders on what the current status of the Baster plight is. Does the fact that they have approached an International body mean that there is renewed vigour in achieving traditional recognition? What does traditional recognition mean to the Baster leadership and what would the benefits be for the Baster community to receive formal recognition as a traditional authority?

The second target group was to speak to some governmental officials within the town of Rehoboth and get their impression of a Baster Traditional Authority. Here I was fortunate to get interviews with two Regional Councilors, East and West Constituencies, however, I must say that the interviews were not that fruitful. I got the impression that the Baster Community issue is a sensitive one and no political office bearer will publicly comment thereon. As a result the comments I got were mostly personal views and not formal government policy thereon.⁷

I also interviewed the current CEO (Chief Executive Officer of the Rehoboth Town Council) on the effect of the Baster Paternal laws and traditional leadership on the town of Rehoboth. Also of interest was to know what may be the effect on the town if the Rehoboth Baster community be recognized as a traditional authority.

⁵ Republikein newspaper during the month of February 2007. Exact date of publication not known to author.

⁶ Field note 1 of 05 July 2007

⁷ Field note 2 of 09 July 2007 and note 6 of 03 September 2007

The last target group was to speak to the average Baster community member. It is common cause that the town of Rehoboth has residents from different population groups thus it as well presented a strenuous task of selecting certain individuals to be interviewed.

As I wanted a balanced approach, an expression from the **residents** of the town of Rehoboth, I intended to speak not only to persons who may be regarded as Rehoboth citizens or Rehoboth Basters. I disappointingly could only succeed in persuading three people to interview however the author did include in the research, discussions had with observers and comments made in passing on the topic. These comments seemed to carry the true feeling amongst community members as it was not subjected to a formal setting and they appeared less obliged to present articulated reasoning on the subject-matter.

All interviews were conducted within the town of Rehoboth and mostly in the Afrikaans language translated by the author for the purpose of the dissertation.

CHAPTER 2

2. WHO ARE THE BASTER PEOPLE? A HISTORICAL OVERVIEW.

In translating the work of Maximilian Bayer, “Die Nation der Bastards”, Peter Carstens wrote as follows⁸

“The Rehoboth Basters is probably better known outside Namibia as part of a more bigger category of people in South Africa known as ‘Coloureds’. As the coloureds, they are people of mixed origin, but if one look at their history, even superficial, it is not difficult to understand why the Rehoboth-Basters consider themselves unique”.

These people of mixed origin were a result of relations between white men and indigenous Khoi-San woman after the settlement of Jan Van Riebeeck at the Cape of Good Hope in 1652. They preferred the term Baster even as far back as the 18th century in order to distinguish themselves as a distinct group. Two groups could be identified. One group settled in Griquastown-East under the leadership of Adam Kok, while the other group left the Cape Colony for Rehoboth in 1870.⁹

The decision to leave the Cape Colony was as a result of a coloured derogation, abusive and discriminative attitude by the colonists. Britz¹⁰ refers to such an incident after the proclamation of the Lease Law (farm leasing system) in 1865 – a delegate of Basters was sent to purchase some land. White farmers proclaimed that the granting of land to a mixed people as the Baster would lead to the ruin or destruction of the country. Attitudes like aforesaid prompted the decision, under leadership of Captain Hermanus Van Wyk, to leave the Cape Colony in 1868. Leaving their homes in the Cape Colony they trek northwards in search of land and settled in Rehoboth in 1870. **Photo 1**¹¹ shows the journey of the Basters during 1861-1870.

Photo 1

⁸ Carstens 1984: pg 4

⁹ Britz R., *et al* 1999, A Concise history of the Rehoboth Basters until 1990, pg 9

¹⁰ Britz *et al supra*: pg 12

¹¹ Photos as obtained from <http://www.rehobothbasters.org/index.php>

Rehoboth was purchased from the Swartbooi nation or the Swartbooi tribe under leadership of Captain Abraham Swartbooi. The purchase prize was set at 5 ox wagons and 100 horses.¹²

In 1872 the Rehoboth Basters founded the 'Free Republic of Rehoboth' designed a German influenced nationalist flag and produced a constitution that continue to govern the actions of the Basters to the current day. See Photo 2¹³ of the first pictures of Rehoboth in 1870. Photo 2

¹² NAW SWAA 206/3 1924 – 25

¹³ Photos as obtained from <http://www.rehobothbasters.org/index.php>

Many Basters remained predominantly based around Rehoboth, some however continued to trek northwards settling in the Southern Angolan City of Lubango where they are known as the Omwamo.¹⁴

Photo 3

A revised form of the earlier Baster Constitution was promulgated on the 31st of January 1872 at Rehoboth. It was again reviewed and amended on the 1st of January 1874. This legislation became known as the “*Vaderlike Wette*” (Paternal Law). These laws did not only restrict themselves to constitutional matters (such as the election of a chief and a council) but included at the same time civil and criminal laws and regulations¹⁵. Photo 3¹⁶ shows Kaptein Hermanus Van Wyk and his Council. The first elected captain and council under the Paternal laws.

REHOBOTH UNDER GERMAN OCCUPATION

In 1884 Germany colonized Namibia (the German South West Africa) following the German annexation; the Basters worked with the German colonists and fought on the German side during the Herero Wars. The Rehoboth Basters signed an autonomy agreement with Germany (the “*Schutz- und Freund schaftvertrag*”).¹⁷ Under this “Treaty of Protection and Friendship,” the German Emperor recognized the rights and freedoms acquired by the Basters at Rehoboth for themselves. Photo 4¹⁸ depicts this occasion.

¹⁴ <http://en.wikipedia.org/wiki/Basters> pg.2

¹⁵ <http://www.cwis.org/fwdp/Africa/rehoboth.txt>

¹⁶ Photos as obtained from <http://www.rehobothbasters.org/index.php>

¹⁷ Britz *et al, supra*: pg 18

¹⁸ Photos as obtained from <http://www.rehobothbasters.org/index.php>

Photo 4

It, amongst others, mentioned that all disputes between Rehoboth Community members would be tried by their own adjudicator with their own laws being the applicable law.¹⁹ The German administration and legislation continued efforts to influence the Baster community however. The Baster Council still enacted new laws. The cooperation that existed between the Basters and the German Empire ended on the 08th of May 1915 when Germany declared war on the Basters. Photo 5²⁰ is an overview of the town of Rehoboth in 1907 during the autonomy agreement with Germany.

Photo 5

¹⁹ <http://www.cwis.org/fwdp/Africa/rehoboth.txt>

²⁰ Photos as obtained from <http://www.rehobothbasters.org/index.php>

The First World War broke out in 1914. Basters were called up to support German troops against the Union Soldiers. This led to a rebellion against the German Colonialists as the Baster community refused to take part in the War.

Community leader, Cornelius Van Wyk, brother to the late Hermanus Van Wyk, sought council with General Louis Botha.²¹ He set out to explain the Baster communities' position and their reluctance to assist the Germans. He furthermore expressed the Basters willingness to serve with the South Africans during the War. This was rebuffed by General Louis Botha as he did not consider coloureds having any concern with a war between South Africa and Germany.

THE REHOBOTH BASTERS UNDER SOUTH AFRICAN MANDATE.

The form of local self-government remained unchanged during the period of Military occupation of South-West Africa by Union forces (1915-1919). On the 17th of August 1923, two members of the Executive Council of the Basters and 7 members of the Council signed an agreement with the South-West Africa Administration.²²

The agreement was rejected by a majority of the community as it limited their right to self-determination as cemented under the German regime. It led to division among the Baster community as two councils were then formed. The old council and an oppositional new council were formed.²³ The S.W.A Administration reacted with the enactment of Proclamation 31 of 1924.

This proclamation led to the temporary dispensing of the Captain, the traditional court and officials appointed by the council. All powers were transferred to the magistrate and

²¹ Britz, R., et al, 1999: pg 23

²² <http://www.cwis.org/fwdp/Africa/rehoboth.txt>

²³ Britz, R., et al 1999: pg 28-31

his court. Local self-government seized until 1928 when it was partly restored with proclamation 9 of 1928. An “Advisory Council” was introduced. It governed the community in all “internal matters” such as approval of loans to citizens, buying and selling of land, and village affairs....etc.²⁴

On their initiative a number of petitions were sent to the “League of Nations”, requesting the restoration of full self government. With the election of a new “Advisory Council,” elected by all community members on the 11th of April 1933, an end was brought to the division in the community.

In 1976 the South African Parliament passed a law – Act 56 of 1976 - which created a formal type of institution which fitted in the traditional existing ones. The Baster community opted and settled for a semi-autonomous Baster homeland (known as “Baster Gebiet.” Photo 6²⁵ shows a map of the Republic of Namibia depicting the Rehoboth “Gebiet” which consisted of some 14,216 km².

Photo 6

²⁴ <http://en.wikipedia.org/wiki/Basters>

²⁵ Photos as obtained from <http://www.rehobothbasters.org/index.php>

REHOBOTH BASTER COMMUNITY UNDER THE REHOBOTH SELF GOVERNMENT ACT 56 of 1976

Many Rehoboth citizens viewed the period from 1979 to 1989 as one where the Rehoboth “gebiet” (area) developed, grew and prospered on all levels.²⁶

The Baster community never abandoned their ideal of a self governing Rehoboth “Gebied” and saw the Rehoboth Self Governing Act as a means to achieve this goal.

According to Amissah JP in Attorney-General v Dow 1994 (6) BCLR (Botswana)²⁷ on the effect of preambles:

“The preamble is an optional feature in public general Act, though compulsory in private Acts. It states the reason for passing the Act. It may include a recital of the mischief to which the Act is directed. When present, it is thus a useful guide to the legislative intention.”

An examination of the Preamble Act 56 of 1976 reveals the intention of the legislator and the reasons why the legislature passed the Act. It relates as follows:

“To grant self-government in accordance with the Paternal Law of 1872 to the citizens of the Rehoboth Gebiet within the territory of South West Africa; for that purpose to provide for the establishment of a Captain Council and a Legislative Council for the said Gebiet; to determine the powers and function of the said Council; and to provide for matters connected therewith.”²⁸

Elections were held under this Act, then structures were put in place and the Rehoboth area was governed in terms of this Act up to 1989.

²⁶ <http://www.rehobothbasters.org/index.php>

²⁷ Attorney-General v Dow 1994 (6) BCLR (Botswana)

²⁸ Rehoboth Self-Government Act 56 of 1976

According to current Captain²⁹ this period saw the economic development of the town (Rehoboth) and the surrounding settlements. Several schools were erected and improved. The agricultural sector was invested in. An agricultural college was erected. More than 100 000 hectares of previously white-owned farms were purchased. A dairy farm and tannery was established and also and cultural institutions were created. This statement was generally supported amongst most of the interviewees. One interviewee³⁰ noted that, for a student as himself at the time, opportunities were present. The Rehoboth Government had in place a bursary scheme where deserving students were given the opportunity to pursue their education at tertiary institutions. Even the normal school leavers could succeed in obtaining employment in the various governmental departments at the time. Others interviewees³¹ expanded on this by noting that many community members feel that there are hardly students from Rehoboth schools who gets awarded State loans or bursaries. The common believe is that because they come from Rehoboth counts against them in the selection process. Some interviewees however feel that the situation was as well reversed during that era. Many black students members of the Rehoboth community at the time and students in the Rehoboth schools were not given bursaries or governmental employment for that matter. They believe that the selection process was very much focused on “what type of community member you were.”³² If you were a baster born of baster parents or a member (citizen) with parents in good standing your chances were better.

By Proclamation 32 of 1989 the powers granted by Act 56 of 1976 were transferred to the Administrator-General of Namibia in anticipation and in preparation for the independence of Namibia which followed on the 21 March 1990. In terms of schedule 8 of the Namibian Constitution, Act 56 of 1976 was repealed in its totality and the self government which the Basters envisaged from their arrival at Rehoboth during 1871 – 1872, up to the independence of Namibia in 1990, had come to an end.

²⁹ Field note 1 of 05 July 2007 at Rehoboth

³⁰ Field note 2 of 09 July 2007 at Rehoboth

³¹ Field note 8 of 08 September 2007 at Rehoboth

³² Field note 5 and 6

CHAPTER 3

3. THE REHOBOTH BASTER COMMUNITY: IS IT A TRADITIONAL COMMUNITY IN INDEPENDENT NAMIBIA?

In terms of Act 25 of 2000, a traditional community is defined as;

“an indigenous homogeneous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognizes a common traditional authority and inhabits a common communal area, and may include the members of that traditional community residing outside the common communal area”

A reflection on Chapter 2 of this paper will clearly suffice the questioning of whether the Baster people are an “indigenous social group..... sharing a common ancestry, language, cultural heritage, customs and traditions”.

The question now is whether the Baster people recognises a common traditional authority or traditional leadership. According to my interviewees the Baster people are without doubt divided. It is felt that there is division in the form of personal vendettas, political disagreements, religious grounds and opportunist goals creating division³³.

With the appointment of the current traditional leader, about three (3) member of the community stood for such election. At the end of said election foul play was cried, with some community members not recognizing the process. Some interviewees³⁴ as well indicated that the current leader is sitting contrary to what was agreed and undertaken at the election. That is, that a reelection would be called within three years. This never happened. The current Chief or Kaptein is of the opinion that this was never the case. The Paternal laws clearly stipulate that a Chief or Kaptein is elected for life.

³³ Field note 1, *supra*

³⁴ Field note 2, *supra*

His position is however that there is some division amongst the people, however this is evident in any given organized society or organized group. Not all members of an organized community can always share the same view(s). He feels that there is a majority support among the Rehoboth Baster community for the current elected leader, the Kaptein, and his council. He considers a lack of interest, understanding and commitment by the Baster people as the reason why the baster plight is not fully supported.

It is believed by some interviewees that the lack of interest, understanding and commitment of the community is a direct result of the inaptitude ness or inability of the leaders to mobilize the Baster people.³⁵ Most interviewees believed that the Baster leadership is too silent. What are they doing for the community is the common question posted? Even if they are recognized as a traditional authority, what can the leadership do for the Rehoboth people, is another question?

Some of the Rehoboth community members celebrate yearly on the 08th day of May “Sam-kubis day”. This commemorates the day when the German soldiers seized their attack on the Baster community held-up at the village of “Sam-kubis”. This according to the interviewees is the only cultural identity that most Basters share.³⁶ It has however become common nowadays that it is mostly the older generation that share in this day. The Baster leadership is of the opinion that because after independence they ceased to be recognized by the State. With this came the economical downfall of the Rehoboth “Gebied” which led to many seeking opportunities elsewhere. This led to this loss of identity. The Baster culture that there was once is dying out, being replaced by more modern ideas and values.

It is however common cause that the Rehoboth Basters have known a traditional authority for more then 100 years. Up to independence on the 21st of March 1990, the Baster people happily celebrated the existence of a traditional authority. One can argue that the lack of recognition and or formal acknowledgement of the Baster traditional

³⁵ Field note 3 of 10 July 2007 at Rehoboth

³⁶ Field note 4 of 11 July 2007 at Rehoboth

structure lead to the diminishing status and self-recognition among the Baster community of their inherited traditional structure.

One interviewee³⁷ in particular argued that he is born from the damara traditional groups. He however lived in the town of Rehoboth as long as he can remember. He finished his schooling there and later one started in the Rehoboth “Gebiet” as a school teacher. Today he is a school principal. Though he lived in the area for long, he never subscribed to the Baster culture. He mentions however that this concept is not alien to the Paternal laws. It provides for any person to be allowed to reside in the Rehoboth Gebiet and also allows for that person to become a citizen of the Rehoboth community. In essence he believes that there are other racial groups who do not oppose the concept of a traditional Baster authority. It will be acceptable as long as such traditional structure do not affect their national rights.

I concluded from these discussions that though the idea is not fully supported there is community members that relates to the idea of a Baster traditional authority.

The second question is whether the Baster people inhabit a common communal area. To this extent it is important to state the definition of a “communal area” as defined by Act 25 of 2000. Communal area means;

“the geographic area habitually inhabited by a specific traditional community, excluding any local authority area as defined in section 1 of the Local Authorities Act, 23 of 1992”³⁸

The Rehoboth Basters inhabited the area previously known as the “Rehoboth gebied” from as early as 1872. “Habitual” is defined in the Concise Oxford Dictionary as meaning “customary; constant, continual” Since 1872 the Rehoboth Baster people have occupied the mentioned area habitually to the present day.

³⁷ Field note 7 of 08 September 2007

³⁸ Section 1 of Act 25 of 2000

The traditional headquarters was Rehoboth. Development started in and around the Rehoboth settlement. Today the town of Rehoboth has been proclaimed as such, as a local authorities area as envisaged under section 1 of the Local Authorities Act 23 of 1992.

In a legal context however it appears that the Rehoboth Basters cannot claim to be a traditional community as they have no claim to a communal area. The Namibian Supreme³⁹ court ruled in 1996 that all immovable property held by the Baster community was at Independence transferred to the Government of the Republic of Namibia. This effectively meant that all communal land held by the Baster community and their ownership over the town of Rehoboth as private property now belonged to the Namibian Government. Thus because there can no longer be claims to communal land, the Rehoboth Basters can not claim that as traditional community they inhabit a communal area.

In a historical or anthropological context I'm of the opinion that the Rehoboth Basters do inhabit a communal area. What can be more communal, more habitual than a group sharing their ancestry in one specific settlement for more than one hundred years? My research subject felt that the legal explanation why the Baster people have no communal land is meaningless. They share the opinion that if other traditional groups can be allowed to handle their own affairs (to an extent) within certain areas, why can this not be afforded to the Baster people if they want to organize themselves formally. The previous existing communal areas should simply be returned to a proper constituted leadership. The proclaimed town area should however follow the same route as with many other towns and villages all over Namibia.

Some interviewees⁴⁰ are however of the opinion that the Baster leadership do not have traditional governance or administration in mind, but rather a self-government area within the sovereign boundaries of the Republic of Namibia, outside the national laws and policies of the central government. This they felt can not be allowed and is perhaps the reason why the Basters are not recognized.

³⁹ Rehoboth Bastergemeente V The Government of the Republic of Namibia, 1996 NR 238

⁴⁰ Field notes 2, 3 and 6

CHAPTER 4

4. TRADITIONAL GOVERNANCE AND RECOGNITION.

4.1 What is the meaning of these terms?

African communities prior to colonization based their systems of governance on traditional leadership rule. Governance in such societal organization was an expression of culture, traditions, customs and values of the people. Traditional leaders and institutions dealt with a wide range of issues which related to traditional communities.

The Baster community never abandoned their ideal of a self governing Rehoboth Gebied and saw the Rehoboth Self Governing Act as a means to achieve this goal.

Menno Boldt (1993)⁴¹, stresses that traditional leaders are the servants of the people. Boldt further describes traditional governance as a paradigm of mutual empowerment in which an empowered people hold their leaders accountable. Traditional leaders were thus tasked to “uphold, promote and preserve the culture, language, tradition and traditional values” of the community.

Ken Coates (1998)⁴² wrote extensively on the Aboriginal nations in North America. He writes that these nations have had thousands of years of experience with governance. Systems varied dramatically, from the structured processes of settled peoples on the coast, which tended to be hierarchical and status oriented, to the more informal structures of interior, forest and plains people, which were built around control of land and resources.

Based on these descriptions, Coates envisage what traditional Aboriginal governance might have looked like. There would of course, have been a range of systems, all characterized by a diverse community of empowered individuals, families and clans, interacting according to customary laws and traditions, with a strong spiritual connection

⁴¹ <http://www.grain.org> pg. 3

⁴² <http://www.grain.org> pg. 4

to, and responsibility for, the land. Accountability between people and leaders was strong and usually direct.

African traditional governance can be similarly looked at where “a range of systems characterized by a diverse community of empowered individuals, families and clans interacting” according to the traditions, customs and values of that specific community.

Traditional recognition would denote the formal or informal confirmation of the existence of a group or people based on their distinct character. Thus a group or people with a distinctive tradition, culture, values and belief system should be afforded traditional recognition.

Identifying a specific group or people in terms of “Traditional Governance” and “Traditional Recognition” is depending on the political “will” of the State. What I mean by this, is that, a specific group will be recognized as a traditional group and afforded traditional governance if that group conforms to or adheres to certain criteria or requirements or formal policies set by the State.

The existence and formal recognition of Traditional Authorities in Namibia is regulated by the Traditional Authorities Act. The Act defines who “members” of a traditional community are and also when a community can call itself a “traditional community”. Once a community can successfully subscribe to being a traditional community the next step would be to apply for formal recognition as a Traditional Authority. The referred Act under section 2 thereof deals with the “Establishment of traditional authorities”. Chapter 6 will look at this process in more detail.

4.2 Traditional governance and recognition in a Rehoboth Baster context.

It was important for the purpose of this paper to get an understanding of what the perceptions are of the Baster community with regard to traditional governance and traditional recognition.

It became clear that these concepts have no relevance to the Baster people at present as it were terms that is foreign to the Baster people in an independent Namibia. It is foreign in that the Baster people have never been recognized as a traditional people since independence and subsequently they are deprived from expressing themselves in terms of their traditions, customs, values and beliefs, a system that can be placed on the same level as that of any other recognized traditional group in Namibia. The Baster people first promulgated their constitution in 1872⁴³. This became known as the Paternal laws. It provided a framework of rules defining the organs of government of the Baster people and their rights and duties. Hannah J in *REHOBOTH BASTERGEMEENTE V THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA* summarised the major texts of the Paternal laws as follows;

“They provided for the appointment of an elected supreme ruler known as the Kaptein who was to hold office for life. Also for a Raad (Council) consisting of two citizens to assist the Kaptein and a Volksraad (Parliament) consisting of further two citizens. They provided that every Baster, or anyone married to a Baster, should be a citizen and that all Taxpaying citizens should have the right to vote in the election of the Kaptein and members of Parliament. Provision was also made for non-Basters to become citizens..... The Paternal laws also provided for the appointment of judges by the Kaptein to hear criminal and civil matters and for the appointment of field-cornets the equivalent of modern day deputy-sheriffs. A number of offences were specified together with the penalties to be imposed. A system of taxation was created ‘in order to defray the necessary government expenditure’. There were laws pertaining to marriage and the dissolution thereof and restrictions were imposed on the sale of land. There was a call-up system in the event of attack be enemies.”⁴⁴

As one can see the Paternal laws were equipped to deal with daily interactions among members of the Baster community.

⁴³ <http://www.rehobothbasters.org/index.php>

⁴⁴ *Rehoboth Bastergemeente V The Government of the Republic of Namibia*, 1996 NR 238

Through my field research it became clear that the Baster people want to be recognized as a traditional people. They want their traditions, customs and beliefs to have formal recognition and consequent to this to practice this more than a hundred years old Paternal laws.⁴⁵

It was noted in my field research that the idea of practicing the Paternal laws would mean applying laws which should not be subject to the national laws of the land. This creates its first conflict as the Paternal laws were written and through the years advocated by the Baster leadership to be the only laws that should apply to the Baster people.⁴⁶

The Baster leadership as well strongly calls for their right as a traditional people to organize and run their day to day activities in accordance with their Paternal laws. This can only be done if the meaning to Traditional Governance in this context means “self-determination”. That is that the Namibian government should allow them to decide for themselves without any interference from the central government.

4.3 Traditional Governance and Self-Determination.

As I've indicated above it seems obvious that the Baster leadership equate traditional governance with self-determination. With self-determination is meant to govern the Baster people- by- the Baster people in accordance with the Paternal laws. They thus seek autonomy for their affairs.

The right to self-determination is recognized under international law as an important part of human rights. According to Brownlie⁴⁷ (1990; pg 595), it is “not necessarily the case that there is a divorce between the legal and human rights of groups, on the one hand, and individuals, on the other. Guarantees and standards governing treatment of individuals tend, by their emphasis on equality, to protect groups as well: this is obviously in regard to racial discrimination”.

⁴⁵ Field note 1 of 05 July 2007 at Rehoboth

⁴⁶ Field note 1 of 05 July 2007 at Rehoboth

⁴⁷ Brownlie, I., 1995, Principles of Public International Law, 4th edition, Clarendon Press, London

Many international instruments of the type recorded earlier stipulate for rights “without distinction as to race, sex, language, or religion”.⁴⁸ Human right treaties and instruments refer to a general right of people to participate in decisions on political, economic, social and cultural matters. This one sees embodied in the International Covenant on Civil and Political Rights (Common Article 1(1)). The right protects “peoples” or groups from oppression, subjugation, and exploitation by enabling them to participate in the political process and to pursue economic, social and cultural development.

Özlem Ülgen⁴⁹ writing on “Aboriginal title and the right of internal self-determination under the South African Constitution” sees “two dimensions to the exercise of the right of self-determination”;

- External self-determination
- Internal self-determination

According to Ülgen, External self-determination represents the right of a people as a whole in a State to determine their future without external domination or colonization. Internal self-determination refers to the “right of a group within the State to have decision-making powers”.

Traditional authority is seen as a form of affording a people the right of exercising internal self-determination where such people or group wishes to pursue their common existence based on their cultural traditions. It is not definitively clear where the Baster people lie with regard to which form of self-determination they seek.

My money is however on External self-determination. My impression from certain interviewees is that a move towards total succession from the Namibian state is advocated.

⁴⁸ UN Charter, Art. 1(3)

⁴⁹ Ülgen, Ö., Aboriginal title and the right of internal self-determination under the South African Constitution 2002. Paper as printed in Hinz, M. O, Gatter T. F., 2006, Global Responsibility- Local Agenda: The legitimacy of modern self-determination and African traditional authority, pg 196

If one is then to speak of traditional governance and self-determination in the same context one would then be referring to the right of a people to internal self-determination, as defined by Ülgen above. She ⁵⁰ further qualifies this definition in describing “Internal self-determination as representing devolved power to culturally and linguistically distinct groups, and groups with a territorial base, whilst at the same time maintaining the territorial integrity and sovereignty of the State.

Some interviewees⁵¹ have as well expressed the idea that certainly it is possible for the central government to operate along-side a Traditional Baster authority. It should however be a traditional authority who wants to act in the upliftment of the Baster people, economically, culturally and socially. Mention was made of a community trust that was started in 2003 in the town of Rehoboth. This trust, the Rehoboth Baster Trust, aimed at creating community projects, at providing employment and skills acquiring amongst the Rehoboth community members. They believe that a traditional authority working towards such upliftment along side central government will enjoy huge endorsements within the Rehoboth community.

Though it is my opinion that this form of self-determination is a more accessible goal for the Baster people, however it may not be the preferred autonomy desired by the Baster leadership.

CHAPTER 5

5. TRADITIONAL AUTHORITIES IN AN INDEPENDENT NAMIBIA: A BRIEF LEGAL PERSPECTIVE

⁵⁰ Ülgen, Ö., *supra*, pg 197

⁵¹ Field note 4 of 11 July 2007 at Rehoboth

In pre-colonial Africa, traditional structures were the only forms of government in place. Through its differing hierarchy, traditional authorities rule their people with a system to be equated with State governance today.

Without going too far back in history Namibia a bit more than a hundred years ago saw this form of rule among the various tribes. The Baster people as well were subject to this form of government as early as 1868. Their emigration beyond the borders of the Cape Colony to a free and uncolonized South- West Africa quickly gave rise to the creation of their own constitution, defining their autonomy and regulating their “free Republic of Rehoboth”.

Under colonial rule however traditional structures were task to play a more “local governmental function”.⁵² Colonial rule obviously saw the benefit in using these traditional authorities to promote their agenda. By giving recognition to traditional authorities, confirming, acknowledging and giving “support” to their “autonomy” they could in return count on traditional authorities to act as agents of their colonial agenda. An example is the conceptualization of the Homeland policy in South Africa. Certainly traditional authorities were pleased with territorial autonomy, however the bigger picture were aimed at divide and rule or promoting “Apartheid”.

I’m in agreement with Katjaerua⁵³ in that “traditional authorities responded to this in various ways: they resisted, they accepted and developed their own agenda at the same time.”

At independence traditional authorities in Namibia certainly survived the onslaught of colonial rule and predominantly still commanded the respect of their people’s.

Embodied in its Supreme law is the recognition of culture and existence of customary rule in an independent Namibia. Articles 19 and 66 certainly cemented the importance and future existence of traditions in an independent Namibia.

⁵² Katjaerua, B., 1998: The divided legitimacy. Lessons from empirical research in Namibia, pg 111

⁵³ Katjaerua, B, *supra*, pg 111

Article 19⁵⁴ provides that;

“Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or the national interest”.

This article guarantees every Namibian the right to engage a culture or tradition as long as it does not conflict with the constitution, the rights of other Namibians and the national interest.

Article 66(1) provides that;

Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

This article certainly gave recognition to the existing traditional structures in place at independence and ensures its continued existence post- independence. The problem however was how the continued existence of traditional authorities would fit in or would co-exist within in a new governmental structure.

5.1 The position before the Traditional Authorities Act 17 of 1995.

Pre-independence saw the colonial rulers promoting a “**Traditional modern monism**”⁵⁵ structure as far as traditional authorities were concerned. This is where traditional authorities were allowed to operate and rule, in adherence to their traditions and customs. This was the form of rule that the Baster community through many generations became accustomed to allowing them some form of autonomy.

⁵⁴ Namibian Constitution, Chapter 3

⁵⁵ Hinz, M. O., 2006: Part 1. Customary Law IV lecture on “State responses to customary law and traditional governance.”

After independence a form of “**Unregulated dualism**” existed in that the newly established Namibian government allowed traditional authorities to operate as they please, as long as they did not influence State policy. This certainly was seen as not a conducive situation as some form of formal regulation was needed to clearly outline the boundaries between the two structures. The Rehoboth Baster community did however not fit into this picture as they had basically nothing to rule by. Their property and communal lands were part of the new Namibian government.

5.2 The Position after the Traditional Authorities Act 17 of 1995

The promulgation of the Traditional Authorities Act 17 of 1995 saw an attempt by the Namibian government to regulate the relationship between the State and traditional authorities. The form of “**Regulated dualism**”, although very weak, was aimed at “providing for the establishment of traditional authorities, the designation and recognition of traditional leaders; to define their functions, duties and powers; and to provide for matters incidental thereto”⁵⁶.

The Act provided for the framework where in which traditional authorities could enjoy recognition and have established boundaries in which they can operate. The establishment of traditional authorities under the Act seemed quite clear and straight forward.

The Act provided for “.....every traditional community may be entitled to have a traditional authority”⁵⁷. A traditional community is defined under section 1 thereof (the Act) as “an indigenous homogeneous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, recognizes a common traditional authority and inhabits a common communal area”. Thus once a traditional group fits this definition its is entitled under the Act to have a traditional authority comprising of;

- a. one chief; or

⁵⁶ Preamble to the Traditional Authorities Act 17 of 1995

⁵⁷ Section 2(1) of Act 17 of 1995

- b. one senior traditional councilor; and
- c. a number of traditional councilors

The communities' designation of traditional leader is then communicated to the Minister (Regional and Local Government) in writing, who will then on his turn, if satisfied with the designation, notify the President in writing.

Reflecting on the necessary criteria embodied in Act 17 of 1995 and the procedural requirements it is my submission that the Baster community had every right and "qualifications" to apply for recognition as a traditional authority. It however appeared that the intended purpose of Act 17 of 1995 was merely on paper and that the relevant Ministry did not consider the instrument "ready" for implementation. The Ministry of Regional, Local Government and Housing decided to amend the 1995 act.

In terms of the said Act the criteria of "communal area" were defined as;

"the geographic area habitually inhabited by a specific traditional community"

The Rehoboth community could certainly prove that they inhabited the Rehoboth Gebiet habitually for more than a 100 years.

They were certainly as well an indigenous group and ".....comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, recognizes a common traditional authority". Had they applied then for traditional recognition under Act 17 of 1995, I could not see how their application could be refused on legitimate grounds.

It is only after the Traditional Authorities Amendment Act came into force that the process of recognizing and registering of traditional authorities took place.

The Traditional Authorities Amendment Act 8 of 1997 made certain amendments and substitutions to the principal Act. For the purpose of this paper the amendment made to

section 2 and the substitution of section 5 of the principal Act is of importance. This will be discussed under Chapters 6 and 7 of the paper.

In 2000 the Traditional Authorities Act, as amended, was repealed by the Traditional Authorities Act 25 of 2000. Act 25 is the current applicable instrument for the establishment of traditional authorities. It was also the legal instrument under which, the application for traditional recognition by the Baster people, were turned down.

It seems Act 25 of 2000 contains most of the provisions of Act 17 of 1995 and its amended Act (Act 8 of 1997). It however embodies a fuller defined section I (Definitions) and also the procedural process of the establishment of traditional authorities has been given attention.

CHAPTER 6

6. THE RECOGNITION AND ESTABLISHMENT OF TRADITIONAL AUTHORITIES UNDER THE TRADITIONAL AUTHORITIES ACT, ACT 25 OF 2000.

Legislation allowing for the establishment of traditional authorities has received some extensive revision since the independence of the Republic of Namibia. Since the

implementation of Act 17 of 1995, its amendment in terms of Act 8 of 1997 and`

to the current legislation under Act 25 of 2000. How long this piece of legislation will remain acceptable is unknown as still one find traditional authorities not being completely satisfied with its (the Act) current form.

Since its inception, objections were uttered to the States idea of “the relationship of traditional authorities to Government organs.” In the original instrument section 12 provided for this relationship. It stated that;

“In the performance of its duties and functions and exercise of its powers under customary law or as specified in this Act, traditional authority shall give support to the policies of the central Government, regional councils or local authority councils and refrain from any act which undermines the authority of those institutions as established by law.”⁵⁸

It provides further that;

“Where the powers of a traditional authority or a traditional leader conflicts with the powers of the organ of central Government, regional councils or local authority councils, the powers of the central Government, regional council or local authority council, as the case may be, shall prevail”⁵⁹

As stated, widespread objections were raised, especially in respect of the quoted provisions. Traditional Authorities saw themselves placed at a lower standard than other Governmental institutions.

They felt that their traditional autonomy has been limited to the extent that central Government could determine the boundaries and scope of application of their traditional powers. Many felt that the section was extremely vague and ambiguous.

Act 8 of 1997 amended the first Act and as well substituted the previous section 12. Section 7 substituted section 12 of Act 17 of 1995. Perusing the said section, one can not

⁵⁸ Section 12(1) of Act 17 of 1995

⁵⁹ Section 12(2) of Act 17 of 1995

see and find any significant changes to the two provisions. Truthfully only the following words were deleted from the initial provision.

- * section 12(1) “central” and “established by law”

- * section 12(2) “organ of the central” and “central”

Under the new Act (Act 25 of 2000) section 16 appears to be significantly different from the older provision which it repealed. Regulating the “relationship of traditional authorities with government organs,” section 16 provide as follows;

“A traditional authority shall in the exercise of its powers and the performance of its duties and functions under customary law or as specified in this Act give support to the policies of the Government, regional councils and local authority councils and refrain from any act which undermines the authority of those institutions.”

The new version has done away with the two subsections. It however is clearly only a retaining of the previous section 12(1). Though the order and placement of some words were changed, it remains predominantly the same.

It confirms the sovereignty of the State and sets boundaries for the application of customary law. It clearly recognizes that traditional authorities may operate or “perform its duties and functions under customary law” along-side organs of the State.

Thus in essence a dualistic approach is set and confirmed. It only requires that traditional authorities should not step-over-the-line and intrude into Governmental domain.

This weak regulated dualism is why I considered the possibility of the current instrument again seeing some changes in the near future.

This chapter is however concerned with what the current legislation provide with regard to the establishment of Traditional Authorities. What are the procedural processes?

Though not laying down procedural aspects, section 2 of Act 25 of 2000 provide for the establishment of traditional leaders. It provides under section 2 for the right of every traditional community to establish a traditional authority. Section 2(1) provides that a community “**may**” elect to establish a traditional authority. Thus this is not mandatory or communities are not forced to do so. This section also provides for the composition of such authority in that it may be consisting of;

- (a) “the chief or head of that traditional community, designated and recognized in accordance with this Act; and”
- (b) “Senior traditional councilors and traditional councilors appointed or elected in accordance with this Act.”

The section thus in essence creates the legal right for a community falling under the definition of a traditional community to establish for such community a traditional authority. The legal right is further subject to other provisions of the Act. Section 1 of the Act provide for a number of definitions which I believe sets explicit criteria for a community applying for recognition.

Two definitions are particularly playing leading roles in this exercise. They include;

- a. “Communal area”
- b. “Traditional community”
- c. “Traditional authority”

The definition given to a traditional community seems to incorporate all these necessary definitions. It requires that such community should be “.....an indigenous homogenous, endogamous social grouping of persons” and they should;

- a. “recognize a common traditional authority”
- b. “inhabit a common communal area”

I'm not certain why the definition of a traditional community should include the requirement that it has to recognize a common traditional authority. A traditional authority would be established in accordance with section 2(1) as discussed above. It thus stands to reason that any community who has elected to recognize and designated certain leaders in the establishment of a traditional authority, would certainly recognize that traditional authority. Thus once there is established a traditional authority, it is common cause that it is recognized by the community, who so established it.

The mentioned definition also requires the habitation of a common communal area. Communal area is defined as;

“.....the geographic area habitually inhabited by a specific traditional community, excluding any local authority area as defined in section 1 of the Local Authorities Act 23 of 1992”⁶⁰

What I glean from this definition is that any land or property which is not local authority area or land and has been habitually inhabited by a community can be regarded as “Communal Area.”

My perception have been that communal land or area refers to State owned land or property held in trust by traditional authorities for the mutual benefit of the traditional community.

However clearly the Act encompasses any “habitually inhabited” area, “..... excluding any local authority area as defined in section 1 of the Local Authorities Act”.

This I now interpret to understand, as including a community residing on privately owned property, who can subscribe to the definition of being a traditional community and wanting to establish a traditional authority in terms of section 2(1) of the Act (Act 25 of 2000).

The procedural requisite for the establishment of a traditional authority is embodied under section 5. The designation as referred to in section 2(1) shall be on a prescribed

⁶⁰ Section 1 (definitions) of Act 25 of 2000

form send to the Minister (Minister of Regional and Local Government) who will consider the approval thereof.⁶¹

Section 5(1) provides for certain specific requirements that the applying traditional community should comply with. These include⁶²;

- (i) “the name of the traditional community”
- (ii) “the communal area inhabited”
- (iii) “the estimated members of ... community”
- (iv) “reasons for the proposed designation”
- (v) “the name, office and traditional title, if any, of ... designated chief or head”
- (vi) “the customary law applicable in that community”
- (vii) Such other information as may be prescribed or the Minister may require.”

Once there was compliance to a proposed application, section 5(2) then gives the Minister the power to approve the designation. The Act however, does not consider these criteria as absolute. Meaning that, there are other considerations which may necessitate the State to consider it.

The Act mentions three specific instances where special consideration is to be given to an application.

These are⁶³

Where the Minister is of the opinion that-

- (i) the person sought to be designated as a chief or head of a traditional community represents a group of persons who are

⁶¹ Section 5(1) (a) & (b) of Act 25 of 2000

⁶² Section 5(1)(b) (i), (ii), (iii), (iv), (v), (vi) and (vii)

⁶³ Section 5(3) (a) (i), (ii) and (iii)

- members of a traditional community in respect of which a chief or head has been recognize;
- (ii) such group of persons do not constitute an independent traditional community inhabiting a common communal area detached from another traditional community; or
 - (iii) such group of persons do not comprise a sufficient number of members to warrant a traditional authority to be established in respect thereof

When such an application as determined by section 5(3) (a) is received, the Minister **shall** advise the President accordingly. This provision is mandatory by the use of the word “shall”. It is also noteworthy that section 5(3) (b) requires the Minister to as well indicate whether there are any “reasonable grounds for recognizing such group of persons.”⁶⁴

The President shall then in terms of section 5(4) refer the matter to the Council of Traditional Leaders for its “consideration and recommendation”. The President shall then “in his discretion and in writing, either reject or grand approval for such designation.”⁶⁵

It is my humble opinion that from the quoted and discussed provisions one can reasonably infer two things.

a. That section 1 is not absolute in setting the requisite criteria for a successful application. This is based on the fact that certain circumstances warrant a mandatory consideration by the State President and the Council of Traditional Leaders.

b. That the final decision on whether to approve a designation is a discretionary power held by the State President. That even if none of the

⁶⁴ Section 5(3) (b)

⁶⁵ Section 5(6)

required criteria is present the State President can still decide to approve the application.

As stated earlier in this dissertation paper Kaptein (Captain) John McNab⁶⁶ acknowledged the fact that the Rehoboth Baster community applied for recognition in terms of the Act, an application that was denied because the Baster community has no communal land.

Should one look at the Rehoboth Baster situation then certainly they will not meet the requirement as set by section 5(1) (b) (ii). The Baster people have laid claim to the Rehoboth Gebiet since lawfully obtaining it in 1872. The current legal position thereon is clear and thus for them to state in an application that their communal area is the area previously known as the “Rehoboth Gebiet,” would be a sure and definite unsuccessful application. As I’ve as well discussed previously in this paper, the majority of Rehoboth Basters (more than 80%) live in the town of Rehoboth and some villages outside Rehoboth. Both the town of Rehoboth and its outside villages will be classified as local authority areas.

Being local authority area, the areas inhabited by the Baster community will exclude them from recognition, because they can not proclaim to reside in a communal area.

⁶⁶ Field note 1, *supra*

CHAPTER 7

7. THE CONSTITUTIONALITY OF ACT 25 OF 2000

According to Hinz M. O (2001)⁶⁷ “drafting of the Constitution of the Republic of Namibia happened neither in a social nor legal vacuum: the spirit of liberation and the hope for new realities were as present as the spirit and realities of the past.”

The statement surely summed up the ideals of a young Namibian nation. Ideals which, the new Constitution set out to ensure and to protect. In its preamble reference is made to “the inalienable rights of all members of the human family.” Rights that include “the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status.”⁶⁸

The Constitutional Principles and Guidelines of 1982, which served as a pre-constitutional framework, were a result of “protracted and complicated negotiations.” It functioned to ensure a proper implementation of UN Resolution 435 with the underlying intention of binding the future Namibian constitution makers.

Again according to, Hinz (2001)⁶⁹, the “Principles (as referred to above) contained several prerequisites which the future constitution of Namibia was expected to implement.” Apart from the requirements related to the “doctrine of the rechtsstaat” (supremacy of the constitution, separation of powers, enforcement of the Constitution by an independent judiciary) the Principles as well called for a Declaration of Fundamental Rights which are enforceable by the courts. It listed the rights to life, personal liberty and freedom, freedom of conscience, freedom of assembly and association, due process and equality before the law, protection from arbitrary deprivation of private property without just compensation and freedom from racial, ethnic, religious or sexual discrimination.

⁶⁷ Hinz. M. O., 2001, CONTEMPORARY NAMIBIA. The first landmarks of a Post-Apartheid society to achieve freedom and equality: Namibia’s new legal order, Gamsberg Macmillan Publishers

⁶⁸ Preamble: Constitution of the Republic of Namibia

⁶⁹ Hinz. M. O., *supra*

According to Wiechers (1989: pg90) in analyzing the legal significance of the Principles, he is of the opinion that the binding character of the said Principles “even survived the adoption of the Constitution.”

Most of the aforementioned rights is contained under Chapter 3 of the Namibian Constitution. Particularly for the purposes of this paper the importance of article 19 under Chapter 3 will be discussed. Article 19 deals with Culture, and provides that;

“Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.”⁷⁰

It seems obvious that the fathers of the constitution strived at enhancing tradition, culture and customs. What was as well essential in ensuring the proper application of Article 19 was the formal recognition of customary law. This the constitutional framers embodied under Article 66.

In terms of Art 66⁷¹;

- (1) “Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extend to which such customary or common law does not conflict with this Constitution or any other statutory law.”

⁷⁰ Namibian Constitution: Art 19

⁷¹ Namibian Constitution: Art 66

- (2) “Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.”

Customary law was now formally recognized by the new Namibian democracy. What was then left to government was to attend to the finer details of the place and role of traditional governance in the new system of democratic governance.

Chapter 3 of the Namibian Constitution contains first generation rights also referred to as the classical liberal rights. The rights created under this article is as well aimed at enforcing freedoms and democratic ideals and to prevent the State, or limiting the State powers from intervening in the sphere of the Namibian public.

The legitimacy of the Rehoboth Baster plight under Article 19

Having considered the position of the Rehoboth Basters in being recognized as a traditional authority, it is important to consider their position under the Namibian Constitution.

Again the uncontested reality is that the Baster people are an “indigenous endogamous social group..... sharing a common ancestry, language, cultural heritage, customs and traditions.” The Baster people as an indigenous Namibian community is surely entitled to enjoy, practice, profess, maintain and promote their culture, language, and tradition. This can be seen as the Rehoboth Basters fundamental right guaranteed under article 19 being limited. The question would be, why should such a limitation operate?

Article 19 as well states that the right(s) guaranteed is “.....subject to the terms of this Constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or the national interest”.

The limitation if provided or authorized by law should as well in terms of article 22;

“be of general application, shall not negate the essential content, and shall not be aimed at a particular individual”;

It is thus the authors realization that unless the Basters application for traditional recognition as a traditional authority would impinge upon the rights of others or the national interest, the Constitutionality of Act 25 of 2000 remains in doubt. Again according to the current traditional leadership⁷² the Namibian government through the Minister of Regional Government and Housing simply replied to their application in writing that it is turned down as the Baster people lack communal land.

The practical implication of article 19 is probably not worth the paper it is written on if the Namibian State is not in a position to allow a traditional group from reaping the fruits of the said provision. Thus if recognition can be given to such group as a cultural or traditional group, certainly they should be afforded the opportunity and infrastructure to practice and profess their culture and or tradition.

It is my opinion that communal land or a communal area do not establish, create or confirm traditions, values and customs. The fact that a traditional group had communal land two decades ago and have lost it at present can not detract traditions, values or customs centuries old.

It is with this understanding that I submit that the Rehoboth Basters have a constitutional right to exist as a cultural group. They, further to this, should as a result be afforded every opportunity available to other traditional groups in Namibia, to be given recognition. If they lack the necessary framework, infrastructure or resources to please the institutional requirements of obtaining recognition, then there exists a duty on the Namibian State to provide them with the necessary framework, infrastructure and resources.

⁷² Field note 1 of 05 July 2007 at Rehoboth

What I mean by this is that, if the Namibian governments refusal to recognize the Rehoboth Basters as a traditional authority is based on the absence of a traditional area or land, then surely it should be the duty of the State to either provide them with land or return the Rehoboth communal land that was lost at independence. The Constitution in the preamble refers to the people of Namibia striving to “achieve national reconciliation and to foster peace, unity and common loyalty to a single state.” Surely the State organ has a bigger duty to ensure that such ideals are reached for the common good of the Namibian nation.

According to my conducted interviews⁷³, the current reality with the communal land or area excluding the town of Rehoboth, is that it is the property of the Town Council. Much thereof remains unutilized, some utilized but ineffectively so, benefiting certain individuals who share allegiance with some political office bearers they believe. The question is that, if the property that was considered communal land or communal area previously, is still available, why can the Namibian government not in the interest of national reconciliation return the said property? A gesture which will certainly allow the Rehoboth Baster people to receive the alluring recognition and at the same time confirm the Namibian governments’ commitment towards national reconciliation and nation building.

The refusal to recognize the Baster community as a traditional authority is a clear denial and violation of the Basters peoples right as enshrined under article 19 of the Namibian Constitution.

⁷³ Observations made during informal discussions with community members in the town of Rehoboth

CHAPTER 8

8. CONCLUSION AND RECOMMENDATION: Can the Baster Plight be remedied?

Hinz (2001)⁷⁴ writes that “violations of human rights are normal in the sense that no government is perfect and as long as judicial structures are available to remedy them. Human rights violations however, become an issue of special concern when certain violations of rights grow into a permanent or even structured feature of society for which the usual remedies, be they national or international, are unable to bring relief.”

When considering the situation of the Baster people one tend to find agreement in the above quoted text. It appears to many Baster people that the fight is lost, that their traditions, values and customs are lost in an independent Namibia. The perception is that they have tried to remedy their cause on a national and international platform and still no relief has been forthcoming.

Having given much thought to the Baster plight, I have come to the realization that in finding a solution to the problem would first of all require a realistic analysis of what the Baster community want to achieve and what they can (or is reasonably allowed) achieve in an independent, sovereign Namibian State.

The Rehoboth community claims that as a people it has known a form of self-governance, self-determination which allowed them to determine their political, economic, social and cultural status. According to the Baster Kaptein (Captain), this right is in a contemporary international context embodied in the UN Charter. He sees the “right to self-determination” as a cornerstone of the UN Charter. It is here that he qualifies the Baster plight as not necessarily one where *self-governance* is sought but more *self-determination*.

Under Chapter 1 of the UN Charter, article 1 (2) states that;

⁷⁴Hinz. M. O., *supra*

“The purpose of the United Nations are:.....To develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples.....”

The UN General Assembly then also passed a declaration⁷⁵ in 1970 elaborating on the right to self-determination as follows;

“.....All people have the right to freely determine, without external interference, their political status and pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with provisions of the Charter.”

What is important in the text above is that the “right” to self-determination seems to be a right of a “**people**”, not just any group of individuals.

As already stated elsewhere in this paper, it appears from my interviews that the right to self-determination as professed by the Baster leadership is one which advocates complete or total autonomy from the Namibian State. It is on point that I believe the Rehoboth Baster people should make a choice. Do they want such autonomy (territorial sovereignty or autonomy, separate from the Republic of Namibia) OR is it cultural autonomy that they seek?

In the 1990, at the independence of the Namibian State, the Baster people through its leadership recognized and swore allegiance the newly independent State. In 2003 the current Captain as well accepted the offer by the then President, Sam Nujoma, to act as special advisor to the President.

Also the Baster people applied for recognition as a traditional authority in accordance with Act 25 of 2000. These actions give the reasonable inference that the Baster people through its leadership recognized and continued to recognized the Namibian State. Thus they have given the undertaking to conform and adhere to the laws of the sovereign State.

⁷⁵ UN General Assembly: Declaration on Principles of International Law Concerning Friendly Relations and Cupertino among States in Accordance with the Charter of the UN -1970

It is thus against this background that I can not endorse and or alternatively recommend any argument in support of an undertaking by the Rehoboth community for recognition as a sovereign people, with their own territorial boundaries within the Republic of Namibia. On an international platform the United Nations Human Rights Committee⁷⁶ has already found that the Baster people are not a people with distinctive characteristic which warrant their sovereign recognition.

If the Rehoboth Baster community however seeks cultural autonomy, in the sense that they want to organize themselves as a traditional people and warrant the necessary recognition as a traditional authority, then certainly I see merits in such an undertaking.

As I have indicated above, the Baster people have a constitutional right to “practice and profess” their culture, traditions and way of life as is cemented in their Paternal laws. Guaranteeing such right under article 19 certainly places a duty on the State organ to ensure the perseverance of culture in facilitating and promoting the enjoyment thereof.

In his paper, “The project of ‘tradition’: Constitutionalism in Africa”, Hinz M. O (2006)⁷⁷ states that “the constitutions of Namibia and South Africa..... facilitate the acceptance and functioning of hereditary traditional structures, which in the pre-constitutional order were considered inferior”. He state further the “the constitutional recognition of tradition means more than the acceptance of something that was not acknowledged before”.

As I’ve stated above a bigger duty rest on the Namibian State apart from its mere recognition of customary law under article 66 and guaranteeing the right to culture under article 19.

I submit that this could be extended to as well oblige the State to ensure that communities such as the Rehoboth Basters are equipped to enjoy, practice, profess, maintain and promote their culture, language and tradition.

In considering an application for the establishment of a traditional authority without the requisite communal area, as in the case of the Rehoboth Basters, I submit that the

⁷⁶ Decision by the International Covenant on Civil and Political Rights – 23rd June 1997

⁷⁷ Hinz M. O., *et al*, 2006, Global Responsibility – Local Agenda, pg 19

consideration should then, as is seemingly required by section 5(3) (b) of Act 17 of 2000, be referred to the President for him to deal therewith in accordance with sections 5(4) and (6) of the Act.

I further submit that in dealing with the same application, having regard to the spirit of article 19, the President should consider the possibility of establishing for a community such as the Basters, new communal land areas as is envisaged by section 16 of the Communal Land Act, Act 5 of 2002. Certainly the spirit of the said Act is as well to provide land to the “landless” for the “benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia”.⁷⁸

Finally I submit that the Rehoboth Baster people can ensue a constitutional challenge on the basis that Act 25 of 2000 unconstitutionally limits their fundamental right as guaranteed under article 19. Surely Article 5 of the Constitution sums it up adequately that;

“The fundamental rights and freedoms enshrined in this chapter (3) shall be respected and upheld by the Executive, Legislature and the Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Court in the manner hereinafter prescribed”.

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FIELD NOTES

1. Field note one

05 July 2007

Captain (Kaptein) John McNab

Captains Councilor Mr Aldan Cloete

Rehoboth

2. Field note two

09 July 2007

Hon. Theo Diergaartd

Regional Councilor – Constituency West

Rehoboth

3. Field note three

10 July 2007

Mr Theo Jankowski

C.E.O (Chief Executive Officer) Rehoboth Town Council

Rehoboth

4. Field note four

11 July 2007

Rev. F.C.J Stanley (retired)

5. Field note five

22 July 2007

Mr H. Olivier

Retired teacher

Rehoboth

6. Field note six

03 September 2007

Hon. Wambo

Regional Councilor - Constituency East

Rehoboth

7. Field note seven

08 September 2007

Mr W. Beukes

School Principal

Rehoboth

8. Field note eight

08 September 2007

Mrs W. Januarie

Rehoboth