STATE OBLIGATION TO PROVIDE LEGAL REPRESENTATION FOR AN UNREPRESENTED DETAINEE OR ACCUSED.

BY

MMAKOLA M K.
(STUDENT No. 200523045).

Submitted in partial fulfilment of the requirements for the degree of Master in Development and Management Law University of Limpopo.

SUPERVISOR:

Prof. D M Matlala.

JULY 2008.
DECLARATION

I declare that the dissertation submitted by me to the University of Limpopo for the degree of Master in Development and Management Law has not been previously submitted by me for degree purposes at this or any other University. This is my own work in design and in execution, and all material contained herein has been duly acknowledged.

-----------------------------  -----------------------------
Signed                      Date

(i)
PREFACE

The Constitution of the Republic of South Africa Act of 1996 provides the legal framework which guarantees the right of legal representation to unrepresented detainee or accused at State expense, if substantial injustice would otherwise result. Prior to this, legal representation at state expense, although provided, was restricted to cases which were justiciable in the High Courts of the land e.g high treason, murder and rape etc.

The majority of people who appeared in lower courts and who in most instances it was their first encounter with the legal process were denied this right and yet were required to face the challenges lying before them for instance cross examination of witnesses, addressing the court on the merits and on sentence - to name but a few. They were usually sentenced to crippling fines or lengthy periods of imprisonment. By and large those people were Blacks.

The advent of democracy and the adoption of the Bill of Rights brought hope to those who are arrested, detained and charged with crimes.

This presentation seeks to explore the question whether the constitutional imperatives are being adequately given effect to, the extent to which the Legal Aid Board established in terms of the Legal Aid Act 22 of 1969 succeeds in providing legal representation to unrepresented detainees or accused persons and the challenges that are being experienced. In doing so attention will be given to two different periods, namely pre-constitutional and post-constitutional era and thereafter a review of international law will be undertaken.
# TABLE OF CONTENTS

Declaration ................................................................................................................................. (i)
Preface ............................................................................................................................................ (ii)

1. Introduction .............................................................................................................................. 1
2. Position before 1994 ................................................................................................................. 2
3. Position after 1994 ..................................................................................................................... 3
   3.1 Constitutional requirement ................................................................................................. 3
   3.2 Legal Aid Board.................................................................................................................... 7
   3.2.1. Indigence ....................................................................................................................... 7
   3.3 Right to be informed of the right to legal representation promptly .................................... 12
4. Legal aid exclusions .................................................................................................................. 18
5. Judicial assistance .................................................................................................................... 19
   5.1 Explanation of competent verdicts ...................................................................................... 19
   5.2 Cross examination of witnesses ........................................................................................... 20
   5.3 Assisting the accused at the end of the State case ............................................................... 21
   5.4 Closing arguments ............................................................................................................... 22
   5.5 The Sentencing stage ........................................................................................................... 23
   5.6 After sentencing .................................................................................................................. 25
6. Overstepping the bounds/limits of judicial assistance .............................................................. 27
7. Limitations ................................................................................................................................ 30
8. International law ....................................................................................................................... 30
   8.1 International Covenant on Civil and Political Rights .......................................................... 31
   8.2 Convention on the Rights of the Child ............................................................................... 31
   8.3 United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment of 1988 .......................................................... 31
   8.5 United Nations Rules for the Protection of Juveniles Deprived of Their Liberty ................. 32
9. Conclusion ................................................................................................................................. 33

Bibliography .................................................................................................................................. 35

Table of cases ................................................................................................................................ 36
Table of international law instruments ......................................................................................... 38
Table of statutes ............................................................................................................................. 39