

Overcoming challenges to the duty lawyer scheme in Moldova

Nadejda Hriptievschi explains the origins of the scheme and the problems in implementing it

The 2003 Moldovan Criminal Procedure Code expressly provides that criminal suspects and defendants have the right to consult a lawyer. In practice, the right remained illusory until 2009, and it is only since then that action has been taken to make it effective. This article aims to share the experience in setting up the duty lawyer scheme in Moldova and the challenges the scheme still faces.

Why a duty lawyer scheme was necessary?

Moldovan law provides that every person has the right to be assisted by a lawyer from the moment that s/he is informed about the suspicion or charge. A suspect has a right to a confidential consultation with their lawyer before being questioned by the police, and there is no limitation on the number of consultations or their duration. The lawyer is entitled to be present during any police interview, and may intervene by asking questions or advising the client regarding his/her right to remain silent.

These rights look very good on paper, but the practice was very different. It was not uncommon for the police, especially in legal aid cases, to interview the suspect and then call the lawyer so that they could sign the necessary paperwork indicating that they had been present during the interview. Moreover, in order for the lawyer to receive payment from the legal aid authority, the police had to provide written confirmation that the lawyer had been present. This system meant that lawyers were directly dependent on the police for their income, making

them very reluctant to challenge violations or to provide effective assistance to their clients (Gramatikov and Hriptievschi, 2012). Although the poor quality of legal aid affected all stages of criminal proceedings, the availability and quality of legal aid was particularly poor at the pre-trial stage.

This situation was acknowledged by both policy makers and lawyers, and when the new legal aid law was adopted in 2007, legal aid was divided in two types, based on the stage of proceedings: 'urgent legal aid' and 'ordinary legal aid'. Urgent legal aid applies to the initial stages of the process, up to the moment when the decision on pre-trial arrest is determined by a judge, and is provided irrespective of a suspect's financial status. After this point, ordinary legal aid is provided to defendants who satisfy the eligibility criteria.

How is the duty lawyer scheme regulated?

The new legal aid regulations came into force nationally although, on reflection, it would have been better for the new scheme to have been piloted first. The drafters of the legal aid law introduced the category of 'urgent legal aid' in order to involve a lawyer as soon as possible after a person's arrest, thus ensuring the fundamental right to defence, as well as to prevent abuse by the investigating authority. Urgent legal aid should be provided within a maximum of three hours from the moment a person is arrested.

In order to ensure the timely presence of a lawyer following an arrest, detailed regulations governing

the appointment of duty lawyers were developed, setting out rights and obligations for all persons involved. The working group that drafted the regulations aimed to develop an appointment scheme that would both ensure timely appointment of the lawyer and break the direct link between the police and lawyers. The intention was to reduce the dependence of lawyers on the police, and eradicate the corrupt practices described earlier. The working group considered setting up a nationwide call centre for appointing legal aid lawyers to provide urgent legal aid. However, due to financial and technical limitations, it was concluded that such a scheme was not possible at that time. As a result, the regulations provided for dual system of appointment, which only partially broke the link between the criminal investigation authority and the legal aid lawyer.

According to the regulations, on arresting a suspect the police must contact the legal aid appointing authority, the National Legal Aid Council (NLAC), within a maximum of one hour, and the NLAC must appoint a lawyer immediately, and no later than two hours from the time of the request. In areas outside of the five cities where NLAC offices are located, as well as outside of office hours, the police or the court must directly contact a lawyer participating in the duty schedule. This schedule is drafted by the legal aid authorities on a monthly basis and is distributed to all criminal investigation bodies and courts. Only those lawyers who are included on the roster of duty lawyers and who are appointed according to the duty schedules can receive payment from the legal aid authority, which checks lawyers' monthly reports before making the payment. This helps prevent 'pocket-lawyers' (a term used to describe lawyers that are friendly to the criminal investigation bodies and the judges, often to the detriment of their clients) from being contacted.

The roster of duty lawyers includes those lawyers who provide 'ordinary' legal aid who have expressly applied to be included in

the roster. The legal aid authority signs a contract, which sets out the obligations of duty lawyers, with each legal aid lawyer. A duty lawyer is obliged to be available on the telephone during their duty days and must be available to provide legal assistance. If a lawyer does not respond to a duty call within half an hour, s/he is considered unavailable. A lawyer can be excluded from the duty roster if they cause delays to investigative actions, ignore duty calls (for example, by switching off their telephone during a duty period), or refuse to provide urgent legal aid for an unjustifiable reason. In the case of repeated breaches of their contractual obligations, the legal aid authority will terminate the contract and inform the Bar. Duty lawyers are remunerated for time spent on duty cases, subject to an upper limit. In order to encourage lawyers to accept calls on weekends and official holidays, they are paid a 'symbolic' fee for the period spent on duty.

How the duty lawyer scheme operates in practice

Although the current legal framework could still be improved, it offers more clarity in terms of appointment of, as well as in respect of remuneration of, duty lawyers than was the case prior to 2008. Duty lawyers are no longer dependent on the police or the court for their appointment, and no longer depend on a police signature in order to get paid. This represents a significant advance. However, the speed with which the duty lawyer is contacted depends entirely on the police. Evidence shows that duty lawyers are not called immediately following an arrest, and often either the police indicate an incorrect arrest time on the arrest record (thus purporting to comply with the legal requirement to contact a lawyer within three hours of arrest), or lawyers do not check the time and tacitly accept violation of procedure by the police.

Another challenge to effective

implementation of the right to legal assistance is the reluctance of the duty lawyers to attend promptly when called, especially at night or during weekend and holidays. This may partly be the result of inadequate remuneration for out-of-hours work, but is primarily a

consequence of the professional culture of lawyers in Moldova, who have historically had only a limited role at the pre-trial stage.

There is a lack of appreciation of the importance of the initial stages of the criminal process and acceptance of lower standards in legal aid cases

than in privately paid cases (Hriptievski, 2012). The police are so used to lawyers acting passively at the pre-trial stage of proceedings that they openly ignore them, or even suggest that they attend only to sign the necessary paperwork. As one duty lawyer admitted, he received a call at night to inform him of an arrest, and the police suggested to him that he need only attend in the morning in order to sign the papers

– this, it was said, would be convenient both for the lawyer and for the police. Regrettably, such stories are not unique.

The 'pocket-lawyers' phenomenon still persists. In a high profile case, involving the arrest of a senior official in February 2013, it was reported that the police contacted a 'pocket-lawyer' following arrest, who did not even advise the official on his rights. This case has spurred discussion amongst the legal community, and it is hoped that the Bar Ethics and Discipline Commission will take action (Nani, 2013).

The introduction of the duty lawyer scheme in Moldova was well intentioned and necessary to ensure

the effective implementation of the right to legal assistance. However, it is far from being an accomplished endeavour. Duty lawyers are still insufficiently motivated to provide timely advice and assistance and effective defence for their clients. The police are also still far from

appreciating the importance of the lawyer's presence during the initial stages of the criminal process. Defence lawyers are still viewed primarily as being necessary to enable the police to demonstrate compliance with the law on paper, rather than as an essential component of fair

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trial. Although statements of defendants taken in the absence of a lawyer are not legally admissible at trial, prosecutors and judges continue to rely on them. Hence, while the necessary legal regulations seem to be in place, there is still much work to be done regarding professional cultures – of the police, prosecutors, judges and defence lawyers – if the procedural rights of suspects and defendants are to be respected. ■

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References

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