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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT CONSOLIDATED OPINION
ON THE LAW
ON MODIFICATION AND ADDITION
IN THE CONSTITUTION
OF THE REPUBLIC OF MOLDOVA

based on comments by:

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I. Introduction

1. On 10 December 2001 the Moldovan authorities submitted a request to the Venice Commission to give an opinion on the draft law 'On changes and amendments to the Constitution of the Republic of Moldova' with regard to the status of the Gagauz autonomy¹[1].
2. On the invitation of the Moldovan authorities a group of Rapporteurs and two members of the Secretariat of the Venice Commission visited Moldova from 11 to 14 February 2002. The purpose of the visit was to meet representatives of the Moldovan and Gagauz authorities and to discuss the draft law on constitutional changes relating to autonomous regions within the Republic of Moldova, with particular reference to the territorial autonomy of Gagauzia. The following text has been established on the basis of comments given by the Rapporteurs of the Venice Commission, Messrs J. Hamilton, K. Tuori and J. Vintro.
3. In order to place the proposal in its context it is necessary to refer to certain current legal provisions concerning the autonomous region of Gagauzia, their place in the Moldovan legal order and certain key provisions of the Constitution of Moldova.

II. Current legislative framework

A. *The Constitution of the Republic of Moldova*

4. Article 1 of the Constitution establishes the Republic of Moldova as a sovereign, independent, unitary and indivisible state. Article 2 provides that national sovereignty resides with the people, who shall exercise it directly and through its representative bodies in the ways provided for by the Constitution.
 5. Article 60 provides that Parliament is the sole legislative authority of the State in the Republic of Moldova. Article 66 provides that among the basic powers of Parliament is the power "to ... ensure the legislative unity of regulations throughout the country", "to approve and control the national budget" and "to suspend the activity of local institutions of public administration under the law".
 6. The Constitution is, by virtue of Article 7, the supreme law of the country. No laws or other legal acts and regulations in contradiction with its provisions may have any legal power. Article 135 empowers the Constitutional Court to enforce constitutional control over laws and under Article 140 laws become null and void from the moment the Constitutional Court decides to that effect.
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7. Article 72 classifies the laws into three categories: constitutional, organic and ordinary. Constitutional laws are aimed at revising the Constitution. The revision, under Article 141, must be initiated by popular initiative, by one-third of the Parliament, or by the Government. A revision may not be allowed if it results in the suppression of fundamental rights or their guarantees (Article 142 (2)). The Constitutional Court must approve the initiative for revision. The constitutional law must be approved by a two-thirds majority in Parliament not earlier than six months after it is initiated but not later than one year after, at which time the initiative, if not by then approved, lapses (Article 143). In the case of revisions regarding the sovereignty, independence and unity of the State, or its permanent neutrality, approval of the constitutional law in a popular referendum is also required (Article 142 (1)).
8. Article 111 of the Constitution provides that special forms of autonomy, according to special statutory provisions of organic law, may be granted to (a) “the places on the left bank of the Nistru river” (Transdnistria) and (b) “certain other places in the south of the Republic of Moldova” (this refers to Gagauzia). Article 111 goes on to provide that “amendments to the organic laws establishing special status” for these places require a three-fifths majority in Parliament. Article 111.2 implicitly provides for “special” organic laws regulating the status of autonomies.

B. The Law on the Special Legal Status of Gagauzia

9. Gagauzia was established as an autonomous territorial entity by an organic law of 23 December 1994 (CDL (95) 11) (hereafter referred to as the 1994 Law).
10. The 1994 Law establishes Gagauzia as comprising localities where Gagauzes constitute more than 50% of the population, together with other localities where a majority in a local referendum wish to be included in Gagauzia. (Article 5). The 1994 Law provides that “land, mineral deposits, water flora and fauna, other natural resources and movable and immovable property situated in Gagauzia shall be the property of the people of the Republic of Moldova whilst constituting the economic basis of Gagauzia”.
11. Article 1 (4) of the 1994 Law provides that in the event of a change in the status of Moldova as an independent State, the people of Gagauzia shall have the right to external self-determination.
12. The 1994 Law establishes a representative body in Gagauzia (“the People’s Assembly”) with power to adopt legal Acts within the limit of its competence (Article 7). It can adopt legal local laws by a simple majority (Article 11 (1)) in the fields of science, culture and education; housing and public services and utilities; health care, physical culture and sport; local budgetary, financial and fiscal activities; the economy and ecology; and labour relations and social security (Article 12 (2)).

13. The People's Assembly also has powers in relation to regional planning, boundaries of regions, towns and villages, place-names, local elections and referenda, symbols and awards (Article 12 (3)). It has power to adopt, and has adopted, a legal code (Article 11 (2)).
14. The texts do not make it clear what the respective powers of the People's Assembly and the national Parliament to make laws in these areas are, and what place such laws have in the hierarchy of norms. It would seem, from answers given to the delegation in the course of discussions, that the People's Assembly's competence to make laws in the area where it is empowered to legislate are not exclusive, that is, that laws of the national Parliament may continue to apply, but that in case of conflict that laws of the People's Assembly prevail.
15. The People's Assembly can ask the Constitutional Court to declare invalid legal Acts of the legislative and executive authorities of the Republic of Moldova, which infringe the powers of Gagauzia (Article 12 (3)(i)). Legal acts of Gagauzia that contradict the Constitution may also be declared invalid (Article 12 (6)), but the 1994 Law sets out no special procedure to regulate applications to do so. The initiative to bring such a matter before the Court is determined by the law regarding the Constitutional Court in accordance with Article 135 (2) of the Constitution of Moldova.
16. The 1994 Law also provides for an executive Head (*Bashkan*) of Gagauzia, and an Executive Committee. The Executive Committee has responsibility, *inter alia*, for local budgetary and financial arrangements, local taxation, and drawing up a budget. By Article 18 the budget is to consist of such receipts as shall be determined by national legislation and by the People's Assembly.
17. The 1994 Law also established a Court of Gagauzia as an appellate court and as a court of first instance for complicated civil, administrative and criminal cases (Article 20). Gagauzia has its own Procurator and its own Departments of Justice, National Security and the Interior, whose heads are appointed and dismissed by their national counterparts on a proposal from the People's Assembly or the *Bashkan* with the approval of the People's Assembly. Responsibility for the appointment and dismissal of senior police officers is shared between the central authorities and Gagauzia.

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18. Taking into account the current legislative provisions and the consensus of all parties that constitutional changes should be made on the basis of the 1994 Law and in full respect of constitutional provisions, it can be presumed that constitutional amendments should be drafted on the following principles and criteria:
 - a) compatibility between the unitary character of the Republic of Moldova and the recognition of territorial autonomies;
 - b) political, rather than administrative, nature of territorial autonomies such as Gagauzia;
 - c) possibility to use special symbols of the autonomies and a special status (official) of other language(s) in use on the territory alongside

the State and national languages established by the Constitution of Moldova;

- d) special organic law is the legal basis for the functioning of the autonomy; Law of 1994 can be already considered as such law in the light of Article 111.2 (see p.10);
- e) “special organic law” should be distinguished from organic laws on both material and formal levels²[2];
- f) the Constitution of Moldova and special organic laws represent a constitutional basis, which determines the development of all other norms – no piece of legislation or other normative act can be in conflict with the provisions of the Constitution and the special organic law; organic and ordinary laws can be implemented in Gagauzia if they do not contradict the Constitution and provisions of the special law on the status of Gagauzia;
- g) The Constitutional court of the Republic of Moldova shall settle all constitutional disputes between the central authorities and the autonomies.

III. The Proposed Constitutional Law

A. *The current situation with regard of the status of the Gagauz autonomy.*

19. It is important to emphasize that both the Moldovan authorities whom the Commission delegation met and the Gagauzian representatives who were critical of the proposed law expressed themselves generally satisfied with the workings of Gagauzian autonomy as provided for in the provisions of the 1994 Law. The question therefore arises whether the proposed constitutional law is necessary and whether it might not be wiser to leave well alone given that the present system appears to have worked now for eight years. The present proposal may run the risk of upsetting the balance with a constitutional law that has proved to be controversial.
 20. The answer, which was given to this question by supporters of the proposal, is that a constitutional underpinning of the existing arrangements is both desirable and necessary. It was suggested that aspects of the 1994 Law might be in conflict with the Constitution. For example, the Constitutional Court abrogated one provision of the 1994 Law, Article 20 (2), which provided for the nomination of judges in Gagauzia on the proposal of the Popular Assembly³[3].
 21. The establishment of an autonomous region in Gagauzia falls far short of converting Moldova from a unitary state to a federal one. Only one relatively small part of Moldova, with a population of 150,000 out of a total population of 4,300,000, is comprised in the autonomous region, and there are no other subordinate legislatures throughout the country as a whole. The possibility of autonomy as a solution to the Transnistrian question has also been canvassed
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and is expressly envisaged in the Constitution. There are other unitary states, which have established regions with autonomous powers without moving to a fully federal system, for example, Spain, Portugal⁴ and the United Kingdom. There is a debate on such constitutional transformation in many other states. There is logic to maintaining a system of a unitary state with a number of autonomous regions rather than a full-blown federal system where the state is relatively small, the autonomous region or regions comprise only a small part of the whole and there is no political demand for autonomy in the other parts of the country. Such an asymmetrical solution, however, runs the risk that other parts of the country may resent the inhabitants of the autonomous region continuing to exercise their share of power over the affairs of the state as a whole while maintaining a nearly exclusive control their own affairs, a problem which is avoided in fully federal systems. In view of the disparity of size between Gagauzia and Moldova as a whole, however, this seems to be a somewhat theoretical consideration.

25. However, the extent of the powers conferred on the Gagauzian autonomous institutions is very striking. The range of matters on which the People's Assembly can legislate is almost fully comprehensive. It is difficult to see any important area, which is excluded from their competence apart from defence and foreign policy. Even here the 1994 Law contains an express right for the People's Assembly to participate in the implementation not only of the home policies but also the foreign policies of the Republic of Moldova with regard to matters affecting the interests of Gagauzia (Article 12 (3)(b)). The range of executive responsibilities is equally comprehensive. In addition to budgetary powers, the Executive Committee can regulate property relations, management of the economy, social and cultural systems, social security, remuneration, local taxation, environmental protection, and the use of natural resources. It has responsibility for the implementation of legal acts of the People's Assembly which, as already seen, can cover a comprehensive range which includes education, housing, public services and utility, health and labour relations.
 26. There are, therefore, aspects of the current arrangements under the 1994 Law, which are difficult to square with all of the constitutional provisions, notwithstanding that the Constitution, in Articles 72 and 111, expressly envisaged the creation of local autonomous institutions. It is difficult, for example, to see that the creation of a legislature in Gagauzia whose laws are capable of ousting the national laws is consistent with Article 60 in its conferring of sole legislative competence on the national Parliament, or with Article 66 which empowers Parliament to ensure legislative unity of regulations throughout the country.
 27. More fundamentally, if the solution arrived at in 1994 is intended to represent a lasting solution to the problem of Gagauzian autonomy and self-determination, it would represent a better protection for the legal order established by the 1994 Law if the essential features of that law (and not merely the right to make such a law) were reflected in the Constitution.
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Unless and until this is done the 1994 Law remains vulnerable to further incursion by decisions of the Constitutional Court or to being amended or abrogated by a three-fifths majority in Parliament.

28. It seems, therefore, that there are good reasons why the 1994 Law should be given a constitutional underpinning, both to avoid any question about its compatibility with the constitutional framework and possibly to avoid the essential features of it being altered without the consent of the people of the autonomous region.
29. From the beginning of the process of drafting the amendments in 2001 there were two different approaches to the future provisions of the Constitution with regard to Gagauzia. One draft was presented by a special Commission on constitutional amendments created by the parliament of Moldova and comprising a number of parliamentarians, state officials and representatives of Gagauzia. This draft will be examined in the next part of this opinion.
30. The second proposal of constitutional amendments had been drafted by a group of members of the Popular Assembly of Gagauzia and was presented during the visit of the delegation of the Venice Commission to Chisinau in February 2002. This draft law aims at transforming Moldova into a federative state with the present Republic of Moldova and Gagauzia as its constitutive (and equal) entities. As such, the draft law can be considered an unrealistic basis for any further discussions. Given the various national and ethnic minorities in Moldova, as well as the still unsolved problem of Transnistria, developments in a federative direction in the relations between the Republic of Moldova could also have disruptive effects with regard to the entire state structure of the country.

B. Law on modification and addition in the Constitution of the Republic of Moldova

31. When analysing the law it should be pointed out that it contains a number of positive features. These could be identified principally as follows:
 - a. The clarification of Article 73 is useful and important and has been generally supported. According to the proposed Article 73, the Popular Assembly of Gagauzia would be granted the right to legislative initiatives. As it is the case in most countries with territorial autonomies the final decision on the initiative belongs to the national parliament. If the intended amendments are to cover not only a status of Gagauzia but autonomies in general it could be completed with the phrase '(Gagauzia) and other legislative Assemblies of autonomies'.
 - b. The amendment of Article 110 to make specific provision for the Gagauzian autonomy is a positive step.
 - c. Similarly, the idea of the new Article 111-1, which makes detailed provision for Gagauzian autonomy, setting out a number of key provisions of the 1994 Law in the Constitution, is a positive step. In

particular, the giving of constitutional expression in paragraph (5) to the right of self-determination of Gagauzia in the event of a change of status of Moldova is important, as is the recognition in paragraph (1) of the existing recognition for the self-determination of Gagauzia as autonomy within the Republic of Moldova.

32. There are, however, a number of shortcomings in the draft which could be identified as follows:

- a. Articles 110(1), 111(2), 111-1(4) and 111-1(6) refer to “special organic laws” which would apparently constitute a new hierarchical level between the Constitution and “ordinary” organic laws in the legal order of Moldova. If such a new hierarchical level is introduced, provisions on it should also be added to Title Three, Chapter IV, Section Three of the Constitution; to Article 72 (Classification of Laws) and to Article 74 (the Passing of Laws and Resolutions). The hierarchy of norms should be as clear as possible.

Article 111

- b. The proposed new Article 111(1) makes no reference to the existence of legislative bodies since its wording is “the territorial autonomies have representative and executive bodies according to the law”. The term “representative” could be replaced by “legislative”. The constitutional change should underline rather political than purely administrative character of the autonomy. The text needs to make specific provision for legislative powers and to address the possible conflict with the existing Articles 60 (Parliament as the Supreme Representative Body and Legislative authority) and 66 (Basic Powers). If the scope of the proposed modification of the Constitution is upheld, Articles 60 and 66 should be modified in the light of the law of 1994.
- c. Article 111 (2) should provide for the legislative nature of the assembly of the autonomy and the democratic character of territorial institutions. It could provide that a territorial autonomy has a legislative assembly and executive bodies democratically elected in accordance with the Constitution and the special organic law.
- d. The reference in the proposed Article 111(3) that the control over the observance of the Constitution and legislation of the Republic of Moldova is being carried out by Government is a source of concern. This seems more appropriately to be a judicial function: to the Constitutional court and the judiciary⁵[5].

Article 111-1

- e. The meaning of the expression “within the law’s framework” is unclear in Article 111-1(1). It seems that such changes would continue
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to have to be made by an organic law. As has already been mentioned, the references to a “special” organic law seem to refer to the current Article 111(2), which requires a three-fifths majority to amend organic laws concerning autonomy, but since there is otherwise no reference to “special” organic laws it would be desirable that this be clarified in the text. In addition, the effect of putting certain provisions in the Constitution will be to further entrench them since amendments to the Constitution require a two-thirds majority. It is therefore a safeguard for the Gagauzian autonomy that the key provisions of the 1994 Law should appear in the Constitution.

- f. The proposed Article 111-1 (3) concerning natural resources differs from the text of the 1994 Law. It is not clear why this should be so.
- g. According to the proposed Article 111-1(4), the budgetary process in Gagauzia shall be regulated through the special organic law determining the status of Gagauzia. This is the only issue, which Art 111-1 on “the Territorial Autonomy Gagauzia” explicitly requires to be regulated through the special organic law. It is essential for the constitutional protection of the autonomy of Gagauzia that the issues, which belong to the exclusive scope of regulation of the special organic law, are enumerated in the Constitution.
- h. It may be appropriate to give some consideration as to how future amendments to the system of Gagauzian autonomy should be made. The proposed Article 111-1(6) contains a provision on the qualified majority required for changes and amendments to the special organic law on Gagauzia. A question in need of further consideration is whether the appropriate location for such a provision in this Article or in Chapter Three, Section Three of the Constitution. For example, in Finland changes and amendments to the Law on the Autonomy of the Aland Islands require not only a qualified majority in the national parliament but also the consent of the Legislative Assembly of Aland. The constitutional guarantees for the autonomy of Gagauzia would be further enhanced by a corresponding requirement of the consent of the Gagauz Popular Assembly for changes and amendments to the (special) organic law on the Special Legal Status of Gagauzia.

Other observations

In order to facilitate control through the Constitutional Court, the appropriate Moldovan authority, such as the Government of the Republic of Moldova or the Prime Minister, should have the power to submit to the Court any legal act adopted by the Popular Assembly of Gagauzia which the authority considers to exceed the powers of the Assembly. At present, the law on the Special Legal Status of Gagauzia only gives the Popular Assembly of Gagauzia the power to submit to the Constitutional Court legal acts adopted by the legislative or executive authorities of the Republic of Moldova which it considers to infringe the autonomous powers of Gagauzia (Article 12(3), par. i). Article 135 (1) of the

Constitution of Moldova could be amended with corresponding provisions giving the power to central authorities to challenge the constitutionality of the normative acts of the autonomy.

IV. Conclusion

The proposed draft law on constitutional amendments concerning Gagauzia is a positive development since it recognises the existence of the autonomy and determines its competences at the level of the Constitution of the Republic of Moldova. Nevertheless the draft law has a number of shortcomings that should be studied by the parties involved in the process. The Venice Commission welcomes the willingness of the Moldovan and Gagauz authorities to further co-operate on this matter and hopes that the above opinion will be taken into account in the future work on the constitutional amendments.