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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**LAW
ON MODIFICATION AND ADDITION
TO THE CONSTITUTION
OF THE REPUBLIC OF MOLDOVA**

Comments by:

**Mr James HAMILTON
(Member, Ireland)**

**Law on modification and addition in the
Constitution of the Republic of Moldova**

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1. 1. The Commission's opinion has been sought on a proposed modification and addition to the Constitution of the Republic of Moldova. The proposal relates to autonomous regions within the Republic of Moldova, with particular reference to the territorial autonomy of Gagauzia.
2. 2. 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.

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The Constitutional Framework

3. 3. 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.
4. 4. 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 are 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”.
5. 5. 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.
6. 6. 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 initiative for revision must be approved by the Constitutional Court. 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)).
7. 7. Organic laws are laws which direct and control a range of important matters which are specified in Article 72(3). These matters include the organisation and functioning of the institutions of state and the political system, including “the organisation of local administration, of the national territory, and the general functioning of local autonomy” (Article 72 (3)(3)). Organic laws must be passed by majority vote based on at least two ballots (Article 74 (1)).
8. 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 statutes” (sic) (should this be “status”?) for these places require a three-fifths majority in Parliament.

The Law on the Special Legal Status of Gagauzia

9. 9. Gagauzia was established as an autonomous territorial entity by an organic law of 23 December 1994. (CDL (95) 11) (which I will refer to as the 1994 Law).
10. 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. 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. 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. 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. 14. The texts do not make it clear what are the respective powers of the People’s Assembly and the national Parliament to make laws in these areas, 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. 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)). The Constitutional Court may also declare invalid legal acts of Gagauzia which contradict the Constitution (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. 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. 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). It appears, however, from information given to the delegation in Moldova, that the Constitutional Court has struck down this provision for inconsistency with the Constitution. 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.

The Proposed Constitutional Law

18. 18. 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.
19. 19. 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 may be in conflict with the Constitution. For example, the Constitutional Court abrogated one provision of the 1994 Law, Article 20, which provided for the establishment of the Court of Gagauzia. It was even suggested, more fundamentally, that the effect of the 1994 Law was to make Moldova *de facto* a

federation, notwithstanding the express terms of the Constitution establishing Moldova as a unitary state.

20. 20. 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 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 and the United Kingdom. There is a debate on such constitutional transformation in many other states. There is a 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.
21. 21. 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 comprehensive. It is difficult to see any important area which is excluded from their competence apart from than 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 system, social security, remuneration, local taxation, environmental protection, and the use of natural resources. It has responsibility for 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.
22. 22. 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. As already noted, the Constitutional Court already struck down provisions in the 1994 Law concerning the judiciary.

23. 23. 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. 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.
24. 24. 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.
25. 25. Analysing the law in this light it contains a number of positive features. These I would identify principally as follows: -
 1. 1) The clarification of Article 73 is useful and important and has been generally supported.
 2. 2) The amendment of Article 110 to make specific provision for the Gagauzian autonomy is a positive step.
 3. 3) Similarly, the idea of the new Article 111-1, which makes detailed provision for the 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 an autonomy within the Republic of Moldova.
26. 26. There are, however, a number of shortcomings in the draft which I would identify as follows: -
 1. 1) The proposed new Article 111(1) makes no reference to the existence of legislative bodies. In my opinion the text needs to make specific provision for legislative powers and to address the possible

conflict with the existing Articles 60 and 66, and to make clear the status of Gagauzian law in the hierarchy of norms.

2. 2) There is no mention of the judicial power in the text. It is not clear to me what the current status of the judiciary in Gagauzia is as I have not seen the text of the Constitutional Court decision dealing with Article 20 of the 1994 Law but it would seem there is an outstanding issue to be resolved if Gagauzia is to have its own judiciary. This is a question which may require to be explored further.
 3. 3) The reference in the proposed Article 111(3) to control over the observance of the Constitution and legislation of the Republic of Moldova being carried out by Government is a source of concern. This seems more appropriately to be a judicial function. The proposed text gives rise to a concern that it is intended to strengthen central powers at the expense of the autonomy.
 4. 4) 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.
27. 27. It may be appropriate to give some consideration to how future amendments to the system of Gagauzian autonomy should be made. I do not understand the criticisms of the proposed text which suggested that it would enable amendments to the system to be made by ordinary law. It seems clear to me such changes would continue to have to be made by an organic law. The references to a “special” organic law seem to refer to 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 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. Finally, consideration could be given to whether amendments to the system of Gagauzian autonomy should require the consent of the Gagauzian people or its representatives as well as the consent of the representatives of the people of Moldova as a whole.

James Hamilton
26 February 2002