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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

ON THE LEGAL CODE OF GAGAUZIA

**prepared by
the Working Group
of the Venice Commission
and the Congress of Local and Regional Authorities of Europe
comprising:**

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Introduction

By a letter dated 29 January 1998 and following discussions between representatives of the central authorities of Moldova and the Council of Europe, the President of the Parliament of Gagauzia, Mr Pashali, submitted the draft Legal Code of Gagauzia to the Council of Europe for opinion. Two rapporteurs were appointed for this purpose: Mr Malinverni (European Commission for Democracy through Law) and Mr De Bruycker (Congress of Local and Regional Authorities of Europe: CLRAE).

An initial version of the draft Legal Code had been sent to the rapporteurs in February 1998.

A Council of Europe delegation made up of Mr De Bruycker, CLRAE expert, and two members of the Secretariat of the Venice Commission visited Chisinau on 16 March 1998 to meet representatives of the Moldovan authorities and the Gagauz community as well as the group of experts involved in drafting the Legal Code. The discussions focused on the content of the Code and the holding of a referendum on the basic principles of the Code, on the same day as the general elections.

On arriving in Moldova, the Council of Europe delegation was informed that the Supreme Court of the Republic of Moldova had just decided that this referendum could not take place after all because the time-limits prescribed by Moldovan law had not been observed. Representatives of the Gagauz community expressed disappointment at this decision but said that they were willing to respect it.

The Council of Europe was pleased to note that the parties to the dispute were working together to find a solution to the problem. The Committee of Experts comprising representatives of both sides put considerable effort into producing a draft that would be acceptable to everyone. This text (hereinafter the “new version”¹) was passed on to the Council of Europe representatives.

Following the preparatory meeting in Strasbourg on 9 April 1998, the rapporteurs adopted the present opinion, which was sent to the authorities as requested.

1. Gagauz autonomy

The Constitution of the Republic of Moldova contains only one article (Art. 111) on autonomy. It stipulates that autonomy may be granted “according to special statutory provisions of organic law”.

The rapporteurs welcome the fact that several legal problems found in the first version of the text have now been resolved thanks to the efforts of the Joint Committee. Certain matters will nevertheless have to be clarified in the final version of the Legal Code, particularly as regards the place occupied by Gagauz legislation in Moldovan law as a whole and the division of powers.

¹ *This is actually the third version which the delegation was given during its visit to Chisinau.*

The status of Gagauzia is defined by the Organic Law on the Special Legal Status of Gagauzia (Gagauz Yeri) of 13 January 1995 (hereinafter the “Organic Law”). Under Article 1, para. 1 of this law, Gagauzia is an “autonomous territorial entity with a special status [...] forming an integral part of the Republic of Moldova”.

The hierarchical relationship between the various provisions of Moldovan and Gagauz law is not always entirely clear in the text under review.

It appears from the legal system that, as far as the organisational structure of Gagauzia is concerned, the hierarchy is as follows, in descending order:

1. the Moldovan Constitution
2. the Moldovan law on the special legal status of Gagauzia of 23 December 1994
3. the Legal Code of Gagauzia

Several provisions pose a problem here, particularly Article 2, para. 1 of the Legal Code (inconsistent when it states “that in the event of a conflict between the laws of Gagauzia and other prescriptive acts, the present Legal Code shall prevail”) and Articles 2, paras. 2 and 75 (which omit the law on the special legal status of Gagauzia), para. 87 (which further omits Moldovan laws) and para. 100 (which omits the Moldovan Constitution and the law on the special legal status of Gagauzia).

As far as the hierarchy of legislation on the powers of the Gagauz region is concerned, it seems that the latter possesses legislative power within the limits of sole jurisdiction, which means that Moldovan laws are no longer operative in such matters within the territory of Gagauzia and that the hierarchy of legislation is therefore as follows: Moldovan Constitution, Law on the Special Legal Status of Gagauzia, Legal Code of Gagauzia and finally, Gagauz laws.

This question, which is extremely important for gauging the extent of the Gagauz region’s autonomy, ought to be clarified, because a reading of the Moldovan Constitution is liable to leave one in some doubt about the matter², and because representatives of Gagauzia complain of what they see as interference by the Moldovan Parliament in their sphere of competence. We should further point out that the granting of real legislative power to Gagauzia within the limits of its competence obviously does not preclude Moldovan law from applying within Gagauz territory in matters which fall outside the competence of Gagauzia.

² *Article 60 para. 1 of the Constitution, for example, states that the Moldovan Parliament is the sole legislative authority of the State in the Republic of Moldova, which would seem to preclude any conferral of legislative power on Gagauzia; in addition, Article 111 of the Constitution which deals with special autonomous status appears in chapter VIII “Public Administration” and not in chapter IV “Parliament”, which again could be seen as an indication of the lack of real legislative power vested in Gagauzia (meaning the power to make primary legislation in a particular matter, solely in accordance with the Constitution and the law on the special legal status of Gagauzia).*

Article 4 of the Legal Code, which deals with matters pertaining to nationality, could be safely deleted because it repeats word for word existing provisions of Moldovan legislation on nationality. According to information received by the Committee of Experts, both sides had agreed that the inhabitants of Gagauzia would retain Moldovan nationality only. If the term “citizens of Gagauzia” has a specific meaning (assuming it is not the translation which is at fault), then it should be made clear, as this term appears in several articles of the Code.

The Organic Law grants localities where Gagauzes make up more than 50% of the population and which are currently situated outside Gagauz administrative territory the option of deciding whether they want to be incorporated in Gagauzia via a referendum to be conducted by the central authorities of the Republic of Moldova. The same procedure applies if a locality decides that it no longer wishes to be part of Gagauzia. Article 5 of the Organic Law on the status of Gagauzia lays down the rules for such a procedure, so the Legal Code cannot introduce a provision which is not consistent with the Organic Law (see the provisions of Article 7, para. 6 of the Legal Code).

In Article 11 para. 1 of the Legal Code, which deals with natural resources, the sentence “[...] movable and immovable property situated within the territory of Gagauzia shall belong to the people of the Republic of Moldova” is not clear. In order to avoid confusion, it would be better to say “public movable and immovable property”.

According to the Organic Law, the Legal Code of Gagauzia is to be adopted by the People’s Assembly of Gagauzia by a two-thirds majority (Article 11, para. 2). The text of the draft stipulates that the People’s Assembly shall adopt the Legal Code following a local referendum on the text (Article 97). It is important to note, however, that the Organic Law makes no mention of such a procedure and that the provisions of the Organic Law are the applicable ones. That does not mean that a consultative referendum cannot be held on the principles.

In general, many articles of the Code reproduce provisions which already exist elsewhere in the legislation of the Republic of Moldova, including in the Constitution and the Organic Law. In order to avoid confusion, one should either remove them from the Legal Code or indicate the reference legislation.

2. Human Rights

The Code devotes an entire chapter to human rights, reiterating the guarantees provided for in the Constitution of the Republic of Moldova. The European Convention on Human Rights, which has been signed and ratified by Moldova, also contains a range of guarantees designed to protect human rights.

That being the case, it would be better if the whole of Title II devoted to human and civil rights and freedoms were to be deleted. The reason is that Gagauzia is not competent in this matter, which is governed by the Moldovan Constitution. This is an aspect which could have major implications insofar as uniformity of human rights provisions is an important factor in state unity. In the event that the representatives of Gagauzia should wish to retain these provisions, they ought to be incorporated in the preamble to the Code rather than in the main body of the text.

Whatever the case, the following points should be noted.

Article 17, para. 1 of the Legal Code states that Gagauzia is building a democratic society. This sentence is superfluous, being of a purely declarative and temporary nature and having no prescriptive effect. The provisions of the text are sufficient in themselves to determine the democratic development of Gagauzia. Instead, this article could simply state that “everyone shall be equal before the law and the courts”.

Article 18 of the Legal Code stipulates that “everyone has the right to life” and that “no-one shall be arbitrarily deprived of life”. Although the death penalty has been abolished in the Republic of Moldova, the last part of this article could be construed as leaving open the possibility of inflicting the death penalty in a “non-arbitrary” manner³. This article should establish the right to life as an absolute right, bearing in mind, furthermore, the international commitments entered into by Moldova on joining the Council of Europe.

At the same time, it is very important that several provisions which are incompatible with these international commitments be deleted from the new version of the Code. In particular, it is essential to do away with the distinction made between “nationals of Gagauzia” and “aliens”, particularly in Articles 24 and 26 of the Legal Code.

3. Separation of powers

Despite the endeavours of the Joint Committee of Experts, certain provisions of the Code may still pose a problem when it comes to observing the principle of the separation of powers.

Article 50 of the Legal Code, which sets out the powers of the People’s Assembly, grants the latter, *inter alia*, the power to interpret the Legal Code and laws of Gagauzia (para. 3) (this would apparently be an authentic interpretation) and to determine the functioning of local authorities (para. 6). The power to interpret the law lies only with the judicial authority (Article 114 of the Constitution of the Republic of Moldova) and the local authorities have the right and ability “to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population” (Article 3 of the European Charter of Local Self-Government. It follows that Article 50 para. 6 must be amended in such a way that the People’s Assembly is empowered merely to define the broad principles governing the organisation of local authorities. Article 84, para. 2 on local resources is insufficient, moreover. It is important to bear in mind that in ratifying the Charter of Local Self-Government, Moldova undertook to provide local and regional authorities with the necessary financial resources to exercise their powers.

Paragraph 18 of the same article, whereby the People’s Assembly may “revoke, in whole or in part, decisions and orders of the Executive Committee and of local authorities in the event that they conflict with the Legal Code and the laws of Gagauzia”, poses a similar

³ See the opinion of the Venice Commission on the constitutional aspects of the death penalty in Ukraine adopted by the Commission at its 33rd plenary meeting in Venice, 12-13 December 1997 (doc. CDL-INF (98) 1).

problem. Only the competent courts can rule on the non-compliance of a particular decision with the Statute of Gagauzia and/or the Constitution of the Republic of Moldova.

In Article 58 paras. 1 and 2, the sentence which reads: “The head of the executive (Bashkan) shall be the guarantor of the application of the Legal Code [...] and the exercise of human rights and freedoms” should be replaced by: “The head of the executive (Bashkan) shall ensure that the Legal Code is applied [...] and that human rights and freedoms are upheld”, in order to avoid any confusion between the executive and the judiciary.

In addition, the Organic Law (Article 12, para. 3b) stipulates that it is the People’s Assembly which ensures that the interests of Gagauzia are respected in the implementation of Moldova’s domestic and foreign policy, and not the Bashkan as provided for in Article 67 para. 1 of the Legal Code. Article 67 also stipulates in paragraph 10 that the Bashkan may dissolve the Assembly if the latter rejects three times a draft law which has been tabled by him or her. The Bashkan should not possess such powers except in budgetary matters.

4. Electoral system

The description of the electoral system contained in the Legal Code is incomplete despite the additions made to the new version. Among other things, the articles of the text in question do not include a description of the electoral system. It is not specified, for example, whether the latter is a proportional representation or a first-past-the-post system; nor is there any indication of the number of constituencies (Articles 80, 81 and 82).

Admittedly, the details of the electoral system can be established later by statute, but the Code ought to indicate at least the general principles of the electoral system.

5. Judicial system

The rapporteurs welcome the fact that the new version of the Statute no longer provides for a Supreme Court of Gagauzia with power to rule on the constitutionality of laws and decrees issued by the Bashkan. They note, however, that under Article 88 of the new text, this function is assigned to the Court of Gagauzia. This is hardly compatible with the Moldovan Constitution whereby such matters come under the sole jurisdiction of the Constitutional Court (Article 135, para. 1(a) of the Constitution of the Republic of Moldova). It is the Constitutional Court, in fact, which must rule on the constitutionality of prescriptive acts adopted by the Gagauz People’s Assembly and other authorities. The task of verifying the compatibility of acts of the Bashkan and the People’s Assembly of Gagauzia with the Legal Code, on the other hand, may be assigned to the Court of Gagauzia.

The text of Article 89 should also be amended therefore. In the first sentence, “the Court of Gagauzia is a judicial body dealing with civil, criminal, administrative and other cases”, the words “and other” should be deleted.

Another possible solution where matters relating to the constitutionality of the legal acts of Gagauzia are concerned would be, say, for a Gagauz judge to sit in the Constitutional Court whenever questions of this type are being considered. Obviously he or she would not in any

way represent Gagauzia, but would sit as a judge specialising in the aforementioned field.

The chapter on the justice system should also make it clear that the courts of Gagauzia form part of the judicial system of the Republic of Moldova.

6. Conclusions

Overall, the draft Legal Code constitutes a good basis for defining the rules governing Gagauz autonomy.

Generally speaking, however, the draft Code regrettably incorporates numerous provisions derived from other legal texts which it has simply copied. The result is that the draft Code covers matters which in actual fact fall outside the jurisdiction of Gagauzia, raising doubts in the reader's mind as to which is the right text (the Legal Code or the text copied).

It would be better if all the provisions copied from other texts were to be systematically expunged from the draft. This applies in particular to Title II (see point 2 above) and Articles 7, paras. 2 to 5, 11, 15, para. 1, 42 (except where the number of Assembly members is concerned), 47, paras. 1 and 76. Should this prove unacceptable, the Legal Code should at least make it clear where the copied texts came from, so as to avoid any ambiguity.

The functions of the People's Assembly of Gagauzia in the justice field, and in particular its right to revoke any laws and decisions which conflict with the Legal Code or other legislation, poses problems from the point of view of the separation of powers.

The description of the electoral system given in the Legal Code is rather sketchy. A number of additional provisions, including some indication as to whether the system is a proportional representation or first-past-the-post system, could be usefully incorporated in the text of the Code.