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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

**ON THE QUESTIONS RAISED
CONCERNING THE CONFORMITY OF THE LAWS
OF THE REPUBLIC OF MOLDOVA
ON LOCAL ADMINISTRATION
AND ADMINISTRATIVE AND TERRITORIAL
ORGANISATION
TO CURRENT LEGISLATION
GOVERNING CERTAIN MINORITIES**

by

**Messrs Kaarlo TUORI (Finland)
Giorgio MALINVERNI (Switzerland)
Franz MATSCHER (Austria)**

In their report on the honouring of the commitments entered into by Moldova on its accession to the Council of Europe, the Rapporteurs, Mr Columberg and Ms Durrieu, questioned whether the laws on local administration of 1998 and administrative and territorial organisation as adopted by the Moldovan Parliament were compatible with the Moldovan Constitution and the Institutional Law on the Status of Gagauzia (para. 102 of Document AS/Mon (1998) 52 rev. 2 of 14 January 1992), and thought an opinion should be requested from the Venice Commission on this matter.

In March 1999, the Venice Commission prepared a preliminary memorandum on this issue for the attention of the Parliamentary Assembly (Doc CDL (99) 5). Mr Tuori and representatives of the Secretariat then travelled to Moldova on 22-26 May to meet the Moldovan authorities and representatives of the Bulgarian and Gagauz minorities. The Venice Commission delegation met Mr Vartik, Head of the Local Affairs Unit of the State Chancellery of Moldova, Mrs Stoyanov, Director of the National Relations Department, Messrs Solonari and Chobanu, members of Moldovan Parliament, Mr Cretu and Ms Poalelouni, Deputy Ministers of Justice and Messrs Tabunschik, Head of the Executive of Gagauzia, and Pashali, President of the Popular Assembly of Gagauzia. Unfortunately, representatives of the Venice Commission did not meet representatives of the Bulgarian minority.

The Commission examined this question during its 39th plenary meeting in June 1999 and, owing to the importance of the issue, decided to extend the delay for the examination of this question by the rapporteurs. In the meantime a delegation from the Congress of Local and Regional Authorities visited Moldova. After an exchange of views between the Commission Secretariat and the Congress, it was decided that it would be useful to take note of the information collected by the latter. This fact is reflected in the present report.

I. The Law on Local Administration in the Republic of Moldova

1. The Law on Local Administration in the Republic of Moldova was adopted on 6 November 1998. It sets out the general framework for the organisation of local authorities and their interaction with the central authorities through representatives in the regions (counties) and municipalities.
2. As far as the Gagauz region is concerned, the Law on Local Administration in the Republic of Moldova is liable to clash with the Law on the Special Status of Gagauzia of 1994 and the Legal Code of Gagauzia adopted in July 1998 by the People's Assembly of Gagauzia. The Law on the Special Status of Gagauzia and the Law on Local Administration are both organic laws. ***The difference between the two is that: the Law of 1994 can be amended by the 3/5 majority of members of Parliament (Article 111 (2) of the Constitution of the Republic of Moldova) and the Law of 1998 can be amended according to the normal procedure foreseen for any organic law, which consists in amendment by simple majority.*** The Legal Code of Gagauzia amounts to a constitution for the autonomous region¹, but it is difficult to determine its position in the hierarchy of Moldovan norms. In any case, the lack of a clear hierarchical relationship between these prescriptive texts is a problem, which was already been noted by the Venice Commission in its opinion on the Legal Code of Gagauzia [CDL (98) 41]. During the visit of the Venice Commission delegation to Moldova, the central authorities as well as representatives of the local authorities of Gagauzia acknowledged the existence of these ambiguities.

¹ *The 1994 Law on the special status of Gagauzia mentions the Legal Code on three occasions in articles 2, 11 and 12 without, however making a reference to its legal nature.*

3. Article 2 of the Law on the Special Status of Gagauzia of 23 December 1994, stipulates that "*the administration in Gagauzia shall operate on the basis of the Constitution of the Republic of Moldova, the present Law and the legislation of the Republic of Moldova (except where otherwise provided in the present Law) and in conformity with the Legal Code of Gagauzia and the decisions of the People's Assembly*".
4. Article 2 para. 2 of the Law on Local Administration provides that "*the organisation and operation of local administration in the autonomous territorial entities shall be determined by the Law on the status of the corresponding region and the present Law*".
5. These above-mentioned provisions would suggest that the two laws are complementary.
6. The Gagauzians consider that the Law on the special status of Gagauzia has priority over the Law on local administration. During the meeting at the Ministry of Justice of Moldova on 24 May 1999, M Cretu and Mrs Polelunzh, Deputy Ministers of Justice, suggested that their institution considered that in legal terms, the Law on the special status of Gagauzia, being *a lex specialis*, has priority over the law on local public administration, and consequently there are no contradictions between these two laws. A similar view is shared by Mr Solonari, Chairman of the Committee on National Minorities of the Parliament, and Mr Chobanu, Vice-Chairman of the Committee on Legal Affairs.
7. The Commission considers that the provisions of the two laws could conflict with each other. Article 107 of the Law on Local Administration designates the *prefect* as the representative of the central authorities in the regions, including the autonomous entities. The Law on the Status of Gagauzia does not provide for any central authority representative. Moreover, Articles 21, 22, 23 and 24 of the Law on the Status of Gagauzia lays down that the heads of the prokuratura, the department of justice, the department of national security and the police exercising their functions in the autonomous regions shall be appointed by the corresponding Moldovan ministers, with the agreement of the People's Assembly, whereas Article 110 of the Law on Local Administration stipulates that the *prefect* must nominate candidates for these functions and ensure the smooth operation of the departments in question. Furthermore, the Law on the Status of Gagauzia stipulates that the *Bashkan* is the supreme authority of the executive in Gagauzia (Art. 14 para. 1); again, the Law on Local Organisation does not specify the relationship between the *prefect's* powers and the rather similar powers of the *Bashkan*. For example, Articles 113, 114 and 115 of the Law on Local Administration are likely to clash with Article 14 paras. 6, 7 and 8 of the Law on the Status of Gagauzia.
8. Article 12 of the Law on Local Administration provides that the prefect shall be appointed by decree of the Government of Moldova and shall represent the central authorities at local level. This text contains no specific provisions on Gagauzia, and so the prefect of this autonomous entity exercises the same powers as his opposite numbers in the other regions (counties). At the same time, the *Bashkan* is established in his functions by the President of the Republic of Moldova and is a member of the Government of Moldova (Article 14 para. 4 of the Law on the Status of Gagauzia). According to the Law on the Status of Gagauzia, the *Bashkan* has an important, specific position in the executive hierarchy, unparalleled in ordinary local administration in the country; he also takes part in the appointment of *prefects* as a member of the Government of Moldova. This situation, which is linked to the *Bashkan's* special position, is

apparently not taken into account in the Law on Local Administration, Article 109 para. 2 of which lays down that there are no subordinate relations between the *prefect* and the local authority bodies.

9. A comparison between the Law on Local Administration and the Legal Code of Gagauzia highlights even more obvious contradictions.
10. The first question is that of the relations between, on the one hand, the *prefects* and *sub-prefects* provided for in the Law on Local Administration and, on the other, the heads of local administration provided for in the Legal Code of Gagauzia (Article 82). The Legal Code describes the latter as local civil servants, since their powers are determined by local legislation (Article 82 para. 2).
11. Furthermore, the fact that the Law on Local Administration contains no specific provision on Gagauzia (which is for the moment the only autonomous territory with a reasonably well defined status) raises a problem vis-à-vis interpretation of the provisions of the Law on the Status of Gagauzia and the Legal Code of Gagauzia. For instance, it is uncertain whether and to what extent the provisions of the Law on Local Administration will affect the powers of the People's Assembly and what will be the position of the Court of Gagauzia in the Moldovan judicial system (especially as regards its powers to interpret legal rules adopted by local authorities).
12. One separate question is that of the provisions of the Legal Code regarding their "exclusive" legal force in the territory of Gagauzia (Article 2) and the People's Assembly's power to set aside any decisions by the "*public authorities of Gagauzia that are contrary to the provisions of the Legal Code*" (Article 51 para. 9). In view of the fact that the Legal Code of Gagauzia devotes a whole chapter to human rights protection, it might be wondered whether and how the aforementioned powers of the People's Assembly and the exclusivity of the provisions of the Legal Code of Gagauzia can be reconciled with the prefect's powers, particularly those based on Article 111 (d) of the Law on Local Administration, to the effect that "*the prefect can order the public authorities to take the requisite measures to prevent offences/crimes and ensure respect for human rights*".
13. The problems of possible clashes as described above could be solved by interpreting the Law on Local Administration in such a way that its provisions would be inapplicable where contrary to those of the Law on the Status of Gagauzia. ***There could be two possible legal interpretations that could justify such approach. Indeed, the Law of 1994 can be considered either as lex superior with respect of the law on local administration, or as lex specialis.***
14. ***According to the Article 111 par. 2 of the Constitution of Moldova, the Law on the special status of Gagauzia can only be modified by a majority vote of 3/5 of members of the parliament. The Law on local administration of 1998 can be changed according to the normal procedure. This difference could mean that the law of 1994 is superior to that of 1998 (lex superior). The inconvenience of such interpretation is that the constitutional doctrine of Moldova does not seem to recognise any legal difference between organic laws. Representatives of the Ministry of Justice have underlined on several occasions that both laws have the same legal value. The Constitution, in article***

- 72, does not make a distinction between different types of organic laws². As a result, in order to determine the relation between these two laws, two criteria can be applied – the first one of a formal nature (majority required for an amendment) and the second one of a substance (the content of the law). Under present conditions the rapporteurs are of the opinion that it would be more prudent to apply the principle of lex specialis.*
15. *If the Law of 1994 is to be considered as a *lex specialis* as compared with the Law on Local Administration, which is a *lex generalis*, such an interpretation could be based on Article 111 of the Moldovan Constitution, which authorises the granting of autonomy status to certain regions in southern Moldova on the basis of an institutional law, such as the 1994 Law on the Status of Gagauzia. This interpretation also derives from the fact that the new Law indirectly but indisputably recognises the existence and validity of the 1994 Law on the Status of Gagauzia, because Article 2 para. 2 of the Law on Local Administration reads: "The organisation and operation of local authority bodies in an autonomous territorial unit with special status shall be regulated by the law on the status of the said unit and the present law".*
 16. The Venice Commission delegation noted during its visit to Moldova that there are certain positive developments that suggest a concrete solution to the problem of compatibility between certain dispositions of the laws in question. During the meeting of the Venice Commission delegation and the Congress of Local and Regional Authorities with representatives of the Ministry of Justice, Mr Cretu and Ms Polelunzh, Deputy Ministers of Justice said, as has already been mentioned in para. 5 of this opinion, that the Law on the special status of Gagauzia has priority over the Law on local public administration. As a consequence, in the light of Article 2 (2) of the Law on local public administration that was quoted in the previous paragraph, articles of this Law which are contrary to the Law of 1994 do not apply to Gagauzia. The role of *prefect* in Gagauzia will be limited to the representation of the interests of the central Government. According to the information received from the Moldovan authorities the Law on administrative disputes³, which is to be discussed by the Parliament, will define the procedure to follow in cases where the *prefect* finds a violation of the Moldovan legislation by any Act adopted by the local authorities, including those passed by the Popular Assembly of Gagauzia. The Commission considers that the application of the principal *lex specialis* allows for the conflict between the provisions of the two laws to be settled.
 17. However, since this issue is highly complex and any uncertainty about the scope of the autonomy of the region in question must be eliminated, it would no doubt have been better to include details, in the provisions of the new Law, on how and to what extent the adoption and enforcement of the latter would affect the provisions of the Law on the Status of Gagauzia, notably by making an explicit reference to Gagauz autonomy in Article 2 (2) of the Law.
 18. The problem of compatibility of certain provisions of the Legal Code of Gagauzia with the Law on local public administration and other Laws of Moldova still exists. This question was already treated in a separate opinion of the Venice Commission in 1998

² Both laws (of 1994 and of 1998) are part of the organic legislation mentioned in par. (f) of the Article 72 of the Constitution.

³ According to information received by the Venice Commission from the Moldovan authorities, the administrative reform includes in addition to the two laws examined by the Commission, laws on administrative disputes, local finances and municipal budgets.

(Doc. CDL (98) 41) and the Law on local public administration only accentuates this problem.

19. *The Popular Assembly of Gagaouzia has its own legislative powers according to Article 12 of the Law of 1994 and Article 52 of the Legal Code of Gagaouzia. The Constitutional Court of Moldova has recognised this fact in its decision “On the constitutional control of the Article 20 (2) of the Law N°344-XIII of 23 December on the Special Status of Gagaouzia”⁴ stating that:*

“[...] The Popular Assembly of Gagaouzia is a representative body, which has the power to adopt normative acts within its competencies, respecting provisions of the Constitution of Moldova. Activities of this body should be considered in connection with its political role.

The Popular Assembly has the power to adopt normative acts (within the limits of the competencies established by the Parliament of the Republic of Moldova) whose application is obligatory on the territory of Gagaouzia [...]”⁵.

There is a further problem that the Parliament of the Republic of Moldova has not defined the limits of competence of the Popular Assembly and has not made public its position regarding the Legal Code. This adds a risk of a general problem of “cohabitation” of the national legislation and legal acts adopted by the Popular Assembly on the territory of Gagaouzia.⁶

II. The Law on Administrative and Territorial Organisation in the Republic of Moldova

20. The Law on Administrative and Territorial Organisation in the Republic of Moldova was adopted on 12 November 1998. Article 4 para. 2 of the Law recognises the specificity of “a number of areas in the south of the Republic which constitute territorial administrative units with special status defined by institutional laws”⁷, and we might suppose that this applies to Gagauzia, according to the Law on the Status of Gagauzia. Article 8 para. 1 lists the towns and cities with municipality status, and includes Komrat, the administrative centre of Gagauzia. Annex 3 to this Law lists the towns and villages belonging to the autonomous territorial unit of Gagauzia. Its territory is also split into three counties.
21. A reading of the text does not reveal any obvious contradictions with current legislation on Gagauzia. However, it should be noted that the new Law empowers the Moldovan Parliament to vote to change the administrative boundaries of the regions, whereas the Legal Code of Gagauzia assigns the People's Assembly of Gagauzia the task of holding referendums on such matters and validating the results (Art. 8 paras. 7-9). During the

⁴ Page 5 of the Monitorul Oficial al Republicii Moldova N°53-54, 27 May 1999.

⁵ Translation by the Secretariat of the Venice Commission.

⁶ By way of example the adoption on 22 June 1999 by the People's Assembly of Gagaouzia of the local public administration law should be mentioned (Information received from the CLRAE following a visit by a delegation of that body to Moldova on 29 July to 1 August 1999).

⁷ The same approach is adopted in Article 4 par. 3, which apparently refers to Transnistria in the following terms: “a number of areas on the left bank of the Dniestr”.

visit of the Venice Commission delegation to Moldova, the representatives of the Gagaouze minority shared with us their concern over the latest amendments to the Electoral Code introducing the rule imposing a 120 day ban on local referendums before and after local elections. Apparently the Gagaouziens were interested in organising such a referendum for two localities which wanted to join the autonomy, but the Central Electoral Committee of Moldova refused it. This is a practical illustration of the problem mentioned in the previous paragraph.

22. Broadly speaking, some of the provisions of the Law on Administrative and Territorial Organisation in the Republic of Moldova are not sufficiently clear. In particular, Articles 18 and 19 stipulate that the Moldovan Parliament is responsible for changing the status of a given administrative entity, on a motion from the Government and the local authorities and "*after consulting the citizens*"⁸. Nevertheless, the law does not go into detail on the procedure for the said consultation. It is important to note that this is also an obligation that follows from article 5 of the European Charter on Local Self-Government.
23. The conflict between the ethnic Bulgarian minority in the Taracliya region and the Moldovan central authorities over certain provisions of this Law was brought to the Commission's attention. The minority in question reportedly objects that the Law on Administrative and Territorial Organisation has changed administrative borders in such a way as to integrate the Taracliya region into a larger administrative unit (*judet*), thus reducing the proportion of the minority population in the region. At the same time in a letter addressed to the Committee of Ministers of the Council of Europe in February 1999, representatives of the Bulgarian minority complain that the population of Taracliya was not consulted on this issue in breach of international obligations of Moldova.
24. This situation might raise problems vis-à-vis the Framework Convention for the Protection of National Minorities (1 February 1995), to which Moldova is a Contracting Party. Article 16 of this Convention lays down that "*the Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention*".
25. Furthermore, on its accession to the Council of Europe, Moldova agreed to base its policy concerning minorities on the principles set out in Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe. Article 11 of the draft Protocol appended to this recommendation provides that "*in the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state*". In interpreting this provision, the Commission has pointed out that it is "*necessary for States to take into account the presence of one or more minorities on their soil when dividing the territory into political or administrative sub-divisions as well as into electoral constituencies*" [Opinion on the interpretation of Article 11 of Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe, CDL-INF (96) 4].

⁸ It is interesting to note here that the legislation in force when the law in question was adopted provided for consulting the population concerned before any move to change any region's administrative boundaries (*Rules on matters relating to the territorial and administrative organisation of the Republic of Moldova, enforced under Law 741-XIII of 20 February 1996*).

26. It is important to mention in this context that the initial draft of the law on territorial administrative organisation of Moldova included Taracliya as a separate territorial entity. President Lucinschi supported this solution. In spite of this fact the final text includes Taracliya in Cahul *judet*. The President sent the law back to the Parliament in November 1998 proposing to revise articles of the law concerning Taracliya, but the Parliament refused to maintain Taracliya as a separate entity. As a consequence part of Taracliya's population boycotted local elections on 23 May 1999.
27. Even though it is difficult to imagine all the direct consequences of enforcing the Law in question, there is no doubt that it will have an impact on the proportion of the minority population in the region, and that the manner in which its provisions are interpreted and applied could affect the rights of persons belonging to minorities. Consequently, in general it is vital that the Moldovan authorities ensure that the rights secured for persons belonging to the ethnic Bulgarian minority under the Framework Convention and the principles of Recommendation 1201 are fully respected and not jeopardised by the implementation of the provisions of the Law in question. The practical implementation of certain aspects of the local autonomy through laws on administrative disputes, local finances and municipal budgets will be of great importance in this context.

III. Conclusions

28. Both laws examined by the Venice Commission are part of the administrative and territorial reform in Moldova, and according to the Government they will be followed by other legislation aimed at decentralising administrative management. Therefore it is very important that these acts are coherent and respect minority rights in conformity with laws defining the status of minorities and with international instruments of protection of minorities ratified by Moldova.
29. Contradictions between the law on the special status of Gagaouzia and the law on local public administration are eased or settled if the principle of either *lex superior* or of *lex specialis* is applied. Article 2 (2) of the Law on local public administration enables this solution to be applied without bringing the provisions of this law into question and endangering administrative reform. At the same time it would be advisable for the Moldovan authorities to define more precisely to what extent the Law on local public administration is applicable to Gagaouzia.
30. Contradictions between the Law on local public administration and the Legal Code of Gagaouzia exist as long as this Code includes provisions that are in conflict with the Law on special status of Gagaouzia and other Moldovan laws. In order to solve this conflict the Code could be revised to make it compatible with Moldovan legislation in force. The government together with the Gagaouzian authorities, given the fact that both sides expressed their readiness to find a solution acceptable to everybody could fulfil this task.
31. ***It would be useful if the Parliament determines its position towards the Legal Code of Gagaouzia and establishes the extent of the legislative competencies of the Popular Assembly respecting the constitutional provisions and those of the Law on the Special Status of Gagaouzia of 1994.***
32. The Commission notes that the Parliament did not consider it possible to maintain the district of Taracliya as a separate administrative entity. The Commission has not received

any information that would point to the violation of the cultural and language rights of the minority of Bulgarian origin, as a consequence of the administrative reform. The Commission, however, emphasises that the provisions of the Framework Convention on National Minorities and the Recommendation 1201 should be fully respected in the implementation of the reform.