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(VENICE COMMISSION)

TUNISIA

OPINION

ON THE DRAFT STATE PROPERTY CODE

**Adopted by the Venice Commission
At its 131th Plenary Session
(Venice, 17-18 June 2022)**

On the basis of comments of

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I. Introduction

1. By letter dated 22 December 2021, Mr M. Mohamed Rekik, Minister of State Domains and Land Affairs of Tunisia, requested an opinion on the draft State Property Code (CDL-REF (2022)020). A French translation of this text was received by the Secretariat on 26 April 2022.

2. Ms Regina Kiener, Mr Panayotis Voyatzis and Mr Sebastien Ferrari were acted as rapporteurs.

3. On 23.05.2022 and 24.05.2022, the rapporteurs, accompanied by Ms Caroline Martin and Mr Serguei Kouznetsov, had online meetings with Mr Mohamed Rekik, Minister of State Domains and Land Affairs, and several members of the Ministry, with a representative of the association "I Watch", as well as with members of the Tunis Centre for Land Law and Urbanism.

The Commission would like to thank the Council of Europe Office in Tunis for organising the meetings and for the documents related to the preparation of this opinion.

4. This opinion was drafted on the basis of the rapporteur's comments and the result of the online meeting on 24 May 2022. Following its examination by the Sub-Commissions on Fundamental Rights and on the Mediterranean basin at their joint meeting on 16 June 2022, it was adopted by the Venice Commission at its 131st Plenary Session (Venice, 17 June 2022).

II. Remarks and frame of reference for the analysis

5. The Draft State Property Code was prepared by the Ministry of State Property and Land Affairs. The draft code comes into play in a national context that deserves to be recalled in the same way as the objectives pursued in its preparation. The text will be assessed in the light of the current national context, the Tunisian Constitution and the standards in this area that derive from international law.

A. Context

6. The draft code comes in an exceptional legal and political context, which is described and analysed in the Venice Commission's Urgent Opinion "on the constitutional and legislative framework concerning the referendum and elections announced by the President of the Republic and in particular on Decree-Law No. 22 of 21 April 2022 amending and supplementing the organic law on the Higher Independent Electoral Body (ISIE)"¹. The Venice Commission expressly reserves its position on the compatibility of the presidential decrees and decree-laws adopted since 26 July 2021 with international standards and with the Tunisian constitution. It also reserves its position on the procedure for the preparation and "adoption" of this Code in the light of the list of Rule of Law Checklist.²

B. National reference standards

7. This analysis will be based on the following national standards in particular:

The Constitution of the Tunisian Republic, promulgated on 27 January 2014.

8. According to the preamble of the Constitution of the Tunisian Republic, promulgated on 27 January 2014, one of the main objectives of the Revolution of Freedom and Dignity is the break with injustice and corruption. This objective is embodied in several provisions of the Constitution:

¹ CDL-PI(2022)026.

² Venice Commission, Rule of Law Checklist, CDL-AD(2016)007.

9. According to Article 10 of the Constitution, the State "shall put in place mechanisms to ensure the collection of taxes and the fight against tax evasion and fraud" (paragraph 2).

10. Therefore, the state is obliged to establish mechanisms to ensure sound management of public resources and to guarantee the fight against tax evasion and fraud. In addition, the state "shall ensure the proper management of public funds and take the necessary measures to use them in accordance with the priorities of the national economy", and "shall act to prevent corruption and anything that is likely to undermine national sovereignty" (paragraph 3).

11. According to Article 13, 'natural resources belong to the Tunisian people. The state 'shall exercise its sovereignty over them in their name' (paragraph 1), and 'investment agreements relating to these resources shall be submitted to the special committee of the Assembly of People's Representatives.

12. The related agreements shall be submitted to the Assembly for approval" (paragraph 2).

13. Finally, according to Article 14, "the functioning of the State administration shall be subject to rules of transparency, integrity and accountability".

14. At the same time, the Constitution guarantees the individual the right to property; this right can only be infringed in cases provided for by law and when the guarantees, also provided for by law, are respected (Article 41 paragraph 1).

15. Under the heading of rights and freedoms is also Article 42, which in its third paragraph establishes that the State "shall protect the cultural heritage and guarantee its right for the benefit of future generations".

16. Article 44 guarantees the right to water and establishes the duty of the State and society to preserve water and ensure its rational use.

17. Finally, in Article 45 of the Constitution, the State is obliged to guarantee the right to a healthy and balanced environment and to contribute to the protection of the environment. It is the responsibility of the State to provide the necessary means to eliminate environmental pollution.

18. Presidential Decree No. 2021-117 of 22 September 2021, on exceptional measures, kept in force the chapter on human rights

C. International standards reference

1. At the universal level

19. With regard to the right to protection of property, Article 17 of the Universal Declaration of Human Rights guarantees the right to property as follows: "Everyone has the right to own property alone as well as in association with others" (paragraph 1). The same article states that "[n]o one shall be arbitrarily deprived of his property" (paragraph 2). As regimes vary considerably in different legal systems, it has not been possible to establish international standards on property rights³. This right is therefore recognised neither in the International Covenant on Civil and Political Rights nor in the International Covenant on Economic, Social and Cultural Rights.

20. The fight against corruption in Tunisia is part of an international normative framework which includes the United Nations Convention against Corruption (2005), A/RES/58/4, ratified by

³ Gudmundur Alfredsson / Asbjorn Eide, The Universal Declaration of Human Rights: a common standard of achievement. Martinus Nijhoff Publishers 1999. p. 372.

Tunisia in 2008. The World Bank has stressed the urgency of the fight against corruption in several reports on Tunisia (see, among others, Report No. 86179-TN)⁴ .

21. Article 6 of the Convention provides that "[e]ach State Party shall ensure, in accordance with the fundamental principles of its legal system, the existence of a body or bodies, as appropriate, for the prevention of corruption" (para. 1); furthermore, the Convention requires that "[e]ach State Party shall grant to the body or bodies referred to in paragraph 1 (') the necessary independence, in accordance with the fundamental principles of its legal system, to enable them to carry out their functions effectively and free from any undue influence. They should be provided with the necessary material resources and specialised staff, as well as the training they may require to perform their functions".

2. At the regional level

22. The African Charter on Human and Peoples' Rights, which was ratified by Tunisia in 1983, protects the right to property in Article 14. The latter stipulates that "[t]he right to property is guaranteed. It may not be infringed except on grounds of public necessity or in the general interest of the community and in accordance with the provisions of the appropriate laws. The right to property is further recognised in Article 13 of the Charter, which states that every citizen has the right to participate freely in the conduct of the public affairs of his country, the right to equal access to public service and "the right of access to public goods and services in strict equality of all persons before the law".

23. Article 21 of the Charter recognises the right of all peoples to freely dispose of their natural wealth and resources and that this right must be exercised in the exclusive interest of the people, who may not be deprived thereof. Article 21 also provides that "in case of dispossession, the dispossessed people shall have the right to the lawful recovery of their property and to adequate compensation".

24. With regard to the African Court on Human and Peoples' Rights in particular, in addition to the provisions of the Charter (Articles 60 and 61)⁵ , Articles 3 and 7 of the Ouagadougou Protocol provide the basis for openness to other human rights protection systems⁶ .

25. Furthermore, it is clear from the case law of the African Court, for example the Lohe Issa Konaté and Sebastien Ajavon judgments, that the Court remains open as to the solutions to be adopted to the relative case law of the European Court of Human Rights⁷ .

3. At the Council of Europe level

26. Protocol I to the European Convention on Human Rights (hereinafter ECHR) in its Article 1 guarantees the right to protection of property as follows: "Every natural or legal person has the right to the respect of his property. No one shall be deprived of his property except in the public interest and in accordance with the law and the general principles of international law" (paragraph 1). "The foregoing provisions shall not affect the right of States to enact such laws as they deem necessary to regulate the use of property in accordance with the public interest or to secure the payment of taxes or other contributions or penalties paragraph 2".

⁴ Banque Mondiale, TUNISIA: Development Policy Review: The Unfinished Revolution: Creating opportunities, quality jobs and wealth for all Tunisians, 24 May 2014.

⁵ See, F. OUGUERGOUZ, 'Les articles 60 et 61 de la Charte africaine des droits de l'homme et des peuples' in L. Burgorgue-Larsen, ed, *Les défis de l'interprétation et de l'application des droits de l'homme : de l'ouverture au dialogue*, Paris, Pedone, 2017, pp 135-56.

⁶ See, in this regard, A.-K. Diop, 'L'influence de la jurisprudence européenne sur le système africain de protection des droits de l'homme', *Revue québécoise de droit international*, 2020, pp. 593-610.

⁷ Ibid.

27. The case law of the European Court of Human Rights (hereinafter ECHR) is relevant in this case as it covers, due to its abundance, the various issues that arise from the reading of the draft and which will be explained below (see 42-57). This is all the more true since the case law of the ECHR has a direct influence on the African human rights protection system, notably through the case law of the Court and the African Commission on Human and Peoples' Rights⁸.

28. The *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*⁹ is the reference document for the fight against corruption within the Council of Europe. According to its Article 2 para.1, States Parties shall adopt *legislative measures* to enable the confiscation of property (see also Article 7 para.2).

II. General comments on the draft Code on State Property

29. The Draft Code is divided into 5 titles and contains 130 articles.

30. This analysis of the draft Code will first focus on general observations related to the current legal and political context (A) and then on the objectives of the draft (B).

31. These objectives will then be assessed against the above-mentioned international standards and treaty norms. The analysis of the draft code will be structured (III) around important legal principles to be respected such as those of legality, legal certainty, procedural safeguards as well as the rights of third parties, proportionality and good faith, which will be set out in advance before being confronted with the draft code.

A. The objectives of the draft code

32. The letter of referral to the Commission from the Minister of State and Land Affairs states that this project is part of the declared desire to strengthen "the legislative framework in certain areas of intervention". Another objective stated in the same letter is the strengthening of transparency and integrity in the management of the State's private domains.

33. The project is a continuation of earlier but unsuccessful initiatives. The explanatory memorandum to the draft states that the Tunisian state has reportedly suffered a wave of violations of state-owned agricultural and non-agricultural land. The project would respond to the need to adopt more rigorous penal provisions in order to preserve the integrity of the State's domains.

34. It also emerges from the exchanges with the Tunisian authorities that the project aims to draw up a single text bringing together and regrouping the scattered texts on State property and to strengthen the legal arsenal against attacks on State property.

35. It was pointed out at a meeting with the Tunis Centre for Land Law and Urban Planning that the institutional land system has long been deficient in the absence of a common management and coordination body, which this draft code would address.

36. On reading the draft and following discussions with the authorities behind the draft, it seems that in general the draft code pursues four objectives: simplification of the law; modernisation of procedures; strengthening the protection of public property; and the fight against corruption.

37. The objectives thus invoked appear to be legitimate and fall within the political priorities pursued by the political power in Tunisia. Thus, the aim of bringing together scattered provisions

⁸ DIOP, op. cit.

⁹ ECtHR, [Guide on Article 1 of Protocol No. 1 - Protection of property \(coe.int\)](#).

on the protection of state property can only be legitimate insofar as, among other things, it reinforces legal certainty. The same applies to the aim of providing greater protection for the agricultural and non-agricultural domains of the state and to the fight against corruption.

38. The Commission is pleased to note that the draft code makes real progress by introducing, in particular, an electronic register of state-owned estates, bringing together, at least in part, scattered texts and formalising a number of procedures that were not previously formalised. The objectives of strengthening the state's agricultural and non-agricultural domains and fighting corruption are also worthy of support.

39. The way in which the objectives pursued are achieved by the draft Code will be analysed below, in the light of international standards.

III. Analysis of the draft code

40. After a brief presentation of the international reference standards (A), the compatibility of several provisions of the draft code with international standards of protection of property rights will be presented under four main categories.

41. The first category concerns the principle of the rule of law, in particular the principle of legality. The second category will deal with the principle of proportionality of the infringement in relation to the public interest that justified it. The third category relates to the procedural guarantees provided for in the draft code. Finally, the analysis will address the question of the penalties provided for in the draft code and their proportionality.

A. Presentation of international standards on property rights

1. The right to protection of property

42. The right to protection of property is guaranteed by Article 1 of Protocol I to the ECHR (see para. 26 above). Property" within the meaning of Article 1 of Protocol I includes rights in rem and personal rights. The term includes immovable and movable property as well as other property interests¹⁰. The fact that a property right is revocable in certain circumstances does not prevent it from being considered as "property" protected by Article 1, at least until it is revoked¹¹.

43. Article 1 of Protocol No. 1 thus contains three distinct norms. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, sets out the principle of respect for property. The second, contained in the second sentence of the same paragraph, concerns deprivation of property and makes it subject to certain conditions. The third, contained in the second paragraph, recognises the power of States, inter alia, to regulate the use of property in accordance with the general interest¹². To be considered compatible with Article 1 of Protocol No. 1, the interference must meet certain criteria: it must comply with the principle of *legality* and pursue a *legitimate aim* by means that bear a reasonable relationship of *proportionality* to the aim¹³.

¹⁰ European Court of Human Rights, [Guide on Article 1 of Protocol No. 1 - Protection of property \(coe.int\)](#)

¹¹ ECtHR *Bélané Nagy v. Hungary* [GC], para. 75; *Krstić v. Serbia*, para. 83, and *Čakarević v. Croatia*, para. 52; *Moskal v. Poland*, para. 40; *Grobelyny v. Poland*, para. 58.

¹² [Guide on Article 1 of Protocol No. 1 - Protection of property \(coe.int\)](#) para. 78.

¹³ ECtHR *Beyeler v. Italy* [GC], para. 108-114.

2. The legality of interference by public authority

44. It follows from the ECtHR case law on the legality of interference with the right to protection of property that the existence of a legal basis in domestic law is not sufficient, as such, to satisfy the principle of legality. In addition, this legal basis must have a certain quality, that of being compatible with the rule of law and offering guarantees against arbitrariness¹⁴.

45. Interference by the public authority with the enjoyment of the right to respect for property can only be justified if it serves a *legitimate public (or general) interest*. The Court considers that the following objectives fall within the notion of public interest within the meaning of this provision:¹⁵

- the adoption of urban and land use plans¹⁶;
- obtaining land in the context of a local land use plan¹⁷;
- prevention of tax fraud¹⁸;
- confiscation of illegally obtained funds¹⁹;
- environmental protection²⁰;
- The preservation of cultural heritage and, where necessary, its sustainable use, can be aimed at protecting the historical, cultural and artistic roots of a region and its inhabitants in addition to maintaining a certain quality of life. As such, they embody an essential value, the protection and promotion of which must be the responsibility of the public authorities²¹.

46. In order to be compatible with the general standard set out in the first sentence of Article 1(1) of Protocol No. 1, an interference with the applicant's right to respect for his property must, in addition to being prescribed by law and serving a public purpose, also strike a "*fair balance*" between the requirements of the general interest of the community and the need to safeguard the fundamental rights of the individual.

47. In other words, in each case where a violation of Article 1 of Protocol No. 1 is alleged, the Court must ascertain whether, as a result of the State's action or inaction, the person concerned has had to bear a disproportionate and excessive burden. In assessing compliance with this requirement, the Court must make a comprehensive examination of the various interests at stake, bearing in mind that the Convention is intended to safeguard rights that are "concrete and effective". In this respect, it must be stressed that uncertainty - whether legislative, administrative or related to the practices of the authorities - is a factor that must be taken into account in assessing the State's conduct.²²

48. In order to assess whether the contested measure strikes the right balance and, in particular, whether it does not impose a disproportionate burden on the applicant, the compensation arrangements provided for in the domestic legislation must be taken into account.²³

49. In view of the above and in order to mention only the most salient elements of the draft code,

¹⁴See ECtHR *East West Alliance Limited v. Ukraine*, para. 167; *Ünsped Paket Servisi SaN. Ve TiC. A.Ş. v. Bulgaria*, para. 37; *Vistiņš and Perepjolkins v. Latvia* [GC], para. 96; European Court of Human Rights, [Guide on Article 1 of Protocol No. 1 - Protection of property \(coe.int\)](#) p. 26.

¹⁵ See ECtHR [Guide on Article 1 of Protocol No. 1 - Protection of property \(coe.int\)](#) para. 128.

¹⁶ ECtHR, *Sporrong and Lönnroth v. Sweden*, para. 69, and *Cooperativa La Laurentina v. Italy*, para. 94

¹⁷ ECtHR, *Skibińscy v. Poland*, para. 86

¹⁸ ECtHR, *Hentrich v. France*, para. 39

¹⁹ ECtHR, *Honecker and others v. Germany*

²⁰ ECtHR, *G.I.E.M. S.R.L. and Others v. Italy* (Merits) [GC], para. 295; *Bahia Nova S.A. v. Spain* (dec.), and *Chapman v. the United Kingdom* [GC], para. 82

²¹ ECtHR *Beyeler v. Italy* [GC], para. 112; *SCEA Ferme de Fresnoy v. France* (dec.); *Debelianovi v. Bulgaria*, para. 54, *Kozacıoğlu v. Turkey* [GC], para. 54

²² [Guide on Article 1 of Protocol No. 1 - Protection of property \(coe.int\)](#) para. 139 and 140.

²³ [Guide on Article 1 of Protocol No. 1 - Protection of property \(coe.int\)](#) para. 170.

the analysis will focus on some components of the principles listed above and will analyse the draft code in terms of the necessary legality (B), procedural safeguards (C) and the principle of proportionality of penalties for infringement of state property (D).

B. The principle of legality from the point of view of the foreseeability and intelligibility of domestic law

50. The principle of legality presupposes the existence of sufficiently accessible, precise and predictable norms of domestic law²⁴.

51. The requirement of foreseeability means not only that the law should, if possible, receive the necessary publicity before being enacted and that its effects should be foreseeable, but also that its wording should be sufficiently precise and clear to enable legal subjects to regulate their conduct in accordance with its rules²⁵.

52. The relevant standard must be stated with sufficient precision to enable the citizen to regulate his conduct by foreseeing, to a degree that is reasonable in the circumstances of the case, the consequences that may follow from a particular act. These consequences need not be foreseeable with absolute certainty, as excessive rigidity is not desirable²⁶.

53. The requirement of foreseeability requires that the relevant norm be stated with sufficient precision so that the citizen can regulate his or her behaviour by foreseeing, to a degree that is reasonable in the circumstances of the case, the consequences that may follow from a particular act²⁷.

54. The requirement of foreseeability is often linked to the imperative of absence of arbitrariness and the requirement of procedural guarantees. In particular, a norm is "foreseeable" when it offers some guarantee against arbitrary infringements by public authorities. The lack of procedural safeguards in the draft Code will be considered separately in the section (see below para.107-125).

55. In the light of the above principles, the draft Code requires considerable further work to clarify and complete the provisions, so that they meet the criteria of legality and predictability described above.

1. Unclear definitions

56. The preliminary title is intended to define the domains of the state; however, the descriptive framework is open-ended and not very precise.

57. The definition given in Article 1^{er} is too restrictive, in that it does not include movable property. Its scope is limited to the components of this field, while the regime applicable to them is also addressed.

58. In its Article 2, the scope *rationae personae* of the code is ambiguous, as are, *rationae materiae*, the modes of appropriation of the property concerned.

59. The persons subject to the code are not precisely identified, since "any body" having a state purpose may be so identified.

²⁴ ECtHR, *Lekić v. Slovenia*, para. 95; *Centro Europa 7 S.R.L. and di Stefano v. Italy* [GC], para. 187; *Hutten Czapska v. Poland* [GC], para. 163; *Vistiņš and Perepjolkins v. Latvia* [GC], para. 96-97).

²⁵ Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, para.58.

²⁶ ECtHR *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], para. 141.

²⁷ [Guide on Article 1 of Protocol No. 1 - Protection of property \(coe.int\)](#) para. 118.

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59. State appropriation of property is not only the result of law or natural phenomenon but also of "any other manner", which is excessively broad.
60. Similarly, its Articles 3 and 4 only envisage partial protection of state property.
61. In particular, the market value of state-owned property is not subject to specific protection.
62. In Title I, which determines the components of the State domain, in Article 7, the definition of the public domain is based on vague and incomplete criteria.
63. During the interviews, the Tunisian authorities considered that this definition is usefully supplemented by case law, but it is arguably up to a sufficient legal basis, in this case the law, to set clear, objective and rational criteria.
64. Article 8, which defines the extent of the public domain of the State, relies on the obscure notion of "natural property" and proceeds with an enumeration mixing broad categories such as "surface and underground natural resources" or specific property such as "religious monuments", which may be a source of uncertainty or even conflict given the reserve of particular texts that is arranged.
65. Article 10, formulated with broad and unclear notions, provides for the delimitation of the public domain of the State. This delimitation must be "carried out in accordance with the procedures provided for in the texts specific to each type". It is not clear to which procedures reference is made in the sense that it is left to specific texts to determine the procedural guarantees, but reference is made to the different "types", a term which seems to refer, in an inconsistent manner, to the distinction between private and public domain.
66. The distinction between the public and private domain is equally difficult in Article 11. This article allows for the incorporation of private real estate into the public domain of the State when such property is "necessary": the notion of "necessity" should be defined, and the procedures and criteria for determining necessity should be stipulated.
67. The third book organises the control of the State over its domain.
68. In Article 33, the reservations attached to this control, which are related to internal security and national defence, are particularly vague and extensive.
69. In the fourth book, which establishes registers of state property, Article 39 makes the 'management' of state property conditional on its being recorded and updated in the registers. This condition is elliptical and confusing, as it does not specify the type of estate or the processes involved, nor the legal consequences of failure to comply with this formality.
70. The lack of clarity and thus predictability is also to be found in the parts of the draft code relating to public-private partnership contracts.
71. In this respect, in Title II, which deals with the non-agricultural private domain of the State, the second chapter concerns temporary occupation. Article 42 deals with the occupation of the private domain and "parts" of the public domain in an indissociable manner, which seems imprecise and above all a source of confusion, given the protections, different in content and scope, that are provided for by the law.
72. Moreover, the Tunisian authorities, during the interviews, specified that in reality the management of the State's public domain is still covered by other texts. Furthermore, there are no provisions relating to occupation fees, as the draft is still unclear on the applicable rules.

73. In Chapter IV regulating the partnership between the public and private sectors, Article 49, which provides that 'the private domain of the State may be exploited within the framework of partnership contracts between the public and private sectors', not only blurs the separation between the private and public domains, but also does not regulate the procedure or the duration of partnership contracts between the public and private sectors relating to the private non-agricultural domain of the State.

74. Article 72 introduces a largely discretionary exchange procedure, as evidenced by the generic reference to an "administrative act", whereas such a transfer modality carries with it a risk of circumventing the ordinary law procedure. This article is also inadequate from the point of view of the procedural guarantees examined below (para.107-125).

75. Title III on State-owned agricultural property also contains broadly worded and unclear provisions. There is also little or no mention of the procedures in place (see below for the deficit on procedural issues).

76. The Venice Commission concludes that many provisions are unclear, too open-ended and indeterminate. Moreover, the explanatory memorandum attached to the draft code (see CDL-REF(2022)020) has not been sufficiently developed and detailed to provide clarification. The Commission recommends that the definitions analysed above be completed and developed, and that a more detailed explanatory report be drafted.

2. Missing notions or definitions

77. The reading of the Code and the exchanges with the Tunisian authorities confirmed that the draft Code on State Property mainly but incompletely regulates its private domain.

78. It is difficult, if not impossible, to determine the number of texts relating to both the public and private domains with which the present draft code must be linked. The improved intelligibility of the applicable rules that is being sought thus appears to be partly compromised.

79. Without going into an exhaustive list, the following shortcomings can be noted, for example:

80. Article 9 introduces confusion by creating a specific regime for the property of public establishments, without any real justification in relation to the general framework, which is detrimental to the intelligibility of the domestic legal norm.

81. The second Title regulates the non-agricultural private domain of the State, and its first book concerns the management of this domain. The first chapter contains general provisions.

82. Article 40 lists the methods of management of the State's non-agricultural private domain and provides guarantees that are more procedural than substantive. In particular, there is no rule protecting public property.

83. In the eighth chapter, Article 65 provides for the possibility of making contributions in kind, which is not a method of management but of transferring property, without specifying the scope of application or the guarantees to ensure the protection of property and public funds.

84. In Title III on State-owned agricultural property, Article 94 provides that a lessee who voluntarily abandons the leased property may have the contract terminated. No information is given on what is meant by "voluntarily abandoning". In view of the consequences this may have, the law should be more precise in order to satisfy the principle of legality.

85. Articles 100 and 101 mention royalties. These are estimated by "experts of the State's domains". No information is given, however, on the qualifications and appointment of these

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experts, nor on the criteria they apply to determine the level of royalties, which is essential to ensure impartiality.

86. Title V is brief, containing only one article. Article 130 provides for a transitional regime for contracts relating to state-owned agricultural property concluded before the publication of the law. No transitional regime is provided for other categories of property. It is difficult to understand why transitional arrangements are not provided for all categories of property.

87. To sum up, the Venice Commission recommends that the missing concepts, in particular the distinction between private and public property, be added to the draft Code in order to comply with the obligations of legality and predictability.

3. Many derogations or exceptions

The draft code is characterised by a large number of derogations or exceptions.

a. Direct agreement (the direct agreement procedure)

88. The draft Code provides in several places, including Articles 17, 53, 68, 69 (and 79 in Title III), that the State may dispose of property "by direct agreement".

89. Article 17 opens up an exception for over-the-counter acquisition which is not sufficiently regulated, its scope being particularly broad and the procedural rules remaining undefined.

90. It may be noted, for example, that in the fifth chapter, Article 53 provides for the possibility of leasing property, by way of derogation from the auction procedure, by "direct agreement", without any limitation being imposed, which is likely to compromise the requirement of transparency visibly pursued here by the law.

91. Article 69 provides for the methods of disposal. Real estate may only be disposed of "by public auction or by closed envelope", or by "any other method ensuring equality, competition and transparency". In this respect, the article lays down a procedure which is strongly inspired by the principles governing public procurement, insofar as it provides guarantees of transparency, equality and competition. Paragraph 2 of the same article, however, provides that buildings may be transferred by "direct agreement". Once again, this possibility is not precisely and sufficiently regulated, with the risk of compromising the effectiveness of the ordinary law procedure.

92. In the third title on State-owned agricultural property, the second book of this title contains provisions on leasing. Article 78 provides for two methods of leasing state-owned agricultural buildings, i.e. by public auction and by tender. The third paragraph provides for the possibility of leasing by direct agreement, in "*exceptional cases*" without any further specification.

93. Direct agreement contracting is also mentioned for other kinds of contracts in this title, again without any procedure or guarantee of impartiality.

94. The second book concerns leases. Its fourth chapter provides for a lease by direct agreement in Article 88. As such, it is subject to the same criticism as other similar provisions.

95. The ninth book deals with the regularisation of old land situations and in Article 105 again provides for a case of alienation by direct agreement. Article 106 does not regulate the modalities of this alienation or the determination of the price, leaving it to a decree to specify the applicable rules, in a discretionary, even arbitrary manner.

b. Other derogations

96. The tenth book creates an authorisation for alienation by decree.

97. Article 116 provides for a purely discretionary power to dispose of agricultural property in the State domain by decree without providing for any guarantees of substance or form.

98. The Commission recommends that the exceptions and derogations to the ordinary law of public procurement be considerably reduced and, where they are maintained, that they be framed by procedural safeguards clearly set out in the law.

4. Numerous references to decrees

99. The draft code contains numerous references to implementing decrees on important issues. For example:

100. In the chapter on the creation of the state public domain, Articles 12 and 13 respectively provide for the declassification of a property from the state public domain so that it can be incorporated into the state private domain, and for transfers of management between public entities. The requirement of a decree introduces an asymmetry with the classification procedure, a source of possible conflicts of competence between the state authorities. The procedures lack transparency and there is a risk that the transfer of management will be purely discretionary in the absence of the guarantees set out in the law.

101. In Chapter 3 on the recognition and delimitation of the State's private domain, Articles 29 and 30 establish a regional commission in charge of the procedure, but do not set out any guarantees, for example of independence and impartiality, by referring, far too broadly, to a decree the task of determining its powers, composition and operating rules. Similarly, the approval by decree of the report drawn up by the commission is not a guarantee of independence.

102. In the ninth book, which deals with the regularisation of old land situations, Article 106 does not regulate the procedures for alienation by direct agreement provided for in Article 105, nor the determination of the price, leaving it to a decree to specify the applicable rules, in a totally discretionary manner.

103. The tenth book succinctly creates in its only article an authorisation for alienation by decree.

104. Article 89 authorises leasing by decree in agricultural investment projects of "national importance". The article fails to mention, however, the procedures in this regard to ensure the impartiality of the steps taken in this context.

105. Article 116 provides for a purely discretionary power to dispose of agricultural property in the State domain by decree without providing for any guarantees of substance or form.

The Venice Commission recommends that the exceptions and derogations from the ordinary public procurement regime, such as direct agreement procedures or references to decrees, be considerably reduced. Procedural rules, identification of authorities and decision-making procedures should also be further defined. The draft code could also provide for a deadline for the adoption of the mentioned decrees.

C. Effective procedural safeguards and judicial protections

106. The principles of the rule of law²⁸ and legality also imply that procedural safeguards are determined in a clear, predictable manner, in which the rights of the persons concerned are clearly established.

107. Any interference with the exercise of the right to peaceful enjoyment of property must be accompanied by procedural safeguards that provide the person or entity concerned with a reasonable opportunity to present his or her case to the competent authorities, so as to allow an effective challenge of the measures at issue. In order to ensure that this condition is met, it is necessary to consider all applicable judicial and administrative procedures²⁹.

²⁸ See Venice Commission Rule of Law Checklist, CDL-AD(2016)007.

²⁹ See ECtHR, *Lekić v. Slovenia* [GC], para. 95; *Jokela v. Finland*, para. 45; *Capital Bank AD v. Bulgaria*, para. 134; *Project-Trade d.o.o. v. Croatia*, para. 82); *Ibid.*

108. Procedural safeguards in the implementation of measures interfering with the right to respect for one's property must be taken into account. It follows from the case law of the ECtHR that the person concerned must be given an adequate opportunity to present his or her case to the competent authorities in order to effectively challenge such measures, alleging, where appropriate, irregularity or the existence of arbitrary or unreasonable conduct³⁰. These procedural guarantees are inherent to the principle of legality³¹. The ECtHR has recognised the need for the law to set realistic timetables of mandatory value, taking into account each stage of the process³².

109. The draft code reveals a lack of framework provisions both in terms of the definition of the procedural rules applied and in terms of the procedural guarantees granted to the person, the following articles being of note in this respect:

110. In Title I, Book 1 on the public domain of the State, of the draft code, Articles 12 and 13 provide respectively for the declassification of property from the public domain of the State so that it can be incorporated into the private domain of the State, and the transfer of "the management of parts of the public domain of the State from one public entity to another". This is only possible by decree. In addition to the fact that the requirement of a decree introduces an asymmetry with the classification procedure, a source of possible conflicts of competence between the state authorities, the procedures lack transparency and the transfer of management risks being operated in a purely discretionary manner in the absence of guarantees laid down by the law. Who makes the decision? How can the impartiality of these decisions be ensured?

111. In Book II on the private domain of the State, in Chapter 2 dealing with the modes of acquisition of the private domain of the State, while Article 16 mentions that the purchase is made, as a general rule, according to the procedures of the public order, Article 17 opens an exception of acquisition by the possibility of purchase by direct agreement, i.e. by mutual agreement, with a rather broad field of application, the procedural rules remaining undefined. The decision-making process is not defined either.

112. In Article 20, the procedure for the incorporation of property without owners is just as weakly regulated. For example, no form or time limit is provided, nor is any competent authority designated.

113. In Article 23, the same criticisms can be made of the rules applicable to prescribed sums and securities. The requirement that limitation periods be published in the Official Journal six months before their expiry is particularly unclear.

114. In Article 25, the appropriation by the State of land and sea wrecks is based on a presumption that is not framed by any procedural guarantee or time limit.

115. Chapter 3 establishes a procedure for the 'recognition and delimitation' of the State's private domain. Articles 29 and 30 relating to the private domain of the State establish a regional commission in charge of the procedure. The administrative commission in charge of the procedure of "recognition and delimitation" of the private domain of the State, provided for in Article 29 of the draft, is given the important and abstract competence "to investigate and reveal what belongs to the private domain of the State" without defining either the applicable procedure or the procedural guarantees of the persons concerned by its decisions.

116. Moreover, appeals by third parties against the 'recognition and demarcation' procedure must be brought before the real estate court, which ratifies the commission's report and has

³⁰ See ECtHR *G.I.E.M. S.R.L. and Others v. Italy* (Merits) [GC], para. 302; *Yildirim v. Italy* (dec.); *Arcuri and Others v. Italy* (dec.), and *Riela and Others v. Italy* (dec.).

³¹ ECtHR, *Lekić v. Slovenia* [GC], para. 95.

³² ECtHR, *Manushaqe Puto and others v. Albania*, No. 604/07 and 3 others, 31 July 2012.

sovereign power of assessment; this implies lengthy procedures and does not seem to offer a sufficient guarantee in view of the infringement of property thus caused.

117. In the third Book, which organises the State's control over its domain, Article 32 gives the agents in charge of this control broad powers to override professional secrecy, an infringement that is not regulated in any way.

118. The tenancy by direct agreement provided for in Article 88 of the draft also lacks clarity as to the procedures and conditions of use.

119. Article 89 authorises leasing by decree in agricultural investment projects of "national importance". However, the article fails to mention the procedures in this regard to ensure the impartiality of the steps taken in this context.

120. In Title III concerning state-owned agricultural property, Article 94 envisages the case of voluntary abandonment of the leased property, which leads to the termination of the contract. No time limit or other procedural guarantee surrounds this procedure, although it has important consequences for the lessee. Subsequently, Article 96 provides for the allocation, where appropriate, of state-owned agricultural property to State services. Once again, no procedure is mentioned in this article.

121. Article 117 provides for the possibility of exchanging agricultural state property for agricultural or non-agricultural property, if necessary, and makes it subject to the intervention of an "administrative act"; this provision is particularly imprecise and does not offer sufficient guarantees, especially from the point of view of transparency, especially since the authority responsible for deciding when there is a "case of need" is not determined at all. During the talks, the Tunisian authorities specified that this exchange will take place by simple contract, without prior publicity, and that the requirement of public utility has not been retained because of the desire to promote investment.

122. In general, the draft Code, particularly in Title III, gives the ministers responsible for state property and agriculture numerous powers, particularly in determining the value of property. There is no mention in the draft Code of mechanisms to ensure the impartiality of these decisions.

123. In conclusion, the Commission notes that in many cases the draft Code does not provide a sufficient legal framework in terms of both the procedural rules applied and the procedural guarantees granted to the individual. Moreover, the transparency and even the effectiveness of the procedures envisaged are not guaranteed, given the large number of exceptions to which they are subject and the involvement of several decision-making authorities. Finally, the legal remedies available under ordinary law do not seem to guarantee the rights of third parties as they stand.

124. The Commission therefore recommends that clear procedural rules be provided so that public property can be adequately protected and the rights of third parties can be guaranteed. Measures to counteract the risk of arbitrariness should be considered.

D. Proportionality and criminal sanctions

125. In order to be compatible with the general standard set out in the first sentence of Article 1 para. 1 of Protocol No. 1, an interference with the applicant's right to respect for his property must, in addition to being prescribed by law and serving a public purpose, also strike a "*fair balance*" *between the requirements of the general interest of the community and the imperatives of safeguarding the individual's fundamental rights*. In other words, in each case where a violation of Article 1 of Protocol No. 1 is alleged, the Court must ascertain whether, as a result of the State's action or inaction, the person concerned has had to bear a disproportionate and excessive burden. In assessing compliance with this requirement, the Court undertakes an overall examination of the various interests at stake, bearing in mind that the Convention is intended to safeguard rights that are "concrete and effective". In this respect, it should be emphasised that

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uncertainty - whether legislative, administrative or related to the practices of the authorities - is a factor that must be taken into account in assessing the State's conduct.³³

126. The purpose of the proportionality test is therefore to establish first of all how and to what extent the applicant has suffered restrictions in the exercise of his right affected by the infringement in question and what adverse consequences the restriction imposed on the exercise of that right has had on his situation.

127. The magnitude of this impact will then be weighed against the importance of the public purpose that the infringement in question was intended to serve. In its examination, the Court takes into account many factors, the list of which is not pre-established. These factors vary from case to case depending on the facts and the nature of the infringement in question³⁴.

128. Title IV, which organises the repression of offences against the State's domains, has serious weaknesses with regard to the principles set out above.

129. According to Articles 119, 120 and 121, the attempt to undermine or damage state property is punishable. The infringement of 'signs identifying the State's landed estates', 'advertising marks' in Article 119, 'movable or immovable property' and the wording 'in any manner whatsoever' in Article 120 and 'materials' in Article 121 are terms that lack precision. These terms are problematic in terms of the principle of legality and legal certainty, as they lack precision and predictability. It is doubtful whether "State property" is clearly recognisable by the litigant.

This is all the more important as sanctions are foreseen.

130. Article 120 provides for a prison sentence of up to 3 years for "anyone who infringes upon the property of the State". As property is not clearly defined, the level of the penalty seems excessive.

131. Moreover, the reference to 'without capacity' is ambiguous, as it is not clear whether it refers to the capacity of discernment or to another capacity. If the law refers here to capacity of discernment, it is difficult to consider that the perpetrator can act culpably if he or she does not have the capacity to appreciate the unlawfulness of his or her act. In this article, as in the previous one, it is provided that the attempt may also lead to a sanction. However, this is not defined, which is problematic.

132. The same criticisms of vagueness, with regard to the principle of legality, can also be made of the mitigating circumstances provided for in Articles 121 and 123. Article 124(1) provides for the mitigation of the penalties provided for in the preceding articles. It is not clear why the penalty should be mitigated if the offence takes place, for example, at night.

133. Finally, according to Article 125, the good faith of the offender cannot be taken into account, and "may in no case be considered as an excuse". It cannot be assumed that the commission of the offences provided for in Articles 119 to 123 of the draft is always premeditated (see, for example, the case of destruction of signs identifying State property). It therefore seems that the provision of such an irrebuttable presumption on the absence of mitigating circumstances, such as the good faith of the offender or the possibility of committing negligence, does not sit well with the principle of proportionality.

134. In conclusion, the Commission notes that, in general, sanctions are particularly severe and mitigating circumstances are unclear or non-existent. The absence of mitigating circumstances, such as good faith, is difficult to reconcile with the principle of proportionality. This is particularly problematic in view of the open-ended and indeterminate nature of many of the provisions of the draft Code.

³³ [Guide on Article 1 of Protocol No. 1 - Protection of property \(coe.int\)](#) para. 139 and 140.

³⁴ *Ibid*, p. 32.

135. The Commission recommends reconsidering the sanctions provided for in the draft and introducing mitigating circumstances, such as good faith, in order to meet the requirements of proportionality.

IV. Conclusions

136. The Venice Commission expressly reserves its position on the compatibility of the current political and legal situation with the principles of democracy, rule of law and respect for human rights, and in particular on the procedure for the preparation and "adoption" of this Code in the light of the list of Rule of Law Checklist.

137. The Commission is of the opinion that the draft Code pursues a legitimate aim and achieves real progress through a certain simplification of the law by bringing together some texts and formalising some procedures.

138. However, the analysis shows that the draft contains numerous shortcomings with regard to international standards for the protection of the right to respect for property.

139. Indeed, many concepts and rules remain imprecise and insufficiently framed in law, leaving the state authorities with a significant degree of discretion.

140. In order to make the draft code compatible with the above-mentioned international standards, the Venice Commission recommends in particular to:

- Addressing the lack of notions, including a better definition of private and public goods;
- Bring more clarity and determination to the formulation of standards by avoiding overly open formulations;
- Reduce considerably the exceptions and derogations to the common regime, such as direct agreement procedures; when they are maintained, frame them with clearly established procedural guarantees;
- Introduce clear procedural rules so that public property can be adequately protected and the rights of third parties can be guaranteed;
- Review the level of sanctions envisaged, bearing in mind the need for proportionality;
- Introduce mitigating circumstances, including good faith.

141. The Venice Commission remains at the disposal of the Tunisian authorities.