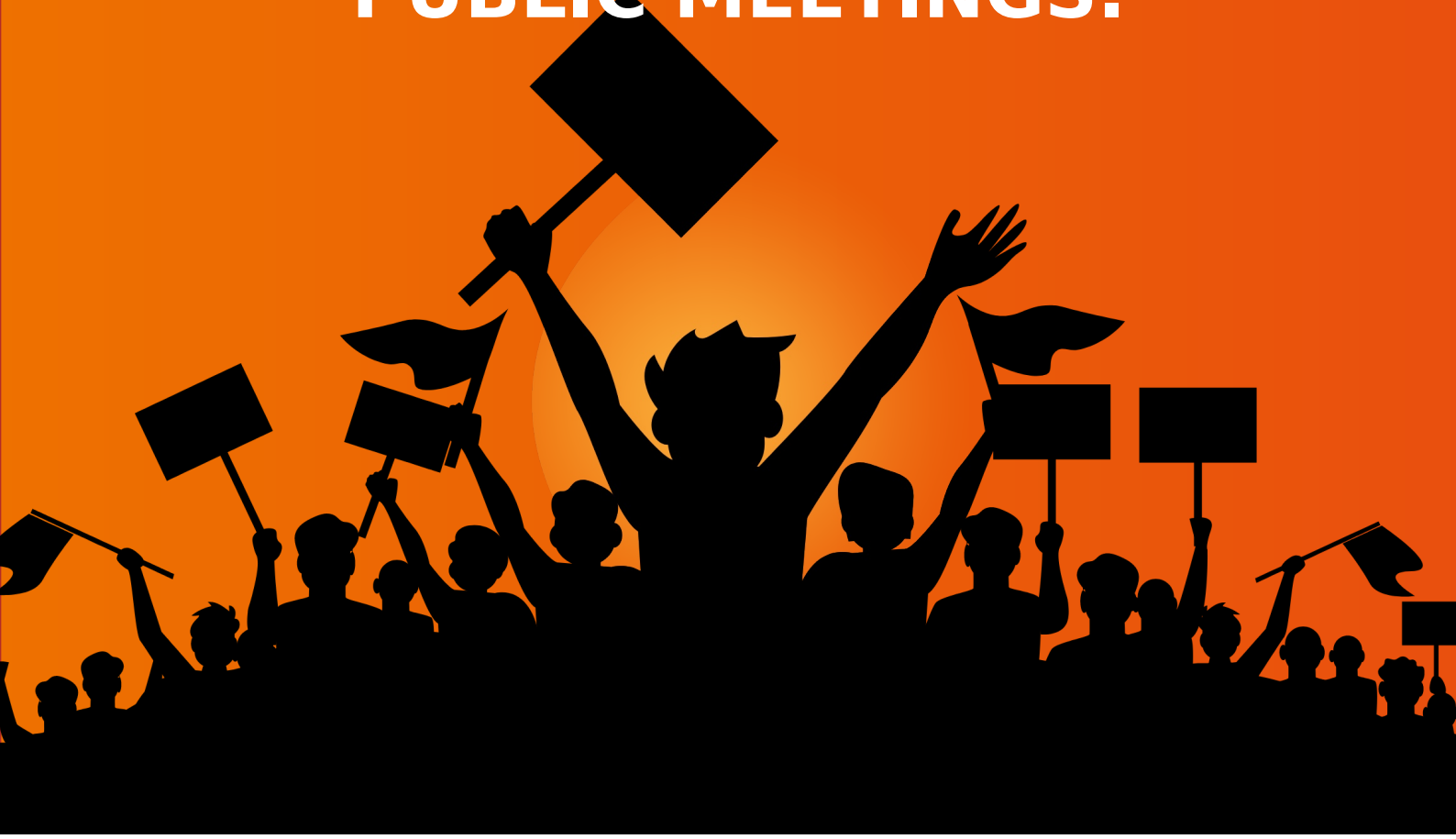
CRITICAL ANALYSIS OF LAW N°1/28 OF 05 DECEMBER 2013, REGULATING DEMONSTRATIONS ON THE PUBLIC SPACE AND PUBLIC MEETINGS.



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INTRODUCTION

1. Background and purpose of the study

On 05 December 2013, Law n°1/28 regulating demonstrations on the public splace and public meetings in Burundi (referred to here as 'the 2013 Law') was promulgated. The text repeals decree n° 100/187791 of 31 December 1991 on the same subject.

The purpose of this law is particularly sensitive in Burundi's socio-political life. Less than two years after the law came into force-on 24 April 2015-the National Council for the Defense of Democracy-Force for the Defense of Democracy (CNDD-FDD) decided to present the late Pierre Nkurunziza, who was about to complete his second term as President of the Republic, for a third term in the same position, in violation of the Constitution and the Arusha Agreement for peace and reconciliation in Burundi. Civil society organizations, opposition political parties and a large section of the leaders of the ruling party itself called for demonstrations to protest this decision. These demonstrations were violently repressed. Thousands of Burundians were murdered, and hundreds of thousands were forced into exile.[1] Civil society organizations were disbanded, their leaders forced into exile or prosecuted in the courts.[2] The United Nations Human Rights Council responded by setting up a Commission whose main task was to investigate the human rights violations committed during this period, assess their scale, identify the alleged perpetrators, and submit recommendations to hold those concerned to account. [3] On 08 October 2021, the Council replaced the Commission with the mandate of the Special Rapporteur.[4] The International Criminal Court opened a preliminary examination on 25 April 2016, which led to the opening of a full investigation on 25 October 2017. This investigation - which is ongoing at the time of writing - concerns crimes against humanity allegedly committed in Burundi and/or by Burundian nationals between 26 April 2015 and 26 October 2017.[5]

In political discourse and in private conversations between Burundians, April-May 2015 in Burundi is always referred to as 'the period of demonstrations'. Although this evocation

[1] See, in particular, the various reports by the Commission of Inquiry and the Special Rapporteur of the United Nations Human Rights Council, available here: https://www.ohchr.org/fr/countries/burundi(source last accessed 2.9.2023).
[2] See Human Rights Watch, 'April 2015 - June 2020: A Chronology of the Repression of Media and Civil Society in Burundi', 26 May 2021, available here.: https://www.hrw.org/fr/news/2021/05/26/avril-2015-juin-2020-chronologie-de-la-repression-des-medias-et-de-la-societe (last accessed on 02 September 2023).
[3] Resolution 33/24 adopted by the Human Rights Council on 30 September 2016. The Commission's mandate was renewed on 04 October 2017 by resolution 36/19, on 28 September 2018 by resolution 39/14, on 27 September 2019 by resolution 42/26 and on 6 October 2020 by resolution 45/19.
[4] Resolution 48/16 adopted by the Human Rights Council on 8 October 2021.
[5] The decision of Pre-Trial Chamber III authorising the opening of the investigation can be read here: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_07031.PDF

elicits varying reactions depending on political sensitivities, Burundian public opinion is unanimous on the fact that the period marked a real break in Burundi's socio-political life.

It is certain that it was not the shortcomings of the 2013 law that led to the catastrophic management of the 2015 demonstrations by the Burundian authorities (police and administration).
The damage would have been much less - or avoided altogether - if the authorities had simply followed the legal framework in force at the time, despite its shortcomings. Nevertheless, the 2013 law itself already contained problematic provisions that need to be reviewed if the opening of civic space is to become a reality. In other words, if democracy and the rule of law are to take root, the search for a culture of respect for the law and quality legal frameworks must go hand in hand.

Beyond the events of 2015, the political life of Burundi today makes it essential to continually reflect on the exercise of freedom of assembly and demonstration. In July 2023, the Human Rights Committee observed that "in practice, opposition parties such as the National Congress for Freedom (CNL) and trade unions are unable to exercise their right, either because of a refusal to authorize the demonstration, or because of attacks or persecution by the forces of law and order or the Imbonerakure, who prevent the demonstration from taking place."[6]

The purpose of this study is to identify and analyze the problematic provisions of the 2013 law (first document according to the terms of reference). The aim is to propose amendments to bring the legislative framework for the exercise of freedom of assembly and demonstration into line with international human rights law and the Burundi Constitution (second document in the terms of reference).

2. Methodological approach and reference standards

To diagnose the 2013 law, this study compares it with the content of the rules on freedom of assembly and expression set out in the international and regional instruments binding Burundi and in the Constitution. The hierarchy of norms requires the law under review to comply with these instruments as well as with the Constitution. This study will show that this is unfortunately not the case for some of the provisions of this law.

The Constitution of the Republic of Burundi of 07 June 2018 is abundantly clear on its own

[6] Human Rights Committee, Burundi: The Human Rights Committee is concerned by the incidence of violations of the freedom of peaceful assembly and participation in public life, and by allegations of disappearances and murders of political activists and journalists by the forces of law and order and groups close to the government, 03 July 2023,

place in the Burundian normative order and on what this implies in the country's legal order when it states as follows:

"Fundamental rights must be respected throughout the legal, administrative and institutional order. The Constitution is the supreme law. The legislature, the executive and the judiciary must uphold it. Any law that does not comply with the Constitution is null and void."[7]

This provision is relevant not only to the rights and freedoms enshrined directly in the Constitution, but also to those set out in the international and regional instruments to which Burundi is a party.
The Constitution incorporates them into the Burundian legal system by providing as follows: "The rights and duties proclaimed and guaranteed by duly ratified international human rights instruments form an integral part of the Constitution." [8]

With regard to international and regional instruments, this study places particular emphasis on the International Covenant on Civil and Political Rights (ICCPR)[9] and the African Charter on Human and Peoples' Rights (ACHPR)[10] as interpreted by the Human Rights Committee and the African Commission on Human and Peoples' Rights respectively. Article 21 of the ICCPR provides as follows: "The right of peaceful assembly is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law, and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."[11] Article 11 of the ACHPR in turn provides as follows: "Everyone has the right to freedom of assembly with others. This right shall be exercised subject only to such restrictions as are prescribed by law or regulation, in the interests of national security or the safety of others, of health or morals or of the rights and freedoms of individuals."[12]
The fact that neither instrument enshrines the 'freedom to demonstrate' does not pose any legal problem. The Human Rights Committee considers that demonstrations are one of the forms of peaceful assembly.

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[7] Article 48.
[8] Article 19 (emphasis added).
[9] Article 21 of the ICCPR provides as follows: "The right of peaceful assembly is recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others". Reference may also be made to Article 19(2). The reason for including the right to freedom of expression is that some people see demonstrations as a form of 'physical' or 'collective' expression. See in particular Jean-Louis Vasseur, 'Libertés publiques : La liberté de manifester, une liberté conditionnée et menacée', Le Courrier des maires, no 323 - May 2018.
[10] Within the ACHPR, see in particular Article 11, which provides as follows: "Everyone has the right to freedom of assembly with others. This right shall be exercised subject only to such restrictions as are necessary under the laws and regulations, in particular in the interests of national security, the safety of others, health, morals or the rights and freedoms of individuals". See also article 9, 2.
[11] The full text of the pact can be found here: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights(source last accessed 02 September 2023).
[12] The full text of the pact can be found here : https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_f.pdf

Indeed, the peaceful assembly protected under Article 21 of the ICCPR can take a variety of forms, including demonstrations, protests, rallies, marches, sit-ins, candlelight vigils and flash mobs.[13] Moreover, it does not matter whether the gathering is static or mobile.[14]

In some foreign legal systems, demonstrations are considered to be a means of exercising freedom of expression. Article 10 of the Constitution of Senegal provides as follows: "Everyone has the right to express and disseminate his opinions freely by word, pen, image and peaceful march, provided that the exercise of these rights does not undermine the honor and consideration of others or public order."[15] Some authors see demonstrations as a form of "physical" or "collective"[16] expression. This approach is not fundamentally different from that of the International Covenant on Civil and Political Rights, which protects demonstrations as a form of assembly. Indeed, in essence, the freedom to assemble and the freedom to express oneself cannot be separated from each other without great difficulty. In most cases, the former is a means to the latter. Thus, according to the Human Rights Committee, "the right to peaceful assembly is a fundamental human right that enables individuals to express themselves collectively and to help shape the society in which they live." [17]

The Human Rights Committee and the African Commission on Human and Peoples' Rights have already produced a substantial body of case law on freedom of assembly and expression. They have also produced standards/guidelines to guide States in fulfilling their obligations in these areas. Two of these will draw our particular attention. These are, for the Human Rights Committee, "General Comment N°. 37 (2020) on the right to freedom of peaceful assembly"[18] and, for the African Commission on Human and Peoples' Rights, "Guidelines on freedom of association and assembly in Africa."[19] As noted above, the Constitution of the Republic of Burundi of 07 June 2018 incorporates the rights and freedoms enshrined in these instruments.[20] It also directly enshrines these freedoms. Regarding freedom of assembly, it is thus provided as follows in Article 32: "freedom of assembly and association is guaranteed, as is the right to found associations or organizations in accordance with the

[13] HR Committee, General Comment n.37 (2020) on the right to freedom of peaceful assembly (Article 21), 129th Session (29 June-24 July 2020), paragraph 6.
[14] HR Committee, General Comment n°.37 (2020) on the right to freedom of peaceful assembly (Article 21), 129th Session (29 June-24 July 2020), paragraph 6.
[15] Article 10 of the Constitution of Senegal of 7.01.2001 (as amended to date) (emphasis added).
[16] See in particular Jean-Louis Vasseur, 'Libertés publiques : La liberté de manifester, une liberté conditionnée et menacée', Le Courrier des maires, n° 323 - May 2018. See also Conseil constit, 4-4-19, decision n°. 2019-780, 4 April 2019.
[17] HR Committee, General Comment n°37(2020) on the right to freedom of peaceful assembly (Article 21), 129th Session (29 June-24 July 2020), para 1. To read this comment, see: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsrdB0H1l5979OVGGB%2BWPAXj3%2Bho0P51AAHSqSubYW2%2FRjpx65WYTJlg4IbLTUz3pDilW4CrHIIIls%2FYX6qNuk6Ze0omKuUloLgpOxEJyoDmb
[18] HR Committee, General Comment n.37(2020) on the right to freedom of peaceful assembly (Article 21), 129th Session (29 June-24 July 2020.
[19] African Commission on Human and Peoples' Rights: Guidelines on Freedom of Association and Assembly in Africa, adopted at its 60th Ordinary Session held in Niamey, Niger from 8 to 22 May 2017.
[20] Article 19.

law."[21] Article 31 of the Basic Law also recognizes freedom of expression, stating as follows: "Freedom of expression is guaranteed. The State shall respect freedom of religion, thought, conscience and opinion."[22] It is therefore correct to conclude that, under Burundian law, the freedoms of assembly and expression are doubly enshrined in the Constitution: directly and indirectly.

3. Content of the study

The main thrust of the study is an analysis of the provisions of the 2013 law that are deemed problematic, with a view to proposing amendments where appropriate. Before doing so, however, we believe it is relevant to identify the precise changes made by this law in relation to the decree it repeals. In some respects, the 2013 Act introduces innovations that improve the legal regime governing freedom of assembly and demonstration. In some other respects, however, the legislator is backtracking on advances already made in 1991. In fact, the 1991 decree was not the first in this area and had, at the time, introduced innovations in relation to the texts it repealed, namely the O.R.U. (Ruanda-Urundi Ordinances) of 31.1.1959 and 18 January 1962.[23]

[21] http://www.presidence.gov.bi/wp-content/uploads/2018/07/constitution-promulguee-le-7-juin-2018.pdf
[22] http://www.presidence.gov.bi/wp-content/uploads/2018/07/constitution-promulguee-le-7-juin-2018.pdf
[23] O.R.U. No. 111/29 of 31 January 1959 on public demonstrations and public meetings (B.O.R.U., p. 155) and O.R.U. No. 111/6 of 18 January 1962 on public gatherings (B.O.R.U., p. 43)

II

OVERVIEW OF THE INNOVATIONS AND RETROPROCESSING OF LAW NO. 1/28 OF 05 DECEMBER 2013 IN RELATION TO THE DECREE OF 31 DECEMBER 1991 REGULATING PUBLIC MEETINGS AND DEMONSTRATIONS ON THE PUBLIC SPACE.

The 2013 Act defines most of the key concepts it uses.[24] This will make them easier to interpret and apply. The 1991 decree only defined the notion of public meeting.[25] The fact that the 2013 law defines its key concepts can be seen as a step forward. This does not mean that the definitions given are perfect. We will come back to this.

At the same time as defining its key concepts, the 2013 Act delimits its scope relatively precisely. The legislator's approach has been to indicate the types of meetings/assemblies to which the 2013 Act does not apply. The first are private meetings/events. To distinguish it from a private meeting, the legislator envisages a public meeting as a type of gathering "to which any citizen has free access."[26] The definition also states that it is a "momentary, concerted and organised gathering of people" and that its purpose is to exchange opinions, study and defend ideas and interests.[27] This makes it clear that, for example, family gatherings do not fall within the scope of this law, even when they are held in a public place. The same applies to cultural events. The law also explicitly excludes from its scope meetings of the statutory bodies of political parties and non-profit-making associations, as well as meetings and events taking place during election campaigns.[28] These clarifications should be seen as a step forward.

Under the 2013 Act, as under the 1991 Decree, public meetings and events are subject to prior declaration.[29] This system, unlike that of prior authorisation, is based on the principle that public meetings and events are free.

They do not therefore have to be "authorised" by the authorities. They are simply "declared" to the authorities by the representatives of the groups concerned. The purpose of the declaration is to alert the authorities so that they can take the necessary measures to ensure that the public meeting/demonstration is properly held, in particular to protect the

[24] Article 2.
[25] Article 3.
[26] Article 3, j.
[27] Article 3, j.
[28] Article 1
[29] Article 1 of the 1991 decree, articles 4 and 7 of the 2013 law.

demonstrators and the interests of third parties. It is a positive aspect of the 2013 Act that the notification system has been renewed. According to the Human Rights Committee, authorisation systems in themselves negate the principle of freedom of assembly/ demonstration.[30] However, it is not sufficient for a legislative text to set up a declaration system.[31] It is also necessary to prevent the "system" from functioning in practice as an authorisation system. Compared to the 1991 decree, the 2013 law is more explicit on the basis of the declaration system in that it clearly states that public meetings and events are "free".[32] Even if the "natural" place for this enshrinement is the Constitution, and the 2018 Constituent Assembly is carrying out this task,[33] it is not redundant for the Act itself to return to this principle at the very beginning of its text.[34] The enshrinement provides information about the spirit of the law, which is not without utility for the judge who has to apply it. In this sense too, the new text constitutes a step forward.

The 2013 Act extends the possible duration of a day of demonstrations by one hour. Demonstrations can now begin at 6 a.m., whereas they could only begin at 7 a.m. under the 1991 decree. As under the repealed decree, the demonstration must end by 6pm.[35] This is a step forward, even if it may seem insignificant.

The 2013 Act states that the judicial review of a decision postponing or prohibiting a meeting/demonstration will be conducted under an emergency procedure.[36] The 1991 decree was silent on this subject. More precisely, it set a time limit within which the applicant had to have referred the matter to the court - thirty days - but did not indicate the time limit within which the court had to have rendered its decision.[37] It must be inferred from this omission that the administrative court hearing the case was then required to apply the ordinary procedure with its time limits. From this point of view, the 2013 Act therefore represents a step forward. However, the innovation brought about by the 2013 Act should be put into perspective and is likely to be merely symbolic given the vagueness of the concept of "urgent procedure". We will come back to this. [38]

The 2013 Act extends the deadline for making a prior declaration. Whereas under the 1991 decree, the public meeting/demonstration had to be declared three clear days before it was held, the 2013 law extends this period to four working days.[39] This should not be misunderstood as a mere extension of one day. The choice of the word "working" instead of "clear" has significant implications. By definition, a period counted as a "working day" never expires on a public holiday or weekend. If it were to expire on a public holiday or weekend, it

[30] ...Having to seek permission from the authorities undermines the principle that the right to peaceful assembly is a fundamental right" HR Committee, General Comment N°. 37 (2020), para 70.

[31] (Comité des DH, Observation générale n°37(2020), para 73).

[32] Article 1 of the Law of 2013

[33] Article 32

[34] Article 1

[35] Articles 4 of the 1991 decree and 11 of the 2013 law

[36] Article 5, al.3 and 10, al.2.

[37] Article 2, al.2

[38] Point III, 6 of this study, p.10.

[39] Articles 5, al.1 and 8, al.1.

would expire on the next working day. In the specific case of the 2013 Act, if there are weekends (Saturday or Sunday) between the day of the declaration and the day of the planned meeting or event - which is unavoidable unless the declaration is filed on a Monday in a week without a public holiday - the time limit is doubled compared to what it was under the 1991 Decree. In other words, it will systematically be greater than or equal to six calendar days. The situation worsens if one or more public holidays are added. Taken together, these two factors create an enormous difference between the respective deadlines under the 1991 decree and the 2013 law. For example, under the 1991 decree, in a week without a public holiday, the organisers of a public meeting or event could submit their declaration on a Tuesday and hold their meeting or event on the Friday of the same week. Under the 2013 Act, they would only be able to hold it on the Monday of the following week.

The 2013 law therefore makes it more difficult to react to political events on the spot by holding public meetings/demonstrations. Yet one of the political functions of a demonstration is precisely to protest. The problem is, however, that the protest loses interest as it moves away from its object over time. From this point of view, the provision of the law in question represents a step backwards in the regulation of freedom of assembly/ demonstration.

DETAILED CRITICAL ANALYSIS OF LAW N°. 1/28 OF 05 DECEMBER 2013

1. Problematic definitions

The 2013 Act defines public order as "all mandatory rules affecting the organisation of the nation, the economy, morality, health, security, public peace and the essential rights and freedoms of each individual." [40]

By defining public order as "a set of mandatory rules..." in a law on the exercise of the freedoms to assemble and demonstrate, the 2013 legislature is mistaken about the context or, in other words, the area of law in which it is operating. Understood in this way, public policy refers to the set of mandatory rules that the parties to an agreement cannot waive in order to make up for them by their own free will, unlike rules that are merely suppletive. Largely, therefore, the legislature had in mind a concept of public policy inspired by private law.
However, the purpose of the law makes it abundantly clear that the relevant notion of public policy here is that which refers rather to the purpose of the administrative police and which describes a material situation (and not a 'set of rules').
Its traditional components are tranquillity (understood as the absence of disturbance), safety (understood as the absence of danger to people and property) and health (understood as the absence of disease or pollution of water, foodstuffs, etc.). [41]

Applied to the articles in which the expression "public order" is used, the definition of this concept given by the 2013 Act makes these provisions unintelligible. Moreover, the definition is too broad. It thus loses its practical utility, which is precisely to delimit the scope of the administration's powers. Indeed, the expected function of a definition of a ground for restricting a freedom is to provide a precise framework for the powers of the public authority. In this respect, the aim is to prevent the authorities from having at their disposal a catch-all concept enabling them to ban any meeting or demonstration they do not like, particularly for political reasons. This objective has been missed with a definition that is too vague, with no precise contours. The Human Rights Committee has already made exactly the same observation in the case of Burundi. [42]

[40] Article 3, h.
[41] Gognetti, Johann, La notion de droit public, Thesis defended at the University of Lille, 1998 (unpublished).
[42] Human Rights Committee, Concluding observations on the second periodic report of Burundi, CCPR/C/BDI/CO/2, para 20. See SOS Torture/Burundi, FOCODE, CBDDH, CB-CPI, CAVIB, UBJ, Tournons la page, FORSC, COSOME, ACAT, RCP, AJBE, Civil Society Report on the Implementation of the International Covenant on Civil and Political Rights (ICCPR), January 2021.

The point here is not to delegitimise the notions of order or public policy. Basically, there is no incompatibility or contradiction between order and freedom. On the contrary, public freedoms require the existence of an organised society that allows public order to be maintained, without which freedom would be swallowed up by the excesses of uncontrolled abuse. Public freedoms depend on good order.[43] It is simply a question of adopting a notion of public order that does not place unlimited and uncontrollable powers in the hands of the authorities, because in that case the public freedom in question would become fictitious. The International Covenant on Civil and Political Rights (ICCPR) itself recognises that public order is one of the legitimate grounds for restricting the freedom to assemble.[44] However, the body that interprets this instrument - the Human Rights Committee - asks States not to adopt a definition that is too broad and vague. [45]

The text of the law gives examples of meetings or demonstrations that are likely to disturb public order. It cites meetings or demonstrations likely to "stir up identity-based hatred, cause unrest or provoke violence".[46] If public order in general were defined in this way - with a relatively precise content - the problem referred to above would not exist. The text of this paragraph of Article 3, h is, however, clear on the exemplary nature of the enumeration. It uses the phrase "in particular."[47] The problem of an extensive definition has therefore not been resolved.

The concept of public policy is very important in the law under review. The maintenance of public order is the sole reason for which the meeting or gathering may be postponed or prohibited. [48]

There are two possible solutions. The legislature could take the paragraph listing the examples and make it the pure and simple definition of public order. Rules that restrict the exercise of a freedom in order to prevent disorder, violence or the spread of hatred are generally considered legitimate.[49] The limits of such a restriction are, moreover, relatively precise if, of course, the rules are applied in good faith. Alternatively, the legislator could replace the notion of "public order" with that of "public safety" throughout the text. This latter approach is followed by certain foreign legislations. [50]

2. Unreasonable delay in making a prior declaration

[43] U.S. Supreme Court, Cox v. New Hampshire, 312 U.S. 569 (1941)

[44] Article 21 of the ICCPR: "The right of peaceful assembly is recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others". (Emphasis added).

[45] Human Rights Committee (United Nations), General Comment n°37, para 44.

[46] Article 3, h, al.2.

[47] Ibidem.

[48] Article 4, al. 4 ; 5, al.2 ; 8, al.2 ; 10, al.1er, 12, al.3.

[49] See in particular articles 19, 3, b and 21 of the ICCPR for freedom of expression and freedom of assembly respectively.

[50] See I. BOUCOBZA, « La liberté de manifestation en Italie, perspective historique », art. cit.

As already noted above, a prior declaration must be made at least four working days before the gathering or meeting is held.[51] By continental African standards, this period is too long, especially if weekend days and any public holidays between the date of the declaration and the date of the planned meeting or gathering are taken into account. Indeed, as indicated above, unless the declaration is filed on the Monday of a week in which there are no public holidays, the period of four working days would systematically be greater than or equal to six calendar days.[52] However, according to the African Commission on Human and Peoples' Rights, the deadline for declaring a meeting or demonstration may not exceed five (5) days. The Commission indicates that it is preferable that it should not exceed 48 hours. [53]

As noted above, it is above all incomprehensible that the 2013 law doubles (in most cases) the three-day time limit set by the 1991 decree. This decree was realistic and struck a good balance between, on the one hand, the need for the active forces of society to react relatively quickly to a decision by the authorities and, on the other hand, the need for the administration and the forces of law and order to have the necessary time to prepare for securing the demonstration and the demonstrators. It could be renewed.

In theory, it would have been more logical to reduce it further (to two clear days in particular)[54] because the Administration and the forces of law and order are supposed to have matured in the exercise of the activity above, more than thirty years after the promulgation of the first unified and relatively modern text on the subject. [55]
However, in the light of reality and the need to take account of the Administration's possible reaction to the declaration, it is more realistic to extend the time limit of the 1991 decree.

3. The imprecision of the concept of "competent authority" to receive the prior declaration

The 2013 Act provides that the declaration is to be sent to the "competent authority" without specifying which authority.[56] This vagueness should be removed, especially in view of the immensity of the powers granted to this "authority". It can, in fact, postpone or prohibit the meeting/demonstration. [57]

This lack of precision may have a negative impact on the exercise of freedom of assembly/

[51] Artcles 5, al.1er and 8,al.1
[52] See section II.6 of this study, page 9.
[53] African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly in Africa, adopted at its 60th Ordinary Session held in Niamey, Niger from 8 to 22 May 2017, para 72, a. note 52.
[54] Article 5, al.2.
[55] When this document is submitted (September 2023), it will be 31 years since the 1991 decree was promulgated.
[56] Articles 5, al.1 and 8, al.1
[57] Articles 5, al.2 et 8, al.2

demonstration. In particular, given the socio-political context in Burundi, certain individuals/organisations could take advantage of this to regulate the exercise of the two freedoms under analysis here. To resolve this problem in law, the legislator would lose nothing by reverting to the terms of the 1991 decree. This explicitly stated that this authority was the Communal Administrator or the Town Mayor, depending on whether the meeting/demonstration was planned in a rural area or in Bujumbura.[58]

In addition, the African Commission on Human and Peoples' Rights recommends that all authorities responsible for managing gatherings should receive appropriate training in human rights so that they are aware that their mandate is essentially to facilitate peaceful gatherings - and not to hinder them. This recommendation applies to both administrative authorities and law enforcement agencies. [59]

4. Lack of precision as to the consequences of the administration's silence on a declaration concerning a demonstration on the public space

With regard to public meetings, the 2013 law is explicit in stating that if, within forty-eight (48) hours, the competent authority has not reacted to the declaration filed by the organisers of the meeting, the meeting must be considered as not prohibited.[60] This is a logical consequence of the rule that the authorities have a period of forty-eight hours in which to make their observations and possibly postpone or prohibit the holding of the public meeting. [61]

There is no similar rule for demonstrations on the public space.[62] Although it is reasonable to assume that a judge hearing the case would probably extend the scope of the above rule to demonstrations on the public space, it is advisable to avoid any risk by laying down a similar rule in the section of the legal text on the freedom to demonstrate on the public space.
The rule would become the new Article 9 and the current Article 9 would become Article 10. We propose the wording below.

5. The imprecise concept of the authority's 'delegate'

[58] Article 1 B.O.B., 1992, n° 6, p. 193.
[59] African Commission on Human and Peoples' Rights, Guidelines on freedom of association and assembly in Africa, adopted at its 60th Ordinary Session held in Niamey, Niger, from 8 to 22 May. See also the UN Code of Conduct for Law Enforcement Officials (art. 1). 2017, para 76, b.
[60] Article 6
[61] Article 5, al.2
[62] See Chapter I, Section 2 of the 2013 Act, Articles 7 to 9.

The 2013 Act gives the competent authority - which is not specified - the prerogative of sending a "delegate" to the place where the public meeting or demonstration is being held.[63] This delegate has significant powers, including the power to suspend or dissolve the gathering if the maintenance of public order so imperatively requires. [64]

Under normal conditions, it is conceivable that the authority will be represented to attend an otherwise public meeting. The formality provided for by law to this effect, namely that the delegate must carry a written document signed by the mandating authority, could suffice. However, in the socio-political context of Burundi, it would be more reassuring if the law clearly indicated that the delegate must be an identifiable agent of the administration. Indeed, the involvement of influential figures from the ruling party and its organs at various levels in the management of public meetings/demonstrations on the public space must be avoided. The administration itself must adhere to the principle of neutrality.

6. Imprecision of the concept of "urgent procedure" in relation to judicial review of administrative decisions postponing or prohibiting public meetings/demonstrations

Articles 5 and 10 of the 2013 Act provide that the decision of the administrative authority deferring or prohibiting a meeting or demonstration may be appealed both hierarchically and judicially. As far as the judicial appeal is concerned, the law states that it is the Administrative Court that hears such appeals "in accordance with the emergency procedure."

The legislator's intention is to be welcomed. It is indeed desirable for the Administrative Court to take its decision as quickly as possible to enable applicants to hold their meeting/demonstration without too much delay in the event that the administration's decision is invalidated. The problem is that the concept of "urgent procedure" is foreign to the Code of Civil Procedure - also applicable by the administrative courts. It would not be correct to assume that the legislator wanted to refer to the "summary" procedure provided for in the Code of Civil Procedure because this only applies to civil and commercial matters - and not administrative matters.[65] Even supposing that this was the intention of the 2013 legislature, the summary proceedings procedure as it exists today in Burundian civil procedure law would not be an appropriate solution. Nor does it include any strict time limits within which the decision must be handed down. [66]

~~The simplest solution would be for the 2013 law~~ to be revised to include a time limit. Given

[63] Article 12, al.1

[64] Articles 162 to 166 of Law no. 1/010 of 13 May 2004 on the Code of Civil Procedure, B.O.B., 2004, no. 5bis, p. 3). Administrative proceedings are governed by articles 371-398.

[65] Articles 162 to 166 of Law no. 1/010 of 13 May 2004 on the Code of Civil Procedure, B.O.B., 2004, no. 5bis, p. 3). Administrative proceedings are governed by articles 371-398.

[66] For French law, see CGT, Régime juridique de la liberté de manifestation, p.3.

the nature of the dispute, this period should not exceed 48 hours (or two calendar days). It would be counted from the time of referral to the judge. This is also the time limit applied in certain foreign laws that generally inspire Burundian law. Given the obvious simplicity of this matter, there seems to be no reason why it should be otherwise in Burundi. [67]

7. Sanctions regime

A. The principle of criminal penalties in a law on public meetings and demonstrations on the public space

Providing for specific offences in the law on public meetings and demonstrations on the public space is problematic from the outset. The legislator must not give the impression of criminalising the exercise of a public freedom. Moreover, there seems to be no need for such a procedure. This does not mean that offences cannot be committed during a public meeting or demonstration. It is simply a matter of pointing out that to deal with them; the legislator could simply have referred to the Criminal Code or to other criminal laws in force.

It should also be noted that, in addition to including criminal offences and penalties in a text that is not the natural place for them, and unnecessarily so, the legislature lacks balance in its approach. In fact, the 2013 law does not criminalise any of the (potentially violent) obstacles to the exercise of the freedom to demonstrate that could come from the administration or the police. In its defence, the legislature could argue that the law provides otherwise and elsewhere, in particular by punishing "infringements by civil servants of the rights guaranteed to individuals."[68] The same approach - reserving the definition of offences and penalties to the Criminal Code-should have been followed for any reprehensible acts committed by demonstrators.

Given the level of the penalties laid down by the statute under review - fines - one might be mistaken in thinking that the legislature was seeking to reduce the severity of the most common criminal sanction - penal servitude - given that the anti-social conduct defined in the statute would be committed in the context of the exercise of a public freedom. This would be a misreading of the text of the Act because it does not exclude the application of the Penal Code.
The penalties provided for in the 2013 Act are "without prejudice to the penalties provided for in the Criminal Code (sic)."[69] Of course, it is not possible to combine the penalties of this law with those of the Penal Code. However, the 2013 law does allow the Public Prosecutor's Office to choose between the two texts, and in particular to use this law if it has difficulty in

[67] Article 427 du Code Pénal.
[68] Article 427 of the Criminal Code.
[69] Article 14, in limine.

proving that the activist being prosecuted committed an offence under the Criminal Code.

The African Commission on Human and Peoples' Rights also considers that laws on public meetings/demonstrations should not include penal rules, even for any offences committed during them. Ordinary criminal law should apply. [70]

B. Additional penalties for foreign nationals

The additional penalty of disqualification from the territory for at least five years is provided for foreign nationals who are guilty of one of the offences under the 2013 Act. [71]

There seems to be no reason to treat foreign nationals differently in this respect. According to the Committee on Human Rights, freedom of assembly and demonstration applies equally to nationals and foreigners. It thus differs from the rights reserved for nationals, such as the right to participate in the running of the country's affairs.[72] In other words, in addition to nationals, foreigners and immigrants also enjoy these freedoms, whether they are documented or not. The same applies to refugees, asylum seekers and stateless persons.[73] This is perfectly understandable because demonstrations/meetings are not necessarily a means of political participation - which it might be legitimate to reserve for nationals only -. People can gather to show solidarity or to assert their identity. Gatherings may also be held for entertainment purposes or to take part in cultural, religious or commercial activities. They remain protected by the relevant rules of international/regional human rights law. [74]

C. Confusion between the responsibilities of the director and the organisation

The 2013 Act creates the possibility of penalising an organisation for failure by its director to

[70] In paragraph 99 of its guidelines on freedom of association and assembly, the Commission states that "States are not expected to impose criminal sanctions under laws governing assemblies. All criminal sanctions are specified in the criminal code and not elsewhere. Gatherings are not governed by criminal provisions other than the generally applicable clauses of the Penal Code." (ACHPR, Guidelines, para 99).

[71] Article 22

[72] Article 25 of the ICCPR. See also General Comment No 25 (57) of the Human Rights Committee. To read it, see http://hrlibrary.umn.edu/gencomm/french/GEN25FRE.htm (last accessed on 21 September 2023).

[73] HR Committee, General Comment n°37(2020) on the right to freedom of peaceful assembly (Article 21), 129th Session (29 June-24 July 2020), para 5.

[74] HR Committee, General Comment n.37(2020) on the right to freedom of peaceful assembly (Article 21), 129th Session (29 June-24 July 2020), para 12.

comply with a penalty (fine) imposed on him or her.[75] This provision runs counter to the fundamental principle of personal responsibility and is problematic in the light of Article 11 of the African Charter on Human and Peoples' Rights.[76]

D. Civil liability of organisations for events outside their control

For compensation for damage caused during public meetings and demonstrations, the 2013 Act creates a system of joint and several liability between, on the one hand, the perpetrators of the harmful acts in question and, on the other hand, " the associations and organisations (sic) that took the initiative for these gatherings".[77] It makes no difference whether these gatherings are legal or illegal. [78]

The regime is clearly unfair. Firstly, the safety of the demonstration is first and foremost the responsibility of the authorities - and not of the associations and organisations that initiated the event - all the more so if the meeting/demonstration has been declared. It is also surprising that the law makes no difference depending on whether or not the meeting or gathering is lawful. The regime applies in the same way in both cases. The legislator is therefore creating a system of vicarious liability that has no basis whatsoever.

With regard to the supervision of the meeting/demonstration, which would be the basis of the liability regime, the role that the law assigns to the supervising office provided for by article 13 must not create confusion. It is not the intention of the authorities to create a system in which the organisers of the event concerned would be entirely responsible for safety. This is simply unimaginable insofar as, for example, these organisers do not have the power to use armed force if necessary. The law is therefore quite right to state clearly that the police powers of the event management committee are exercised "in collaboration with and with the support of the forces of law and order."[79] Collaboration between the forces of law and order on the one hand, and the representatives of the participants in the demonstration on the other, is also one of the key principles of "negotiated management of the public space."[80] Placing the burden of security - and its cost - on the organisers of the meeting/demonstration would be incompatible with the ICCPR.[81] From this point of view, it makes no sense either to make the members of the bureau liable for damage caused by (other)

[75] Article 24
[76] African Commission on Human and Peoples' Rights, Guidelines, para 101. See also International Pen and Others (on behalf of Ken Saro - Wiwa) v Nigeria, Comm. Nos 137/94, 139/94, 154/96 and 161/97 (1998), paras. 105-06
[77] Article 25, al.1.
[78] Article 25, al.1.
[79] Article 13, al.2.
[80] rançois Welter, « L'occupation et la gestion négociée de l'espace public : Ou comment concilier revendications sociales et maintien de l'ordre », Dynamiques. Histoire sociale en revue, No. 2, June 2017 [Online], accessed on 28 June 2017. URL : http:// www.carhop.be/revuescarhop/
[81] According to the Human Rights Committee, "requiring participants or organisers to provide and bear the costs of supervision and maintenance of order and provision of medical care during peaceful assemblies or clean-up of the site after the meeting or any other related public services is generally not compatible with Article 21." (General Comment nr.37(2020), p.64.

organisers, let alone to prosecute them for their actions. [82]

In addition, according to the letter of the law, organisations could be held jointly and severally liable even for acts committed by counter-demonstrators. The phrase "persons found guilty of the various offences provided for by this law"[83] is in fact neutral and general enough to encompass both demonstrators who have responded to the organisers' call and counter-demonstrators.

On the other hand, the law could extend the material scope of civil liability to damage resulting from non-offending acts. By limiting compensation to damage resulting from offences, it leaves open an enormous gap of unrepaired damage. Civil fault and criminal fault are not identical. As a general rule, the latter is more difficult to establish.

As far as civil liability is concerned, the African Commission on Human and Peoples' Rights recommends that States should not create a system that subjects event organisers to excessive obligations.[84] It does not, however, prohibit any system of vicarious liability. Such liability must be subject to strict conditions. Thus, according to its guidelines, organisers of meetings/demonstrations can only be subject to financial penalties if four conditions are met.
Firstly, they must not have given prior notice. [85] This condition can be understood to mean that when advance notice has been given, it is up to the public authorities to ensure order and prevent excesses that could result in damage to third parties. The organiser of the meeting is not then answerable for the failure of the authorities. Secondly, the gathering must (directly) cause the damage.[86] Thirdly, they must be foreseeable. [87] Fourthly and finally, the organiser must have failed to take the necessary measures within his or her power to prevent the event from getting out of hand.[88] In other words, the organiser's obligation is one of means, not of result.
Even if these conditions derive from common sense and should guide the judge even in the current state of the legislation, it remains preferable to incorporate them into the law.

[82] Article 13.
[83] Article 25, al.1er de la loi de 2013.
[84] African Commission on Human and Peoples' Rights, Guidelines, para 76, a.
[85] African Commission on Human and Peoples' Rights, Guidelines, para 76, c.
[86] Ibid.
[87] Ibid.
[88] Ibid.

Recommandations

1.To the Burundian authorities:

A.To the Parliament:

– Review the 2013 law on public meetings and demonstrations on the public highway to consider the grievances identified above.

B.To the Government:

– Continuously train administrative managers and agents as well as law enforcement officers on the content and means of implementing the law on public meetings/ demonstrations on public thoroughfares.

– Continuously train the forces of law and order in human rights and the negotiated management of public space.

C.To the Public Prosecutor's Office:

– Initiate proceedings against state agents and political activists who have exercised various forms of violence against citizens exercising their democratic freedoms, including those of assembling and demonstrating on public thoroughfares, particularly from April 2015.

2.To the Independent National Human Rights Commission « CNIDH »

To carry out its missions fully and unreservedly, and in particular:

– To provide the Government and Parliament, in an advisory capacity, with opinions, recommendations and proposals on all issues relating to the promotion and protection of human rights.
– To contribute to the harmonization of national legislation with international and regional human rights instruments.

3. To civil society organizations :

- Continue to advocate with Burundian and international players for the reopening of civic space in Burundi, by revising the law on public meetings and demonstrations on the public highway.
- Exercise relevant jurisdictional and/or quasi-jurisdictional recourses in Burundi (e.g.: Constitutional Court) and abroad (e.g.: African Commission on Human and Peoples' Rights, Court of Justice of the East African Community) to have the liberticidal nature of certain laws formally noted and to request their revision, accordingly.
- Continue to educate Burundians about rights and freedoms, notably through the media, with a view to contributing to the awakening/training/consolidation of a culture of active and demanding citizenship.

4.To Burundi technical and financial partners

- Use their positive influence on the Burundian government, both through political dialogue and through technical and budgetary support mechanisms, to encourage it to open up civic space.

Conclusion

The aim of this analysis was to identify the problematic provisions of Law n°1/28 of 05 December 2013 regulating demonstrations on the public space and public meetings in Burundi. It first highlighted the advances made by this law in relation to the 1991 decree that governed these matters, as well as the points on which the law has made the regime of freedoms of assembly and demonstration worse. The analysis then focused on studying the provisions of this law in the light of international and regional human rights law and the Constitution of Burundi.

The analysis shows that the 2023 legislature has made an effort to define the concepts it uses. However, some definitions are unsuited to the purpose of the law. The result is that the provisions containing these concepts are, largely, unintelligible. The other consequence is that the administration whose power these definitions were intended to regulate finds itself with virtually unlimited prerogatives. The typical example of this type of concept in the 2013 Act is public policy.

The analysis also reveals that the text of the legislation is not written in a systematic and continuous manner. This is not just a problem of form. It also affects the substance. Thus, while for public meetings, the text is explicit on the consequence of the administration's silence on the prior declaration, indicating that it will be deemed to be "non-interdiction", it is silent on this point with regard to demonstrations on the public space. It is logical to assume that the same rule applies and is implicitly stated. Nevertheless, in a socio-political context such as that of Burundi, it is best to always be explicit.

The study also shows that certain imprecisions in the law make it relatively difficult to use, especially given the socio-political context in Burundi today. This is the case when it refers to the "competent authority" for receiving declarations prior to meetings/demonstrations on the public space, without indicating which authority, and when it gives this "authority"-which is not indicated-the prerogative of appointing a "delegate" to represent it at the place of the meeting/demonstration with powers equivalent to its own, including the power to suspend or terminate the meeting/demonstration.

A close study of this legal text also reveals that some of its provisions have the effect of making the exercise of the freedoms studied here politically less interesting. Such is the case with the extension of the notice period, i.e. the period of prior notification, from three clear days in the 1991 decree to four working days in the 2013 law. The impact of this rule is to make it more difficult for demonstrators to react immediately to certain actions by those in power, thereby causing the meeting/demonstration to lose its socio-political relevance. Some procedures provided for in the law are also of limited use because they are incompletely organised. This is the case, for example, when the law stipulates that appeals against administrative refusals to allow meetings/demonstrations to take place will be dealt with by the administrative courts under an "urgent procedure" without indicating what exactly this means (in terms of time limits, for example), whereas ordinary procedural law is itself silent on this issue.

It also appears that the system of penalties is inappropriate, whether in terms of criminal or civil liability. With regard to criminal liability, the study shows that the law creates a separate system of criminal liability that is unnecessary and in contradiction with African directives on the subject. The study also shows that the civil liability regime for organisers of meetings and gatherings is excessively severe and again in contradiction with African directives on the subject.

These problems are highlighted primarily by a study comparing the provisions of the 2013 law with those of the Constitution and international/regional instruments binding on Burundi in terms of freedom of assembly and demonstration. Possible solutions are proposed (see attached document).

Presentation of the organizations

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COSOME is a coalition of 12 civil society organizations working in diverse sectors and representing various religious denominations. It was established in 2005 with the aim of supporting the Burundian people in the process of democratizing institutions. Its mission is to promote a culture of peace and democracy through civic and electoral education in Burundi and the subregion. **COSOME** strives to advance education on democratic and electoral citizenship, contribute to the improvement of electoral laws, aid in the consolidation of peace by establishing democratically elected institutions, promote democratic audits to identify challenges to democratic values, participate in election observation, and support peaceful, fair, serene, and transparent elections. Additionally, it provides guidance to the population to demand the fulfillment of electoral promises (accountability).

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FOCODE is an organization with a vision of "A reconciled, democratic, just, and prosperous society that respects human rights." Its mission is to engage leaders at all levels and grassroots communities through advocacy, training, information, and mobilization around the ideals of peace, democracy, and good governance for social justice, citizen wellbeing, and prosperity. **FOCODE**'s strategic areas of action include peace and reconciliation, democracy and good governance, development and social justice, the rule of law, human rights, and internal capacity development.

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SOS Torture/Burundi is a nonprofit organization and a member of the SOS Torture network of the World Organization Against Torture (OMCT). Its goal is to act and advocate for the end of human rights violations, the restoration of good governance, and the fight against impunity in Burundi. **SOS Torture/Burundi** regularly publishes reports on the human rights situation in Burundi and a monthly bulletin on justice and governance.