

The State of Protest Report

Right2Protest Project report on the state of protest in South Africa

2019 – 2020



Acknowledgements

The Right to Protest Project (R2P) wishes to thank all those who have supported the work outlined in this report. In particular, R2P would like to thank its funding partners at the Open Society Foundation for South Africa and the Wallace Global Fund for their guidance and support. Without their financial assistance, this report and the work of R2P outlined here would not have been possible.

R2P is also appreciative to the steering committee that pilots this project. The steering committee consists of the Centre for Applied Legal Studies (CALS), the Centre for the Advancement of Community Advice Offices in South Africa (CAOSA), the Freedom of Expression Institute (FXI), Lawyers for Human Rights (LHR) and the Right2Know Campaign (R2K).

R2P further thanks its ordinary members for their support, devotion and continued partnership in the network. The ordinary member organisations include the Centre for Environmental Rights (CER), the Centre for Child Law (CCL), the Equal Education Law Centre (EELC), Grassroot, Ndifuna Ukwazi (NU), ProBono.Org, the Socio-Economic Rights Institute of South Africa (SERI), SECTION27 and the Social Justice Coalition (SJC).

R2P is also grateful to the following individuals who worked tirelessly to produce this report:

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**WALLACE
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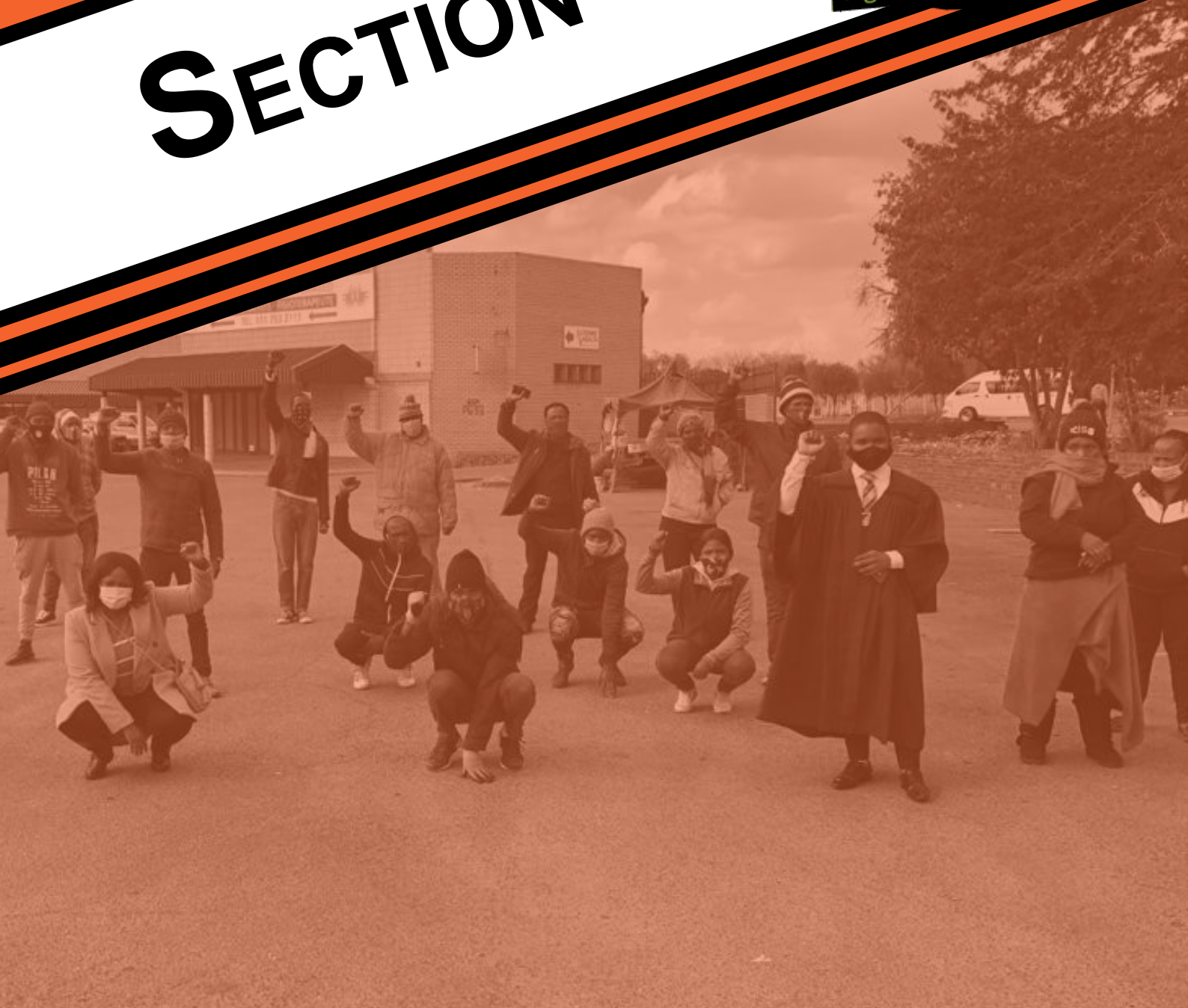


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SECTION 1



1 Introduction

1.1 What is the Right2Protest Project?

The Right2Protest Project (R2P) is a coalition of civil society organisations, which are listed in the acknowledgements section. The project is housed at the Centre for Applied Legal Studies, based at the University of the Witwatersrand, though it operates nationally. It is staffed by a project co-ordinator who co-ordinates legal assistance through the coalition and referral network; and an attorney who assists with legal representation and providing legal advice. The project has a dedicated toll-free hotline number that protesters can use to enquire about their right to protest and obtain legal advice as well as request legal assistance. The project also provides communities around the country with workshops informing them of their right to protest and legal procedures that need to be followed in exercising this right. R2P acknowledges the pro bono legal assistance provided by its member organisations, civil society organisations and private attorneys as part of this project in the reporting period.

1.2 What is the vision of R2P?

R2P envisions a society where we all have the right to protest, peacefully and unarmed; and where this right is regulated by the authorities in compliance with the law, in pursuance of an open, accountable and participatory democracy. R2P aims to achieve this vision through providing non-partisan, peace-building, intersectional and innovative interventions in order to defend and advance the realisation of the constitutional right to assemble, particularly for poor and marginalised communities. R2P also aims to be a reliable and reputable coalition that offers quality legal services and assistance to protesters through either the R2P attorney or the R2P referral network. R2P also aims to provide a collaborative platform for activities as well as people that defend and advance the right to protest.

1.3 What is the current state of protest?

The year 2020 has arguably been the year of protest across the world. Globally, we have seen an increase in protest action from the #BlackLivesMatter protests in the United States of America to the #EndSARS protests in Nigeria. The coronavirus pandemic has, of course, brought with it numerous challenges; and millions of lives have been impacted.

In South Africa, the pandemic has further highlighted the inequalities faced daily by many people in the country. In March 2020, the government of South Africa declared a national state of disaster as per the Disaster Management Act of 2002. Subsequent to the declaration, the government announced a national lockdown. This came with the restriction of movement, close of business and the prohibition of the

gatherings, effectively suppressing the right to protest. Government subsequently announced that the country would come out of the lockdown gradually, through a number of ‘alert levels’. The regulations governing the alert levels from five (5) to two (2) continued to prohibit people from exercising their right to protest. Despite the fact that gatherings were largely prohibited, the Right2Protest Project observed an increase in the occurrence of protests during level five (5) of the national lockdown. We have also observed with great concern how the state responded to protests during levels five (5) to level two (2) considering that they were unlawful.¹

This report reflects on the state of protest in South Africa during the COVID-19 pandemic. The thematic areas of this report include the conduct of responsible officers, police brutality and labour strikes. The report concludes with recommendations to the relevant role players involved in protest action.

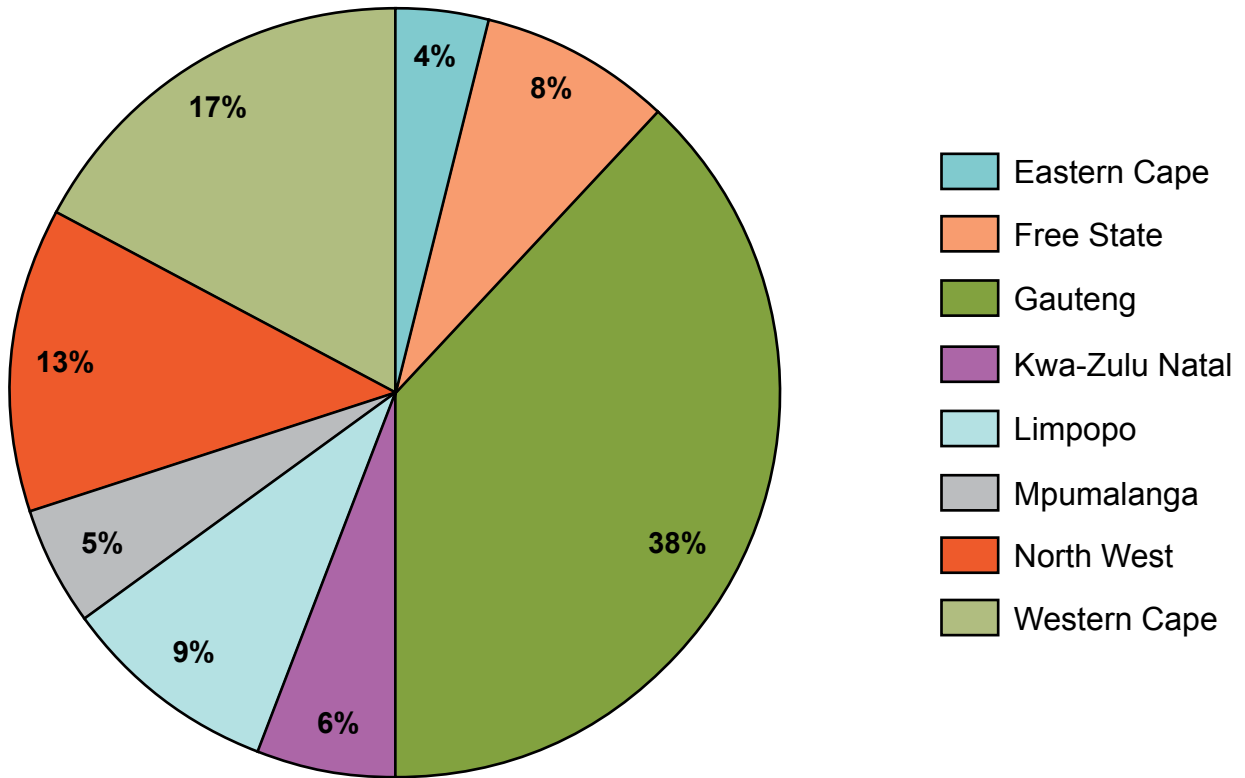
1.4 What trends has R2P observed?

The section that follows will go into more detail about the observations from the reporting period, as well as provide case studies to illustrate them. The major trends in our work for this period include:

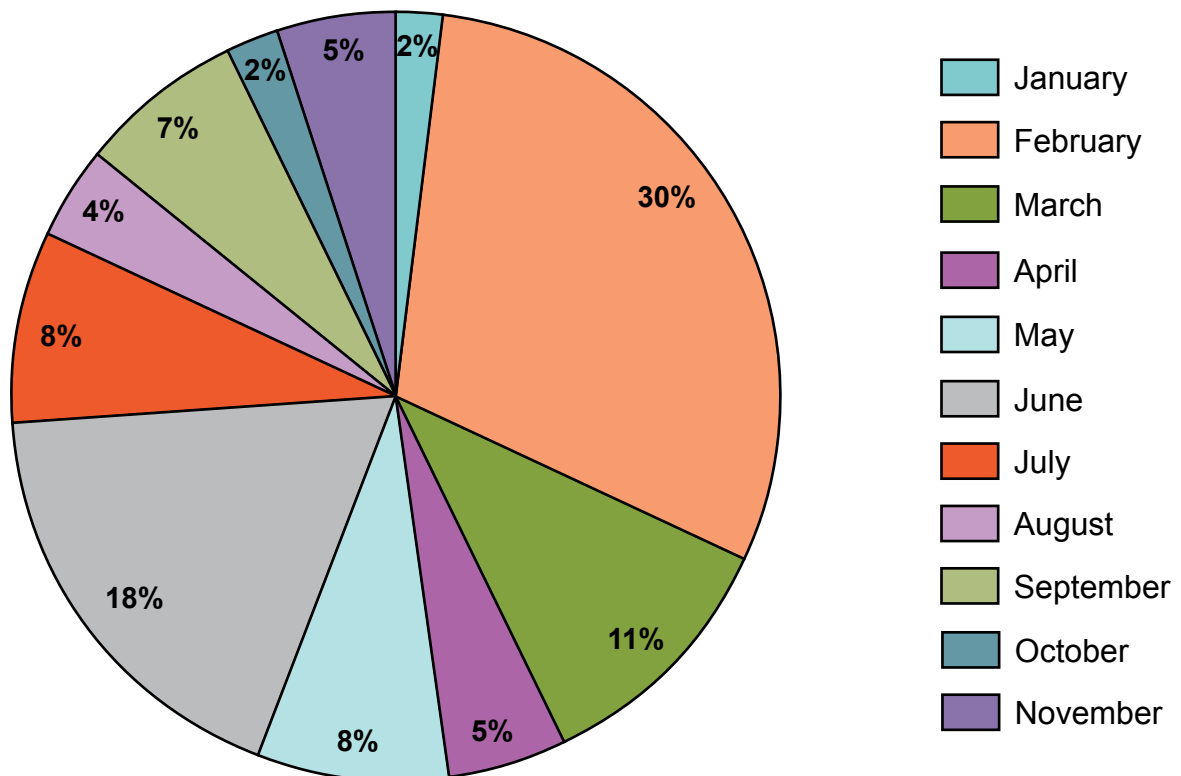
1. R2P is strongest in Gauteng with 38% of the calls received coming from the province. Gauteng is followed by the Western Cape with 17% of the calls received coming from the province. This is a significant change from the previous reporting period where Gauteng was followed closely by Limpopo.
2. R2P received the most number of calls in February 2020 which accounts for 30% of the calls received.
3. During this reporting period, the most common charge for those arrested during a protest remains public violence followed by contravention of the Disaster Management Act.
4. The common issues which we have identified through the calls received on the hotline are:
 - Lack of / poor service delivery
 - Abuse and intimidation by mining companies
 - Police brutality
 - Understanding the Disaster Management Act and the regulations in relation to protests
 - Access to COVID-19 relief such as food parcels

¹ Malematja, S. ‘Government has used lockdown to decide who may protest’. *GroundUp*. 17 August 2020. Accessible from: <https://bit.ly/33iKkQ2>.

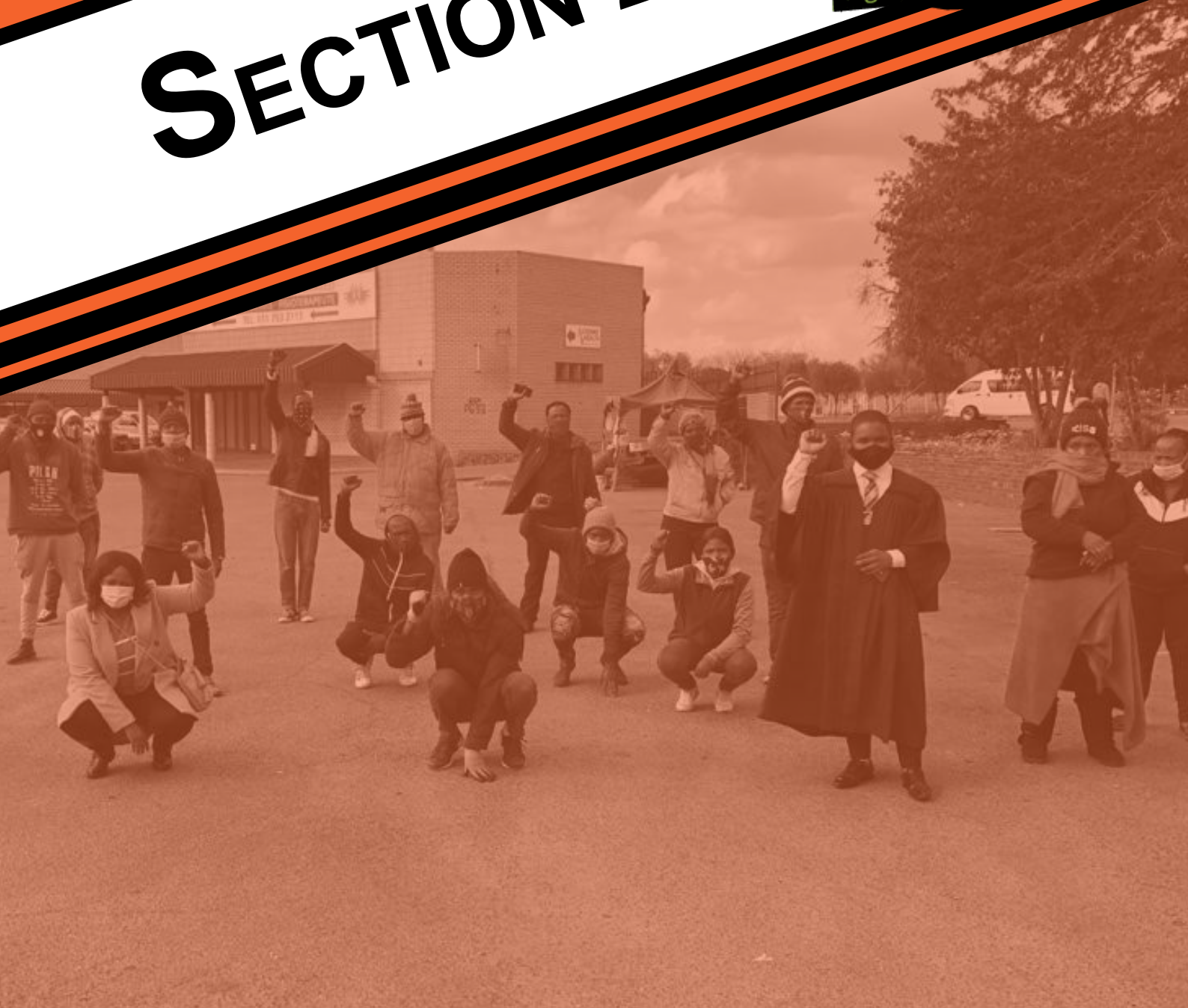
Calls per province



Calls per month



SECTION 2



2 Case studies and observations

2.1 Overview of lockdown regulations relating to protest

Levels four and five

On 25 March 2020, the Minister of Co-operative Governance and Traditional Affairs promulgated the Regulations governing the national lockdown in terms of section 27(2) of the Disaster Management Act (DMA). Gatherings as protected by section 17 of the Constitution and regulated by the Regulation of Gatherings Act (RGA) were largely prohibited. The lockdown regulations declared that “any assembly, concourse or procession in or on:

- (a) any public road as defined in the National Road Traffic Act, 1996 (Act No.93 of 1996); or
- (b) any building, place or premises, including wholly or partly in the open air, and including, but not limited to, any premises or place used for any sporting, entertainment, funeral, recreational, religious, or cultural purposes”.

The definition of gathering in paragraph (a) above is similar to the RGA, the only exception being that the regulations are not concerned with the number of people gathering. Section 11B(1)(a)(ii) prohibited every form of gathering but for gatherings for purposes of funerals. Regulations governing alert level four of the national lockdown did not bring any significant change insofar as gatherings were concerned.

Levels two and three

On 1 June 2020, South Africa entered lockdown alert level three and this resulted in the easing of the lockdown rules. Moving to level three meant that gatherings for religious purposes were permitted with stringent measures. However, gathering for the purposes of protest remained suppressed. This was concerning, since this right is essential in a democratic country like South Africa. According to section 37(1) of the regulations governing alert level three, all gatherings are prohibited except for:

- (a) faith-based institutions (limited to groups of fifty)
- (b) funerals (limited to groups of fifty)
- (c) workplaces (with strict hygiene and social distancing rules in place)
- (d) agricultural auctions
- (e) professional non-contact sport

Although we saw an easing of lockdown rules under alert level three, in-person protests remained prohibited under alert level two with the rules on gatherings remaining the same. This effectively meant that those seeking to protest could not give notice of an intended protest as per the requirements of the Regulation of Gatherings Act.

Level one

Alert level one saw the easing of the regulations particularly around gatherings. At the time of drafting this report, South Africa remains at level one of the national lockdown. Section 69(5) of the regulations now provides that gatherings at political events and traditional council meetings are limited to 250 persons in the case of an indoor gathering, and 500 persons in case of an outdoor gathering. This is also subject to the provision that no more than 50 percent of the capacity of the venue is reached and participants remain at least one and a half metres from each other.

Section 69(5) confirms the constitutional right to protest peacefully and provides guidelines for a protest to be COVID-19 compliant. The section in question places a limitation on the number of participants of a protest depending the location of the protest. The section in question further provides guidelines on social distancing. The lockdown does not negate the fact that mass protests are an important component for holding government accountable.

2.2 Case studies

What follows is a selection of case studies drawn from our experiences during various levels of the national lockdown.

Case Study

Westonaria, Gauteng

On 18 June 2020, R2P attended to the bail application of 8 clients who had been arrested following a peaceful gathering at Bekkersdal Police Station in the West of Johannesburg. The clients are part of a community of shack dwellers which has been in talks with the government in relation to access to basic services in their area. On the 15th of June 2020, the community gathered at a local soccer field to discuss issues faced by community members. However, convening this gathering resulted in the convener being arrested for contravening the lockdown regulations.

On the morning of June 16 2020, the community members went to the police station to demand the release of the convener or that they be arrested as well. The station commander approached the protesters and gave them 5 minutes to disperse.

Prior to the five minutes elapsing, as some members of the community were dispersing, police fired rubber bullets at the dispersing crowd. Eight members of the community were arrested.

On 17 June 2020, R2P travelled to the Bekkersdal police station to negotiate the release of the clients on police bail. The investigating officer in charge of the case informed the R2P attorney that the clients were detained at a different police station which was Randfontein police station. Furthermore that she had not yet formally charged the clients. She consulted with her senior regarding the attorney's request for police bail and the request was turned down.

On 18 June 2020, R2P went to the Westonaria Magistrate's Court for a first court appearance bail application. In consultation with the control prosecutor, the R2P attorney was informed that the state will not prosecute. The clients were charged with public violence and the state concluded that based on the facts, it could not prove the matter beyond reasonable doubt. This was a clean victory for the R2P team and its clients. This matter shows that the clients could have been released on police bail and that taking the matter to court was a clear waste of state resources.

Case Study

Kanana, North West

On 15 July 2020, R2P successfully argued for the release of 18 clients on bail. The clients were arrested following a protest against their employer and Mayor of Klerksdorp. Upon arrival at the Orkney Magistrate's court, the R2P team was appalled to discover that all 18 clients had been crammed into one holding cell. This was despite the regulations which call for social distancing.

Case Study

#BlackLivesMatter

The brutal killing of George Floyd by a police officer in the city of Minneapolis, US sparked global outrage. In response to the death of George Floyd many staged protests voicing their dissent over police brutality.

In South Africa, protesters resonated with the #BlackLivesMatter movement because of our own issues of police brutality. During level five of the national lockdown, there was an increase in reports of police brutality and the excessive use of force by the South African National Defence Force. South Africans used this platform to protest the death of Collins Khosa, a South African man who was killed by soldiers during the enforcement of lockdown regulations in Alexandra Township, north of Johannesburg.

Between 1 and 3 June 2020, R2P received numerous calls from community members, civil society organisations and members of faith-based institutions.

All the individuals enquired about the consequences of engaging in peaceful protests because the lockdown regulations prohibited gatherings. This was a pivotal moment in South Africa, where it mattered not whether a protest was peaceful and protesters were unarmed. Any protester could be arrested and charged with contravention of the lockdown regulations and upon conviction be liable for a fine or a period of imprisonment or both. The bottom line was that an attempt to give notice in terms of section 3 of the RGA was tantamount to giving notice for an intention to commit a crime.

In Cape Town protesters decided to individually drop off flowers and message cards outside the gates of parliament to ensure that they were not in contravention of the lockdown regulations. In Johannesburg, protesters peacefully gathered at the Johannesburg Zoo Lake whilst others gathered at Constitution Hill where the highest court in the land is situated. In Pretoria, church members decided to utilise their church parking lot as a platform to stand in solidarity against racial killings in the US and police brutality in South Africa.

Creative forms of protest

Case Study

#UnitedSmokersSA

On 2 July 2020, R2P responded to a query by #UNITEDSMOKERSSA. The campaign intended to convene a national protest against the ban of the sale on cigarettes. In attempt to adhere to social distancing rules, members of the campaign protested using a convoy, driving and hooting their way to the Legislature in Durban, Parliament in Cape Town and Union Buildings in Tshwane, respectively to submit memorandums of demands. The responsible officers in Tshwane municipality and City of Cape Town respectively, had no issues with the campaign.

The responsible officer in Durban informed the convener of the protest that the convoy was against the lockdown regulations. However, the responsible officer was unable to tell the convener which specific provision of the lockdown regulations the convoy was transgressing. R2P advised the convener to proceed with the intended campaign because their conduct was not in contravention of the lockdown regulations. R2P was on standby for any incidents of arrests or harassment of the protesters. No incidents were reported to R2P and the convener in Durban confirmed that their campaign went on as planned.

The lockdown presented a unique opportunity for people to exercise different forms of protest such as the use of convoys and dropping off message cards outside of parliament.

Conduct of responsible officers

Case Study

Mogalakwena, Limpopo

When the President announced that the country would move to lockdown level one, R2P wrote to the Minister of Co-operative Governance and Traditional Affairs insofar as the restrictions on the right to protest were concerned. Our government institutions are seldom responsive. Nevertheless, lockdown level one came with much anticipated changes, finally in-person gatherings and protest actions were no longer considered unlawful.

In Mogalakwena, a village in Limpopo, the community approached its local municipality in order to give notice in terms of section 3 of the RGA. To his surprise, the convener was informed by the responsible officer that protests remain unlawful until the President announces that the country is moving to level 0 of the national lockdown. In light of this, the responsible officer implied that the RGA remains ineffective and that the convener cannot give notice of “unlawful conduct”.

On 25 September 2020, R2P consulted with the convener and subsequently sent an email to the responsible officer advising on the legality of the protests under level one. The responsible officer advised that he forwarded R2P’s letter to the local municipalities’ legal team, but R2P received no further response.

On 2 October 2020, the convener was called for a meeting in terms of the provisions of section 4 of the RGA. Seemingly, the legal team heeded the advice provided by R2P insofar as the lawfulness of protests under level one was concerned. This matter illustrates that responsible officers or their conducts thereof, may serve as a barrier between conveners and compliance with the law regulating protests.

Case Study

Tshwane, Gauteng

In the capital city of South Africa, a responsible officer acted in bad faith after misinforming the convener of a protest. The responsible officer took note of a section 3 notice form and called the convener for a meeting in terms section 4(2)(b) of the RGA in order to discuss the contents of the notice. In the notice, the convener had intended the protest would take four hours. In consultation, the responsible officer informed the convener that protests are only allowed for no more two hours as per the lockdown level one regulations. The convener, without being aware that he is being misinformed, signed next to the amended section in the notice to give effect to the unfounded two hour duration. There is no provisions of section 69 in the lockdown level one regulations pertaining duration of a protest. Rather, the provisions relate to the number of attendees.

The RGA requires responsible officers to act in good faith and this includes imposing reasonable and lawful conditions. Misinforming the convener to limit the protest to two hours was unreasonable, unfair and possible to challenge in a court of law. It was the instructions of convener to R2P that they do not wish to pursue the matter due to the urgency and how it would distract them from focusing on the protest itself.

Police brutality

SAPS Standing Order No 262 on Crowd Management obliges police to avoid the use of force at all costs and members deployed for a given operation must exercise the highest degree of tolerance. According to section 11(4)(c), the use of rubber bullets is prohibited in crowd management unless less restrictive means are ineffective to disperse the crowd. This goes to show that rubber bullets can cause serious bodily harm, hence they must be used as measure of last resort.

Further, the Ministry of Police has promulgated policy and guidelines on Policing of Public Protests, Gatherings and Major Events. This seeks to ensure that the policing of public protests and gatherings is consistent with the constitutional rights of all persons, demands of effective and peaceful crowd control, an approach that does not have negative impact and promote tension between the police and the community, and an approach that does not promote the violence it seeks to control in public protests.

Case Study

Brackenfell, Western Cape

In November 2020, members of the Economic Freedom Fighters (EFF) political party held a number of protests outside Brackenfell High School in Cape Town after reports of racism at the school. The protests led to confrontation between members of the Brackenfell community and EFF members. Footage shared in the media showed Brackenfell community members attacking peaceful and unarmed protesters.

In an attempt to curb protest action outside the school, the school's governing body approached the courts to obtain an interdict to prevent the EFF and others from protesting within the vicinity of the school. The court did not grant the Brackenfell High School's governing body an interdict. Instead, the court held that the school could not dictate where protests took place thus upholding the right to protest.

On the 20th of November, during a second demonstration against the school convened by the Economic Freedom Fighters (EFF), protesters were met with a heavy police presence which led to clashes between the police and protesters with the police using excessive force against the protesters.

In Senekal, a small town in Free State, farmers staged a protest outside a Magistrate's court following the brutal murder of a farmer. During the protest, the farmers demanded that the accused persons be released into their custody thus taking the matter into their own hands. The farmers stormed the court house and attempted to force their way into the court holding cells. After the failed attempt, the farmers overturned a police van and torched it.

When interviewed on Power FM and Capricorn FM respectively, the R2P attorney noted how not even a single rubber bullet nor tear gas canister was fired by the police to disperse the protesting farmers. In fact, the police ministry said, "the police did not take action against the protesting farmers because they fear that innocent lives would be lost". This protest illustrates that the police are aware of crowd control methods and the impact that these methods have on protests. However, we have noted with great concern how often protesters in poorer communities have suffered police brutality despite being peaceful and unarmed.

The manner in which the police handled the protests in Brackenfell versus how the protests were handled in Senekal have sparked a discussion on the policing of protests and the racial undertones that we continue to see. This a discussion that many in the civil society space have had over the years and the Brackenfell vs. Senekal protests has put a spotlight on this issue. Police continue to use excessive force on unarmed and peaceful protesters, in most instances, without using the correct procedures as outlined in the Regulation of Gatherings Act to disperse the protesters.

The other discussion prompted by the Brackenfell protests is the issue of permission seeking versus giving notice for an intended protest. A perception held by many is that one needs to ask for permission in order to protest. R2P is of the view that this is fundamentally incorrect, you cannot ask for permission to exercise your constitutional right. Protesters merely give notice for their protest to notify the relevant authorities, this is not a permission-seeking process.

Labour strikes

As outlined in previous reports on the State of Protest, labour strikes are often well organised and able to achieve their objectives without engaging in civil disobedience. This is because employees have several methods at their disposal to get the attention of their employer, for example, "go-slow" and "withdrawal of labour". When the government eased the restrictions of the lockdown in an effort to save the economy, businesses began to start operating. But, the right to strike was suppressed since under the regulations gathering at workplaces was only permitted for the purposes of work. This exposed employees to potential exploitation and negatively affected their ability to strike against their employer.

During levels three and four of the national lockdown, R2P observed a rise in protests by doctors and nurses in relation to lack of personal protective gear. Whilst these heroes were at the forefront of combating the coronavirus, the Department of Health failed them in terms of providing them with the necessary protective gear. Because the right to strike was outlawed, people in the medical sector staged protests during lunch breaks as that translated to “gathering for work purposes”. Lunchtime is indeed for work purposes and that time was used to collectively air concerns.

The matter highlighted the significance of strikes as an important bargaining tool and that employers cannot ignore the fact that their employees have the right to picket. The right to protest plays a fundamental role in many aspects of our lives and it deserves legislative protection.

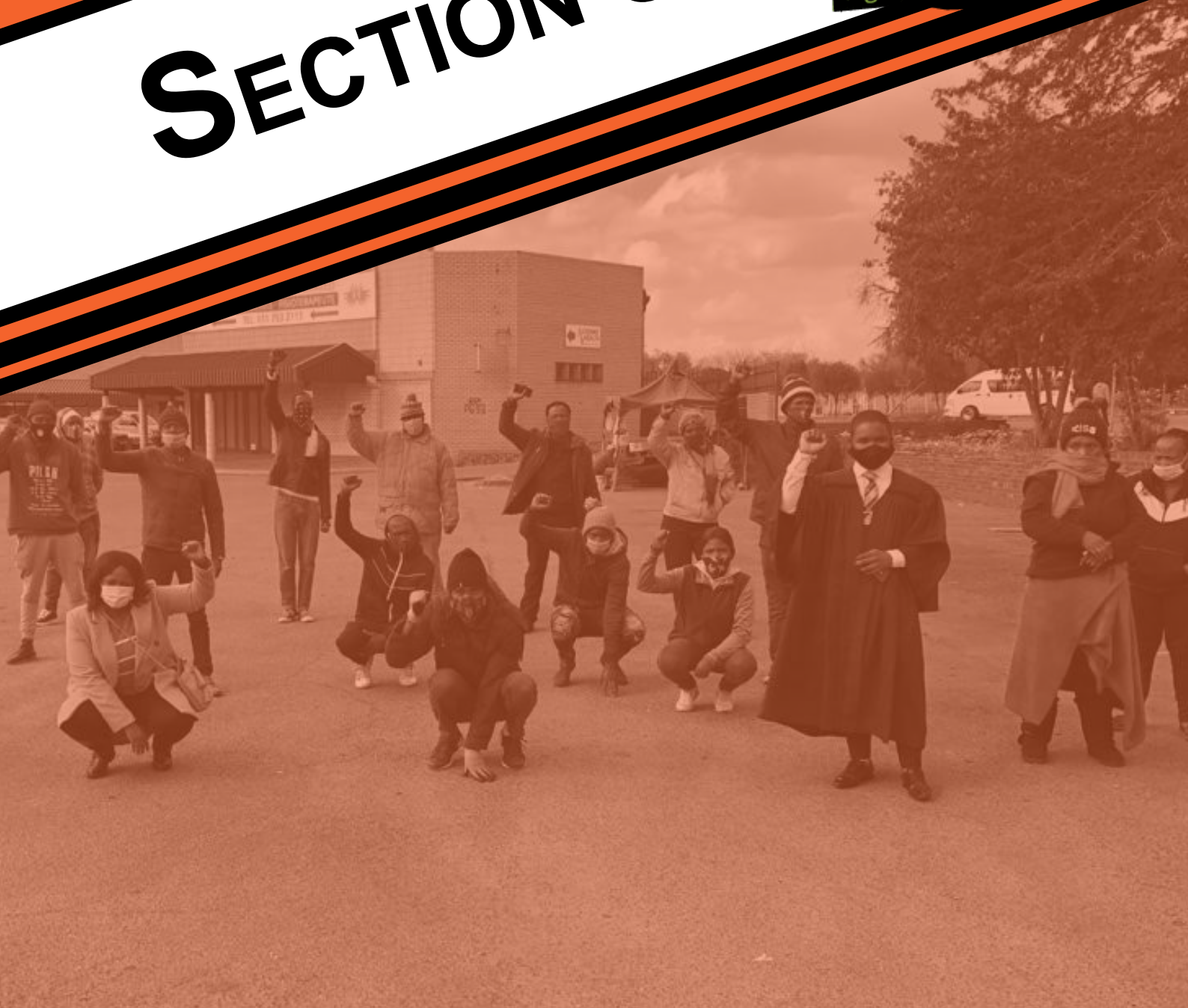
On 22 August 2020, R2P assisted GIWUSA, a labour union in relation to the interpretation of the Labour Act and the regulations governing level two of the lockdown. GIWUSA intended to hold a picket (gathering) against the employer. The police who enforced lockdown regulations insofar as the prohibition of certain gatherings are concerned clamped down on the picket. The Union intended to approach the labour court in terms of Labour Relations Act and they relied on section 69(2)(a) and (b), which says:

“Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held – (a) in any place to which the public has access but outside the premises of an employer; or (b) with the permission of the employer, inside the employer’s premises.”

According to section 55(1)(c) of the regulations governing lockdown level two, a gathering at a workplace is permitted provided that the gathering is for work purposes. Effectively, this provision prohibits employees from holding a picket against their employer. In other words, any gathering at a workplace that is not for work purposes is tantamount to an unprotected strike. The question is: are there any prospects of success in relying on section 69(2) of the LRA to challenge the prohibition of labour pickets in terms of the lockdown regulations?

The lockdown regulations incidentally regulate gatherings and therefore one may rely on section 69(2) of the LRA. The continued prohibition of the right protest raises many challenges for those relying on it as an outlet to voice their dissent and for many the prohibition serves one purpose, which is to suppress and silence pressure groups and challenges against an employer’s actions or omissions. The continued prohibition on this right has no connection with the endeavours to flatten the curve. People already gather (church, sports, restaurants) in instances and it is a disservice for a democratic country to limit this important constitutional right.

SECTION 3



3 Conclusion and recommendations

In light of the reflection on the state of protest in South Africa, R2P makes recommendations as follows:

1. Recommendation to Responsible Officers

Responsible officers are key personnel entrusted with ensuring compliance with the provisions of the RGA. Responsible officers must be cognisant that the right to protest is based on giving *notice*, not an application. They do not have power to “approve” a protest. In their application of municipal laws and by-laws, they must ensure that those laws are not beyond the powers of the RGA. Instead, those laws must be aimed at ensuring a protest takes place within the spirit of the Constitution and the RGA. Responsible officers must exercise their powers in good faith.

2. Recommendation to South African Police Services

Members of SAPS are entrusted with ensuring the safety of protesters and the maintenance of law and order during a protest. We urge them to caution against police brutality and excessive use of force. R2P wishes to build a working relationship with authorised members of SAPS and responsible officers to safeguard the constitutional right to protest.

3. Recommendation to Civil Society

We appreciate the work that has been done by civil society to advance and protect the right to protest even during a time where it was prohibited. Thank you for remaining responsive.

Right2Protest Hotline: 0800 212 111

Call this number for legal advice and support for the right to protest

Connect with us on Facebook and Twitter at [@ProtestZa](#)

Visit www.r2p.org.za for more resources