



The State of Protest Report

Right2Protest Project report on the state of protest in South Africa

2018 – 2019



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) 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), Equal Education Law Centre (EELC), the Freedom of Expression Institute (FXI), 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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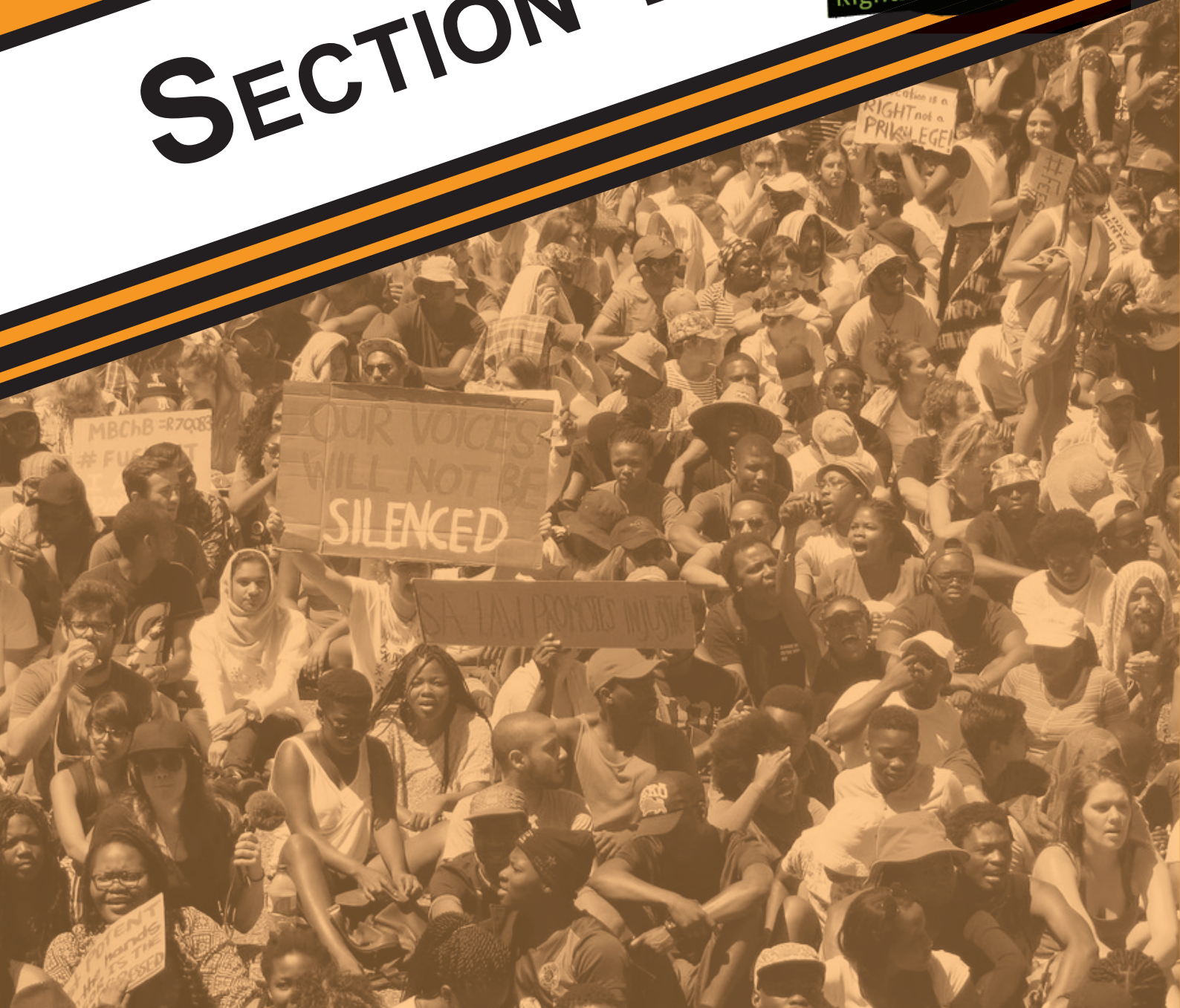


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SECTION 1



1 Introduction

The right to protest is essential to the proper functioning of our democracy. Protests are used as a method of engaging and holding the government accountable. Furthermore, the right to protest serves as a gateway right to enable people to exercise and access other constitutionally guaranteed human rights.¹ During Apartheid, protests, gatherings, demonstrations and/or pickets were dealt with violently by the police who used live ammunition, tear gas and rubber bullets to quell what the government considered ‘unrest’.²

South Africa is often described as one of the most unequal countries in the world, and has also been referred to as the world’s ‘protest capital’.³ Issues of service delivery and lack of political will continue to contribute to protests in South Africa.

This report by the Right2Protest Project provides an analytical view of the state of protest in South Africa. The report outlines the cases (both litigious and media-related) which the Right2Protest Project has engaged with between 2018 and 2019. The aim of the analysis is to establish whether or not the constitutional right to protest is being suppressed or threatened.

In order to achieve its objective, the report examines various issues related to protest action. The report identifies common themes, including: (i) the misapplication of the Regulation of Gatherings Act 205 of 1993 (RGA), (ii) the use of court interdicts to suppress protest, (iii) police brutality, (iv) labour strikes, (v) judicial intervention and (vi) the common law offence of public violence.

The report further engages in a comparative analysis between service delivery protests and labour strikes in order to identify why service delivery protests are more likely to be stigmatised as violent. This is followed by a reflection on R2P’s work and a reflection on a landmark Constitutional Court judgment on the right to protest. The report concludes with some recommendations to the relevant role players involved in protest action.

¹ In service delivery protests, people use the right to protest to raise concerns relating to the violation of their constitutionally guaranteed rights to access basic services.

² See, for example, the Sharpeville Massacre and 16 June 1976 student protests.

³ See <https://www.npr.org/sections/goatsandsoda/2018/04/02/598864666/the-country-with-the-worlds-worst-inequality-is>, accessed on 14 March 2019.

1.1 Overview of the constitutional right to protest

The right to protest as envisaged in section 17 of the Constitution has two internal qualifiers, which are “peaceful and unarmed”.⁴ It is the responsibility of a protester to ensure that they exercise the right to protest in a peaceful and just manner. The Constitution recognises violence as an inherent element of protests and does not seek to suppress it entirely but manage it through the internal qualifiers.⁵ It is clear that a protest loses protection from section 17 of the Constitution the moment violence erupts. However, it is also important to note that an individual does not lose her right to peacefully protest as result of other violence committed by others during a protest.⁶

The ‘peacefully’ modifier readily excludes forms of exercising the right that are not peaceful. Judgment in the *Fourways Mall* case, for example, found that conduct which intimidates and interferes with the rights of others is not protected.⁷ Another modifier is the ‘unarmed’ requirement. This excludes demonstrations and pickets with armed participants from the protection of the right.⁸ At first glance, armed protesters display a preparation and intention to engage in violence and therefore that allows law enforcers to act against the whole protest.⁹ This is to protect participants of a protest and the surrounding society.

The right to protest is affirmed in the Regulation of Gatherings Act 205 of 1993. This piece of legislation seeks to make protest possible, whilst ensuring that protesters and members of society are protected during a protest.¹⁰ This concludes that the law strikes a fine balance between regulating protests and enabling protests to take place. Whilst law enforcement officials have a duty to act in good faith and in a lawful manner, participants of a protest have a responsibility to act within the confines of the law.¹¹

1.2 Key role-players

The RGA provides for role players within the framework of exercising the constitutional right to protest. The role players have a duty to comply with the RGA to ensure that protests take place within the confines of the Constitution and the RGA. The role players are as follows:

1. **Responsible officer** – the objective of this person is to ensure that there is compliance with the RGA and endeavour to ensure that meetings relating to a protest take place in good faith.

⁴ Section 17 of the Constitution of the Republic of South Africa.

⁵ Woolman S in Currie I & De Waal J. *The Bill of Rights Handbook*. (2013). Juta. 384.

⁶ *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZAC 13 at paragraph 53.

⁷ *Fourways Mall (Pty) Ltd v South African Commercial Catering* 1999 (3) SA 752 (W).

⁸ Woolman S in Currie I & De Waal J. *The Bill of Rights Handbook*. (2013). Juta. 384.

⁹ Ibid.

¹⁰ Preamble of the Regulation of Gatherings Act 205 of 1993.

¹¹ Section 4 (2) (d) of the Regulations of Gatherings Act 205 of 1993.

2. **Convener** – this person convenes a protest and has a duty to ensure compliance with the relevant and specific provisions of the RGA. In the event of non-compliance, the responsible officer shall assist the convener.
3. **Authorised member** – this a member of the South African Police Services tasked with ensuring the safety of the participants of a protest. Ideally, this person delegates her duties to the Public Order Police Unit.
4. **Marshal** – this person is appointed by the convener and is tasked with controlling the participants and taking steps to ensure that the gathering remains peaceful.
5. **Public Order Police Unit** – although not specifically mentioned in the RGA, this unit is trained to deal with crowd management. The unit's duty is to ensure the safety of the participants and the surrounding society during a protest.

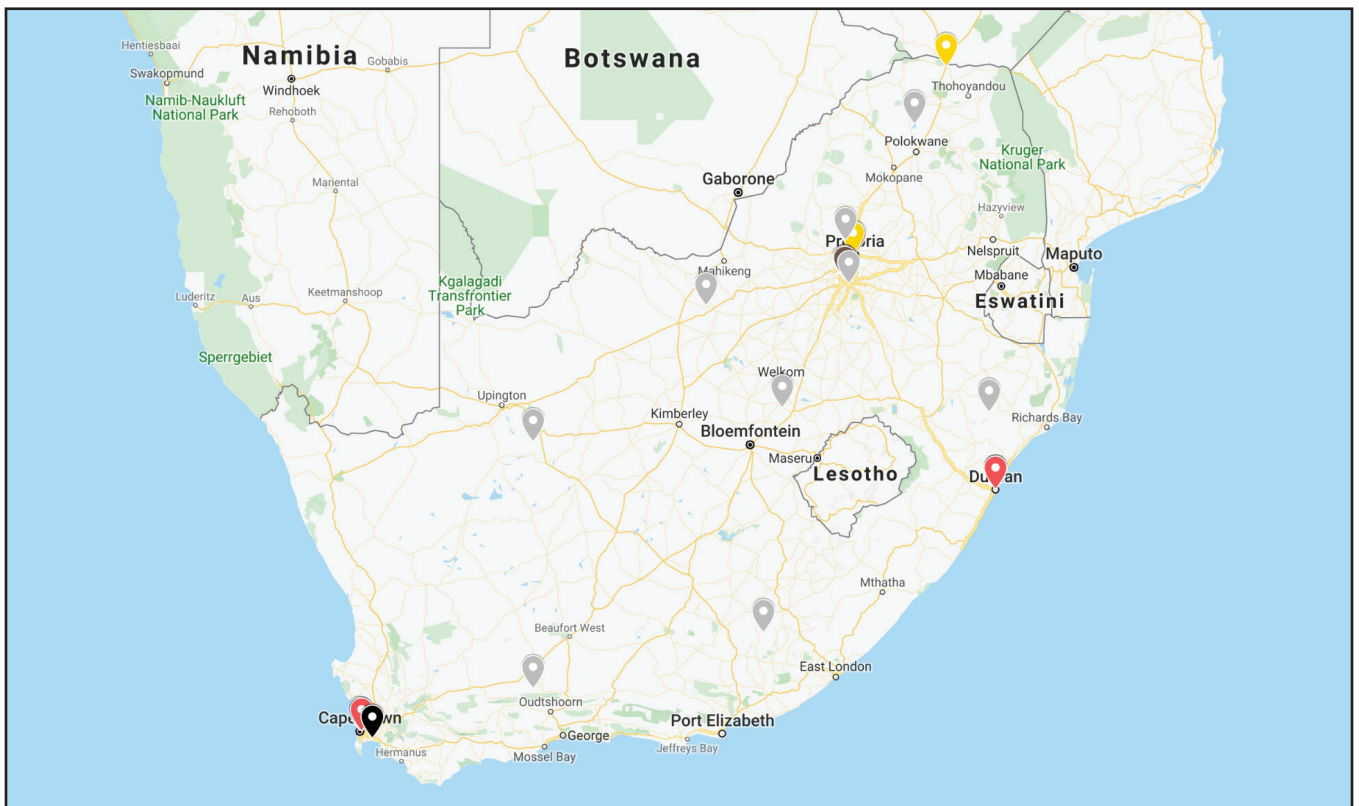
1.3 What is the Right2Protest Project?

R2P is a coalition of civil society organisations, most of which are listed in the acknowledgements. 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.

1.4 What is the vision of R2P?

R2P envisions a South Africa and a world 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.

1.5 Where does the R2P referral network operate?



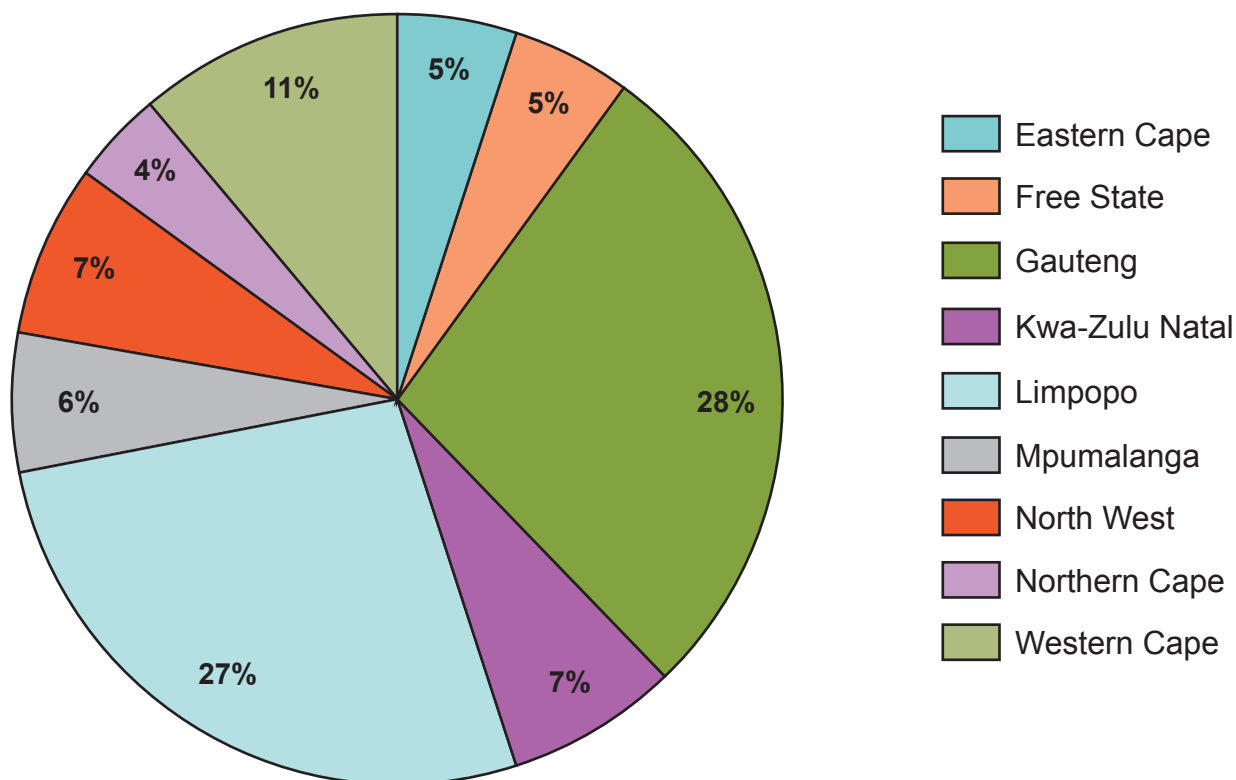
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- 📍 FREEDOM OF EXPRESSION INSTITUTE
- 📍 Equal Education Law Centre
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1.6 What trends has R2P observed?

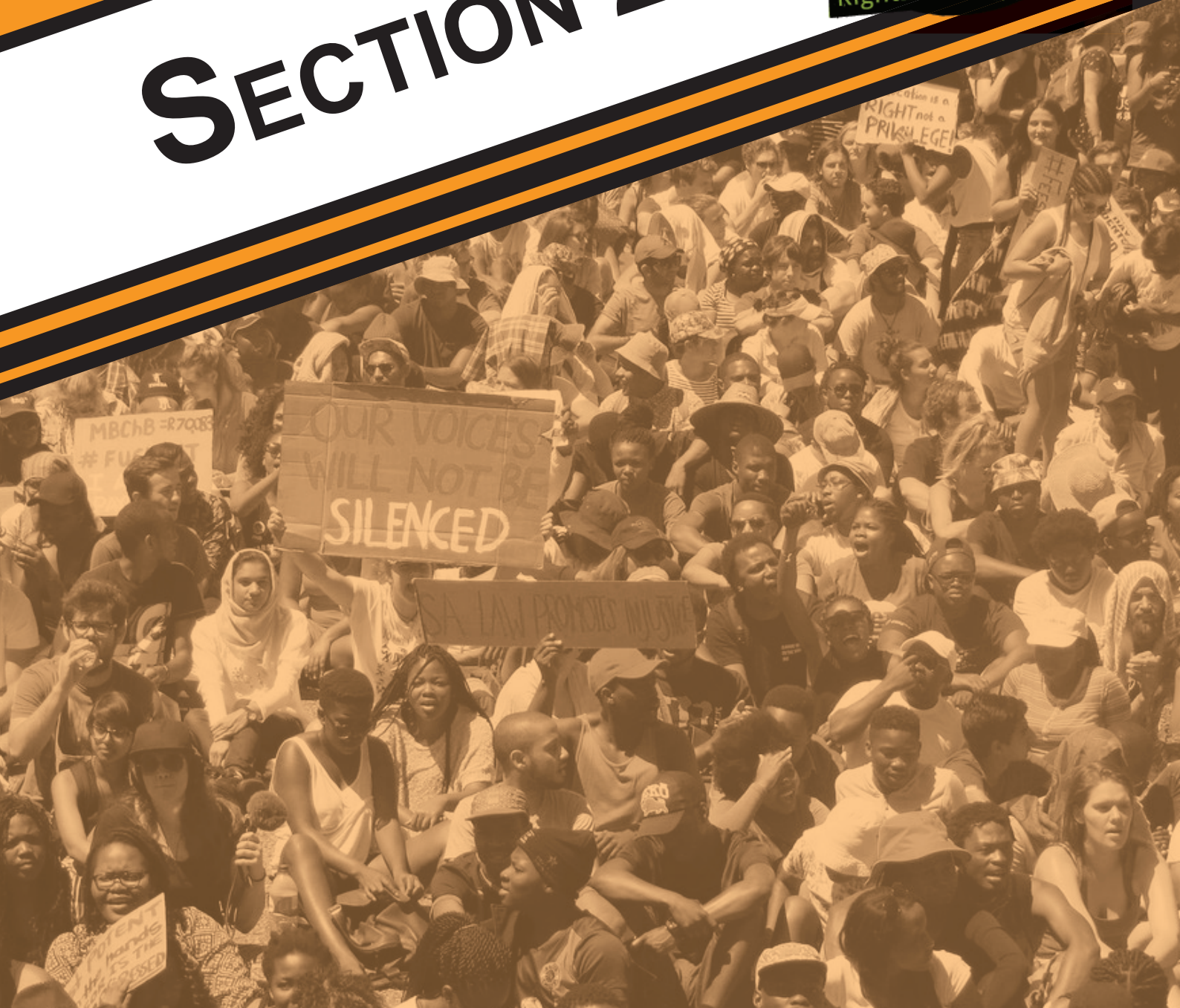
The section that follows will go into more detail about the observations from the reporting period, as well as provide case studies to illustrate them. The major trends in our work for this period include:

1. R2P remains strongest in Gauteng with 28% of the calls received on the hotline coming from the province, followed closely by 27% of the calls coming from Limpopo. This represents a significant change since the last reporting period when the provinces represented 47,5% and 5% of call volumes respectively.
2. R2P has seen an increase in the use of its services in rural communities which make up 27% of the calls received.
3. The most common charge for those arrested during protests remains public violence.
4. The common issues which we have identified through the calls received on the hotline are:
 - Land
 - Mining
 - Housing
 - Poor/lack of service delivery
 - The use of disproportionate force by the police during protests

Calls per province



SECTION 2



2 Case studies and observations

From the work done and matters handled by the R2P coalition, we have observed that the constitutionally guaranteed right to protest is being suppressed. The conduct of local municipalities and law enforcement officials when attending to protests raises a concern as to whether these officials and representatives understand the contents of section 17 of the Constitution. With the unambiguous structure and meaning of section 17 of the Constitution, one may conclude that local municipalities and law enforcement officials deliberately ignore the provisions of this section.

The importance of the constitutional right to protest cannot be overemphasized. The RGA echoes and affirms this right so as to ensure that it is safely exercised and that the rights of other citizens are taken into account. The provisions of the RGA are clear as to how protest should be handled.

Protest action continues to be met with hostility and protesters continue to be labelled as ‘rebels’ whose mission is to ‘subvert’ government. Arbitrary prohibitions of protests take place on a daily basis. In cases where conveners satisfy the relevant provisions of the RGA, they often find it difficult to satisfy municipal by-laws.¹² People are compelled to comply with these by-laws because the issues leading to the protest are rather dreadful to be halted by the by-laws. Sometimes, in order to avoid the by-laws, conveners choose to refrain from giving notice. This has dire consequences as conveners end up enduring police brutality and risk having the protest declared violent and unlawful.

R2P has observed a number of common themes that may lead to the suppression of the right to protest. These include: (i) the misapplication of the Regulation of Gatherings Act, (ii) the use of court interdicts and ‘SLAPP’ suits, (iii) police brutality, (iv) labour strikes, (v) judicial intervention, and (vi) the common law offence of public violence.

We reflect on each of these themes in turn in the sections that follow, providing one or more case studies to illustrate how they impact on the right to protest.

¹² These municipal by-laws include requiring organisers to pay a fee in order to march, provide toilets and water facilities during gatherings, or supply a confirmation letter from the institution or person to whom a petition is to be served.

2.1 Misapplication of the Regulation of Gatherings Act

Case Study

Lephalale Unemployment Forum

On 22 August 2018, the Lephalale Unemployment Forum (LUF), with the assistance of R2P, gave a section 3 notice to its local municipality in order to serve a memorandum of demand to Exxaro mining company. On 28 August 2018, the responsible officer called for a section 4 meeting in order to discuss the contents of the notice, the conditions and the amendment. Present at the meeting was the convener, deputy convener, police official, members of the local municipality and representatives of the Exxaro mining company.

Apart from discussing the contents of the notice, the responsible officer opened the floor to the mine representatives to try and negotiate with the convener to refrain from the protest. The convener made it clear that the time for negotiations is over and that LUF will be submitting its memorandum of demands to the mine on 19 September 2018. The mine's representative stated that mine management will not be available on that date to receive the memorandum. The LUF was then forced to shift their date to 26 September 2018.

This matter illustrates the clear misapplication of section 4 of the Regulation of Gatherings Act 205 of 1993. This section makes it clear that the meeting must be between the responsible officer, the convener, the authorized member, any other responsible officers concerned, representatives of public bodies, local authorities and police community consultative forum. The section at hand does not provide for invitation of representatives of mining companies. Their involvement in such meetings causes more frustrations on communities because they use such a platform to ensure that protests do not take place.

Inviting persons or institutions not mentioned in section 4 of the RGA defeats the purpose of the meeting. A section 4 meeting must be held to ensure that the right to protest is exercised according to the Constitution. Furthermore, it is clear that the section 4 meetings are for the discussion of the contents of the notice, conditions to the conduct and amendments thereof. It is not per se a negotiation platform whereby the party to be protested against is given a chance to justify why the protest should not take place.

2.2 Conduct of responsible officers

Case Study

Treatment Action Campaign

On 10 April 2019, the R2P attorney received a call from SECTION27, an R2P member organisation, regarding an intended protest by the Treatment Action Campaign (TAC). The R2P attorney directly contacted the convener of the protest and it became apparent that the Ekurhuleni Metro Police Department, responsible officer verbally prohibited the protest.

The TAC wanted to protest at Emperors Palace in Kempton Park as there was a World Health Organization Fair Pricing Forum meeting taking place. TAC wanted to serve a memorandum of demands relating to the deaths of HIV/AIDS patients who could not afford anti-retroviral medications.

The responsible officer verbally prohibited the protest for the following reasons:

1. The convener has not made a provision for toilets, resting place, parking area and water facility
2. There is no alternative place of gathering
3. The convener failed to obtain permission from the management of Emperors Palace

Furthermore, management of Emperors Palace sent an email to the convener stating that Emperors Palace is a national key point and therefore no gathering may take place there. The R2P attorney wrote a letter to the responsible officer requesting the written reasons of the prohibition, and simultaneously informing the responsible officer that Emperors Palace is not a national key point and that the prohibition must be consistent with section 5(1) of the RGA.

This section provides that a responsible officer may consider prohibiting a protest if they receive credible information under oath that a protest will cause serious disruption to vehicular or pedestrian traffic, injury to participants or other people or damage to property, and that the police and traffic officers will not be able to contain the threat. None of the above listed reasons of prohibition by the responsible officer affirm section 5(1) of the RGA.

Despite the unreasonable prohibitions, the R2P attorney advised the clients to go ahead with the protest and conduct it in accordance with the contents of their notice. The protest went ahead, the memorandum was served and no one was arrested. This case illustrates a clear suppression of the Constitutional right to protest by responsible officers and their *mala fide* actions towards protests. Responsible officers must exercise their duties in good faith and refrain from infringing on the right to protest.

Case Study

Heineken Workers Council

On 7 November 2018, Heineken Workers Council gave Tshwane Local Municipality a notice in terms of section 3 of the RGA in order to march and hand over a memorandum to the Embassy of Netherlands and Department of Trade and Industry respectively. The march was intended to take place on 15 November 2018. The responsible officer raised an issue with that date and asked the convener to elect an alternative date. The convener elected 19 November 2018 as the alternative date and again the responsible officer raised an issue with that date. Eventually the date of 30 November 2018 was set as the date of the intended march. Shockingly, the responsible officer requested the convener to submit a new notice.

On 20 November 2018, after consulting with Heineken Workers Council, R2P sent a letter to the responsible officer. The letter highlighted that the convener is under no obligation to submit a new notice merely because the initial date of the march was changed. R2P further highlighted that the matter ought to be dealt with under section 4(2) of RGA due to fact that an amendment (changing of dates) was effected on the contents of the notice. Such an amendment to the contents of the notice does not make the notice null and void.

The responsible officer responded to the letter and agreed with the views of R2P. In a telephonic conversation between the R2P attorney and the responsible officer, the latter appreciated the clarification by R2P. However, the responsible officer went on to state that due to the Constitutional Court judgment in the *Mlungwana* case (also referred to as the 'SJC 10')¹³ conveners are no longer required to give a notice of an intended protest. R2P explained that the judgment does not exempt conveners from giving a notice, the judgment however found section 12(1) (a) of the RGA unconstitutional to the extent that it criminally punishes a convener for failure to give a notice regardless whether the protest complied with section 17 of the Constitution.¹⁴

This matter illustrates the lack of understanding of the provisions of the RGA and misapplication thereof. The failure by responsible officers to comprehend and properly apply the provisions of the RGA has a negative effect on the constitutional right to protest. This suppresses the right to protest as it unnecessarily subjects a convener to an irrelevant process. Furthermore, the responsible officer's interpretation of the *Mlungwana* judgment contradicts the RGA. The purpose of giving notice is to allow the state to ensure safety during a protest. Thus, it is essential that a notice must be given prior to a protest.¹⁵

2.3 Use of interdicts

Case Study

Commemoration of the Marikana massacre

On 1 August 2018, the community of Marikana in Rustenburg gave a notice to gather at Tharisa mine in order to commemorate the Marikana massacre which took place on 16 August 2012. On that day, mine workers protested against their employer, Lonmin, for a salary increase.¹⁶

¹³ *Mlungwana & Others v S & Another* [2018] ZACC 45.

¹⁴ According to section 17 of the Constitution, the right to protest must be exercised in a just manner, protesters must be peaceful and unarmed.

¹⁵ Section 3 (2) of the RGA provides that a notice shall be given seven days prior to the date of the gathering. If it is not reasonably possible to give notice seven days prior to the date of the gathering, the notice shall be given at the earliest opportunity, no later than 48 hours before the commencement of the gathering. If notice is given in less than 48 hours before the commencement of the gathering, the may prohibit the gathering.

¹⁶ 'Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out Of The Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province.'

Unfortunately, lethal force was used on the protesting mine workers and approximately 34 mine workers were shot and killed by the police.¹⁷ It should be noted that none of the police officials involved in the killing of the mine workers have yet been held liable for murder.¹⁸

On the eve of the commemoration, Tharisa mine through its legal representatives urgently filed an interim interdict against the conveners of the gathering at the Mahikeng High Court.¹⁹ The conveners were given approximately 6 hours to respond to the interdict and satisfy the court as to why the interim interdict should not be made a final order of court. R2P worked tirelessly with R2K to obtain urgent legal assistance for the clients. Eventually the matter was referred to the Legal Resources Centre and Power Singh Attorneys. The legal team was successful in challenging the interim interdict.²⁰

On 16 August 2018, the community peacefully gathered at Tharisa mine and commemorated the slain mine workers.²¹ This matter shows the measures which institutions or companies take to threaten the right to protest. The mine appeared spiteful by approaching the court on an urgent basis with the hope that the conveners would not in that short space of time obtain legal assistance. The fact that the mine brought the interim interdict on the eve of the gathering clearly proves the misuse of courts and the legal system in order to suppress the constitutional right to protest.²²

2.4 Police brutality

Case Study

Diepkloof

On 10 December 2018, R2P received a call from residents of Diepkloof, Soweto. On 9 December 2018, the residents had taken to the streets to protest against Eskom's decision to cut electricity in Diepkloof, Zone 4. The decision by Eskom was to introduce a prepaid electricity system and scrap the monthly billing system. The residents alleged that Eskom had taken the decision without informing the community. The community blocked a busy road with bricks and rocks in order to demonstrate their frustration against Eskom's decision.

¹⁷ Ibid.

¹⁸ Azad Esse, 'Six Years on, Still no Justice or Closure for Marikana Victims'. *Mail & Guardian*. 16 August 2018. Available at <https://mg.co.za/article/2018-08-16-six-years-on-still-no-justice-or-closure-for-marikana-victims>, accessed on 9 May 2019.

¹⁹ *Tharisa Minerals (Pty) Ltd v Mashamaite and Others* (UM126/18).

²⁰ Ibid.

²¹ Zintle Mahlathi. '#MarikanaMassacre: Govt urged to do more to honour slain miners'. *IOL*. 16 August 2018. Available at <https://www.iol.co.za/news/south-africa/north-west/marikanamassacre-govt-urged-to-do-more-to-honour-slain-miners-16596060>, accessed on 9 May 2019.

²² Busisiwe Mtabane. 'Court delivers Marikana protest victory – R2K'. *Politicsweb*. 16 August 2018. Available at <https://www.politicsweb.co.za/news-and-analysis/court-delivers-marikana-protest-victory--r2k>, accessed on 9 May 2018.

Traffic officers from the Johannesburg Metro Police Department (JMPD) arrived at the scene and fired stun grenades and rubber bullets at the crowd. As the crowd dispersed, eight people were arrested and detained at the Diepkloof Police Station. The arrested people were all charged with public violence. On 10 December 2018, the R2P attorney consulted with the accused persons at the Orlando Magistrate's Court holding cells for purposes of making a bail application.

The matter did not make it to court. The Control Prosecutor nullified the matter and R2P's clients were immediately released. This was a victory worth celebrating; the clients did not have to go through the rigorous criminal justice process for exercising their constitutional right to protest. However, some of the protesters suffered physical injury and trauma at the hands of JMPD officers and SAPS. One of the clients was injured by a rubber bullet fired at close range and kicked in the ear by a JMPD officer. She bled from the ear and mouth and only received medical attention upon release from custody. She had to endure the pain whilst locked up in the police holding cell for more than 20 hours.

The R2P attorney advised the client to get a J88 form from the police station in order to be able to open a case against the JMPD officer. The client never reverted to the R2P attorney and it was difficult for R2P to get hold of the client because she does not have a reliable phone. Consultations were set with the client but she failed to honour the appointment, thus there was no further mandate from the client to R2P. This matter also highlights the potential dangers faced by our clients in exercising their right to protest.

Case Study

Tshwane University of Technology

On 28 August 2018, students of the Tshwane University of Technology engaged in a protest to demonstrate dissatisfaction in relation to the SRC voting results. Police officials arrived at the protest scene and fired an R5 assault rifle at the protesting students. Unfortunately, a student was shot and killed. As a result two police officers were arrested and charged with murder. The case caused public outrage regarding how the state handles protests.

Although the RGA permits the use of force by police during protests, the force must be proportionate and it must not be lethal or cause serious bodily injury.²³ Most importantly, the force used by the police shall not be greater than necessary to disperse people from a gathering.²⁴ The type of weapon (an assault rifle) which the police brought to the scene contradicts sections 9(2) (b) and 9(2) (c) of the RGA. An assault rifle is a lethal weapon which should not be used for crowd management. There is totally no way that such a weapon can be used to disperse a crowd without causing death or serious bodily injury.

This matter illustrates that the use of lethal weapons should be prohibited in relation to crowd management situations. Furthermore, only the South African Police Services Public Order Policing unit should be deployed to manage protests. This particular unit is relevant when it comes to situations of crowd management during protests.

2.5 Common law offence of public violence

Public violence consists of the unlawful and intentional commission, together with a number of people, of an act or acts which assume serious dimensions and which are intended forcibly to disturb public peace and tranquillity or to invade the rights of others.²⁵

In a protest action the charge of public violence is often inevitable. In many instances, police engage in an indiscriminate attack on the protesters and those who cannot outrun the police will be arrested and charged with public violence.

Case Study

Rustenburg Lanxess Chrome mine protest

On 14 February 2019, R2P received a call regarding a protest by a particular group of employees at the Lanxess Chrome mine in Rustenburg, North West Province. Four people were arrested and detained at the Rustenburg Police Station.

During consultation, the clients informed the R2P attorney that they were locked up in the police van for approximately four hours and the police parked the van in front of the police station in the scorching sun. Temperatures were high on that day and the police parked the van in the heat so as to punish the clients. One of the police officials told the clients that they are being taught a lesson by being left in the heat and locked up in a van for four hours.

On 15 February 2019, the R2P attorney appeared at the Rustenburg Magistrate's Court for a bail application on behalf of the clients. To the attorney's surprise, only three out of four clients were brought to court. This was rather surprising because the clients were arrested at the same place and time for the same cause of action, locked in the same police van and detained in the same police holding cell. Two of the three clients were charged with public violence and the other client was additionally charged with theft of a police firearm. All three clients were granted bail of R1,000.00.

The R2P attorney approached the investigating officer and no reason was tendered as to why the fourth client was not brought to court. On 16 February 2019, the R2P attorney appeared at the Rustenburg Magistrate's Court for the fourth client's bail application. The client was charged with public violence and *crimen injuria*. The control prosecutor subsequently removed the charge of public violence on the grounds that this is an offence committed by a group of people and not a single individual. As result, the fourth client was only charged with *crimen injuria* and was granted bail of R500.00.

²³ Section 9 (2) (b) of the RGA.

²⁴ Section 9 (2) (c) of the RGA.

²⁵ *Le Roux v S* (444/2008) [2010] ZASCA 7.

Both of these matters were remanded to 23 March 2019 for further investigation. The matters at hand were successfully referred to the Freedom of Expression Institute for the purpose of trial proceedings. This matter illustrates the ill-treatment of protesters by the police. Police officials rarely carry out arrests of protesters in good faith; they assault and punish protesters in the process. Furthermore, they are quick to lay a charge of public violence against protesters without any level of consideration. The charge of public violence is opened not for purposes of securing a conviction but to detain protesters and suppress their right to protest.

Case Study

Ga Pila, Limpopo

On 15 June 2018, R2P received a call on the hotline regarding a gathering which occurred the day before. Residents of Ga Pila gathered near the premises of Stinkwater mine. The gathering was related to the mine's empty promises to the community and non-compliance with its social labour plans. Prior to the establishment of the mine, the community lived peacefully on the land and survived through farming. Twenty years ago, the mine approached the community and promised it R20 million as well as a lifetime supply of 80kg bags of maize meal per household in exchange of the community vacating the land to give space to mining.

To date, none of the promises have been fulfilled and the mine continues to operate. The community had fruitless engagements with the mine regarding its promises. The gathering which took place on 14 June 2018 was not the first. On that day, police arrived armed with rubber bullets and stun grenades and requested the protesters disperse. In less than five minutes, police started firing at the unarmed and peaceful protesters. Subsequently, nine protesters between the ages of 49 and 60 were arrested and charged with trespassing. They were detained at the Mahwelereng Police Station.

On 16 June 2018, the R2P attorney went to the police station to apply for the release of the protesters on police bail. Upon arrival at the police station, it transpired that only three out of nine protesters had been formally charged. That meant that the other six protesters were detained for two nights without being charged. The investigating officer added charges of public violence, thus making it impossible to release the protesters on police bail. The matter was referred to Freedom of Expression Institute to represent the protesters in trial. The protesters won the matter and all charges against them were dismissed.

This matter shows how police abuse and misuse their power in order to silence protesters. The protesters were not only assaulted, but their right to liberty was infringed upon. Arbitrary charges were used also to instil some fear in the protesters and to further suppress the constitutionally guaranteed right to protest.

2.6 Labour strikes

In November 2017, Parliament called for comments on the rules for picketing in the Labour Relations Act 66 of 1995 (LRA). The intended amendments are targeted at section 64 of the LRA which is the right to strike and lock-out recourse proviso. It should be noted that Parliament is still debating the proposed amendments.²⁶

According to section 64 of the LRA, a trade union which intends to embark on a strike action must refer the issue in dispute to the Commission for Conciliation, Mediation and Arbitration or a bargaining council.²⁷ A commissioner then attempts to mediate between the employers and trade union to resolve the dispute. If, after 30 days, the parties are unable to resolve the dispute, a certificate of non-resolution is issued, commonly referred to as a “strike certificate”. After it has been issued, the trade union must give the employer 48 hours’ notice of any strike action.

The proposed amendments require that rules of picketing should be agreed on before a strike certificate may be issued. Under the current LRA, it is not a legal requirement for picketing rules to be agreed on prior to a strike. The intended amendments would have drastic limitations on all strikes. The intended picketing rules come with the following problems:

1. Requesting an agreement relating to picketing rules prior to the issuance of a strike certificate would mean that the union or employees are compelled to go on strike.
2. Employers would be one step ahead because they would have full details of the strike even before a strike certificate is issued. Employers would be at liberty to undermine the strike, for example, by hiring new staff members in anticipation of the strike.
3. Lastly, the commissioner would be given unfettered power to decide what can and cannot be done at the strike. This may be extended to the songs which may be sung or whether or not placards may be carried during the strike. Both the right to protest and the right to freedom of expression may be gravely suppressed.

Here we can definitely conclude that the right to protest is under attack both at service delivery protests and labour-related protests.

²⁶ Carin Runciman. ‘South Africa’s strike rate isn’t as bad as it’s made out to be’. *Mail & Guardian*. 30 April 2018.

²⁷ Section 64 (1) (a) of Labour Relations Act 66 of 1995.

²⁸ Section 64 (1) (a) (i) of the Labour Relations Act 66 of 1995.

²⁹ Section 64 (1) (b) of the Labour Relations Act 66 of 1995.

³⁰ Carin Runciman. ‘Why changes to picketing rules in South Africa pose a threat to strikes’. *Mail & Guardian*. 21 October 2018.

³¹ Ibid.

³² Section 67 of the Labour Relations Act 66 of 1995.

Case Study

Information Communication Technology Union

On 6 of May 2019, R2P received a call regarding a labour-related protest action which took place outside the Tiso Blackstar Group. Approximately 30 employees of Tiso Blackstar Group, represented by their trade union Information Communication Technology Union (ICTU), took to the streets to protest against low salaries and unfair labour practices. The union complied with the relevant provisions of the LRA insofar as conducting a “protected strike” is concerned.³²

In the telephonic consultation with the R2P attorney, one of the participants of the protest asked whether burning a tyre would render the protest non-peaceful. The R2P attorney first asked what message the participants are aiming to send by burning the tyre. The participant said that perhaps some form of civil disobedience would help them get the necessary attention they wanted from their employer. Even though the protesters gathered outside their workplace, business at the company seemed to proceed as normal and the protesters felt undermined and disregarded.

The R2P attorney advised against burning the tyre because it posed a risk of harm to the surrounding property, protesters as well as non-protesters. This matter is a clear indication that disgruntled and neglected participants of a protest can do anything in order to convey their message and get the attention they require. Actions of the party being protested against have a great influence on whether a protest remains peaceful or becomes violent.

2.7 Judicial interventions

Case Study

Evander

On 29 June 2018, R2P received a call regarding a service delivery protest in Evander, Mpumalanga. On 28 June 2018, community members had taken to the streets to demonstrate against the lack of access to housing. As a result of the protest thirteen people were arrested and charged with the public violence. On 3 July 2018, the R2P attorney and then-candidate attorney at R2P member organisation the Centre for Applied Legal Studies, Vuyolethu Mtonintshi, consulted with the clients at the Evander Magistrate’s Court holding cells.

The candidate attorney appeared before the Magistrate on behalf all thirteen clients. The prosecution asked to the Magistrate to set the amount of bail at R2,000.00 per person. After making representations for their bail application, all thirteen clients were granted bail of R300.00 per client. This matter ultimately shows how the court considered the right to liberty, rule of law and the presumption of innocence until proven guilty in setting a low bail amount.

On 29 October 2018, R2P received a call regarding the arrest of 14 women in Colenso, KwaZulu Natal. The women were charged with public violence; they had been denied bail and spent over 60 days in custody. During the protest, the accused women requested a truck driver to stop and park his truck in the middle of the road in order to obstruct traffic. The truck driver complied with the instruction. The truck was removed by police one hour later. The women had a private attorney on instruction, thus the R2P attorney was ethically prohibited from taking instructions from the accused women.

On 1 November 2018, the R2P attorney did a media interview with Sunday Times newspaper regarding the accused women.³³ It became apparent that bail had been denied because the Magistrate was tired of protests taking place in the area and that the investigating officer in the matter felt unsafe if the women were to be granted bail. The investigating officer further stated that a release on bail fuelled protests in the area. It was however not clear why the private attorney did not appeal the Magistrate's decision.³⁴

This matter paints a picture of how various spheres of the state are being used to stifle the right to protest. The denial of bail was a clear indication that the judiciary is used to suppress the right to protest. The bail system resonates with the principle of legality and the right to be presumed innocent until proven guilty. Therefore, an accused person shall (if the interest of justice permit) be released on bail pending further investigations into the matter. Our constitutional dispensation does not support pre-trial detention because it deprives the accused of her liberty before a court of law pronounces her guilty.³⁵

It is clear that the Magistrate concerned had a negative attitude towards the right to protest and is prepared to misuse the bail system to ensure that protest are treated harshly. The Magistrate's attitude clouded his ability to consider whether the interest of justice permitted the release of the accused women on bail. The Magistrate used the bail system as a punishment to suppress the right to protest.

Although the court has discretion on whether to grant bail or not, it must highly consider the interests of justice and by so doing it is likely to favour the liberty of the accused and grant bail where possible.³⁶ Here we saw how the judiciary can also be used as a stumbling block for those exercising the right to protest. The court failed to consider the interest of justice, hence the unnecessary and lengthy pre-trial detention of women who raised grievances against the local municipality for lack of service delivery.

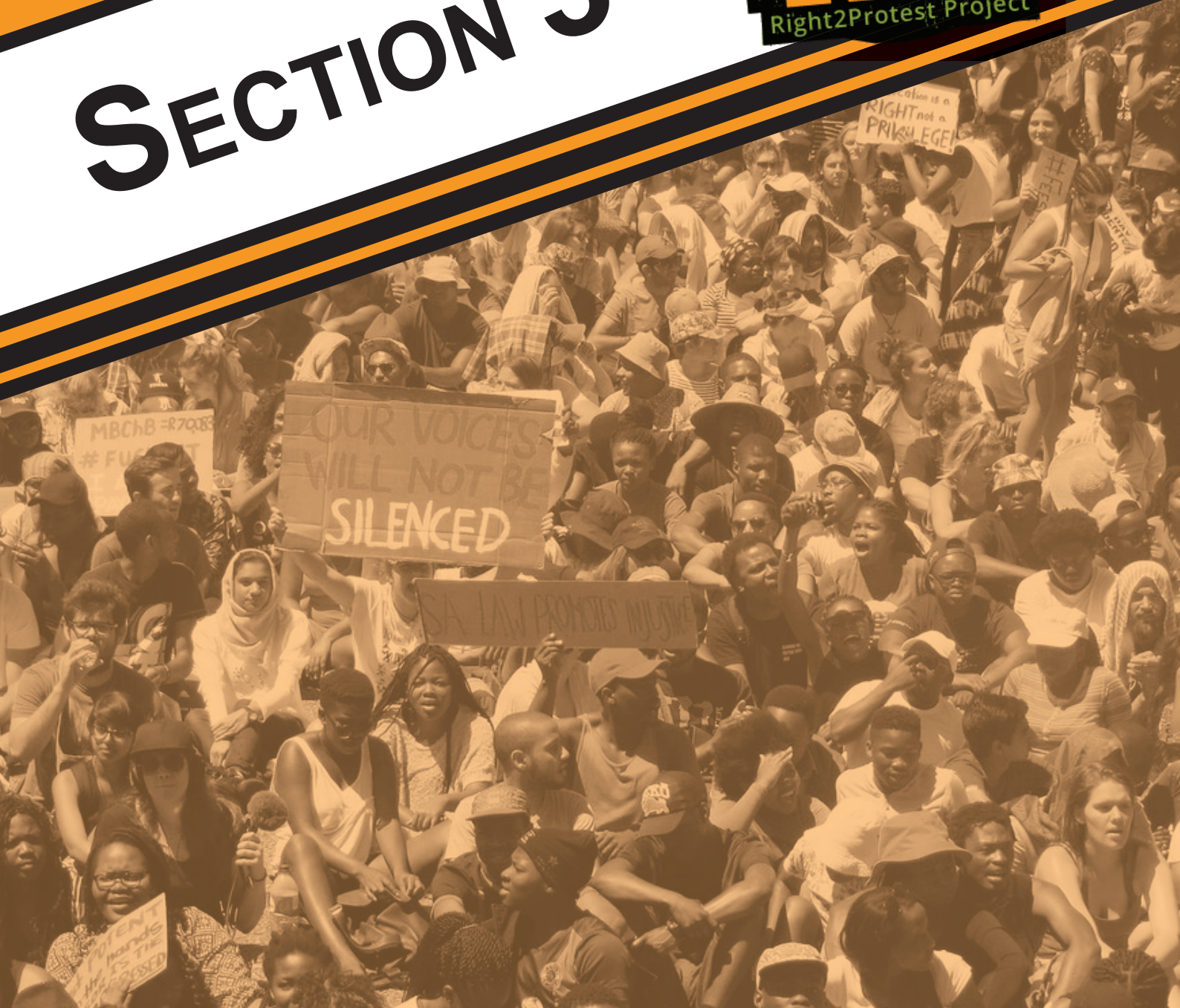
³³ <https://www.pressreader.com/>; 'Prison hell for 60 days for protesting women'.

³⁴ This reason for denial does not resonate with section 60 of the Criminal Procedure Act 51 of 1996 which requires that there should be likelihood that the accused if released on bail will endanger public safety or evade trial or attempt to influence witness or destroy evidence or undermine the criminal justice system or the bail system.

³⁵ Van der Berg, J. *Bail: A practitioner's guide*. Juta (2012) 1.

³⁶ Ibid at 10.

SECTION 3



3 Comparative analysis of labour strikes and service delivery protests

South Africa has a long history of protest action. Many of the protests that occur relate to poor (or lack of) “service delivery”. Quite often those protesting are from poor communities who have little to no access to resources and protest action is the last resort for these communities. On the other hand, labour-related strikes are centred around poor working conditions and unfair labour practices. Labour-related strikes are regulated by the Labour Relations Act (LRA) and service delivery protests are regulated by the RGA. There is a notion that service delivery protests are always violent. In our work, we seek to dismantle this notion and determine the cause for the association of violence to service delivery protests.

Labour-related strikes

The LRA sets out a procedure that employees must follow in order to exercise their constitutional right to protest.³⁷ The LRA also makes provisions for an employer to be able to protect itself against a strike.³⁸ Whilst employees have the right to strike, the employer, on the other hand, has a right to a lock-out. A lock-out refers to the exclusion of employees by their employer from their place of work until certain terms are agreed to. Furthermore, employees may engage in various methods of protest, such as withdrawing labour. These methods are often harmful to the employer’s business in terms of profit generation and preserving the image of the business.

In light of the above, imagine wine farm workers deciding to go on a salary dispute strike during the grape harvesting season. This will affect the employer’s profit in that the grapes will not be delivered to the relevant customers and will end up rotting. This will result in a loss of profit. The employer will in some way be forced to bargain with the employees in an attempt to avert profit loss and preserve the image of the business.³⁹ The employer is legally prohibited from firing striking employees.⁴⁰ However, in labour-related strikes the employer may hire new staff, but the employees have a right of reinstatement.⁴¹ With all the mechanisms in place, employees are not forced to burn tyres and block roads in an attempt to get the attention of their employer and eventually have the dispute resolved.

³⁷ Section 64 of the LRA.

³⁸ Ibid.

³⁹ Zimolong W. ‘Rights afforded to employers and employees during strikes’. Available at <https://www.supplementalconditions.com/2018/10/rights-afforded-to-employees-and-employers-during-strikes/#> accessed on 3 June 2019.

Service delivery protests

These protests result from a lack of or poor service delivery. “Service delivery” includes access to water and adequate housing. Communities across South Africa engage in these protests against their municipalities. Service delivery protests also serve as a method of holding municipalities accountable and forcing such municipalities to promote human rights insofar as the provision of basic services is concerned. Where there is a service delivery protest there is a violation of the right of access to services by the municipalities. In the early stages of such protests, communities usually serve a memorandum of grievances to the relevant municipality and request to be addressed by the relevant officials.⁴²

Corruption is a heavy burden on the state and it gravely affects service delivery. Officials make promises and, in many cases, these promises are not fulfilled. It should be noted that no one wakes up in the morning and decides to block roads and burn tyres for no reason. Protesters engage in disruptive actions in order to get the attention of the relevant municipality and to be heard. Unfortunately, the protesters run the risk of being criminalised during such protests. Unlike striking employees, a community without water has no other mechanism in order to get the attention of the municipality. They therefore put their lives on the line in order to be heard.

It took arrests, criminalisation and police brutality for the Department of Higher Education to listen to students who took to the streets to fight exclusion from higher learning based on financial affordability. The students had no other mechanism to get the attention of the Department of Higher Education.

After 25 years of democracy, South Africa remains one of the most economically unequal countries in the world.⁴³ This is evident in the number of service delivery protests that the country experiences. The response from the government to these protests is concerning. Protesters are forced to engage in a disruptive manner and risk being labelled as criminals and enemies of the state. The state waits for protesters to block roads so as to label the protest “violent” and undermine its legitimacy.

It seems that the government’s attitude towards service delivery protest compels protesters to be disruptive. Disruption is often a measure of last resort; protesters disrupt in distress to be heard and attended to. “Violence” in service delivery protests is attributed to the attitude by the state towards distressed protesters.

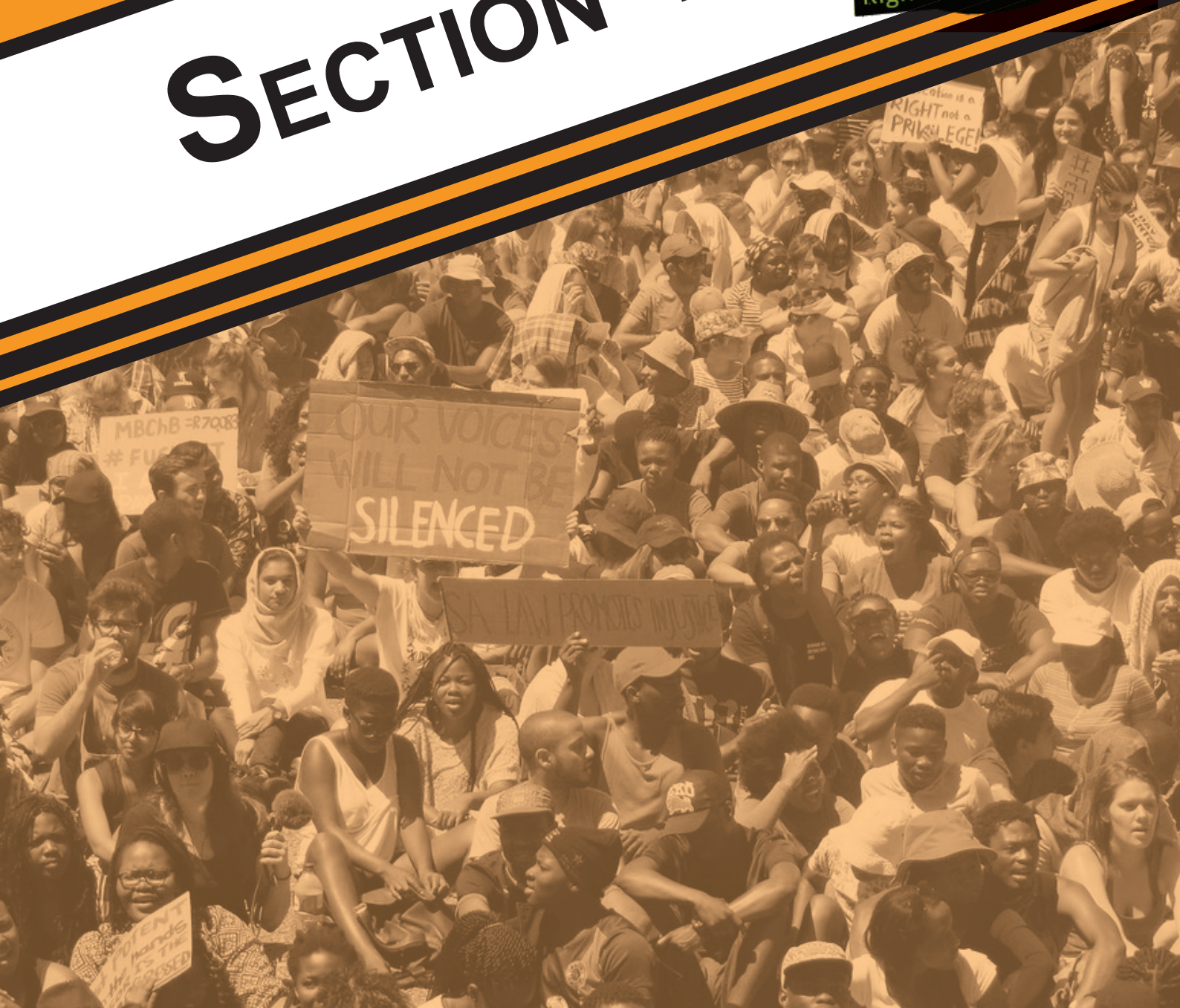
⁴⁰ See note 3 above.

⁴¹ Ibid.

⁴² See Alexandra total shut down.

⁴³ Scott, K. ‘South Africa is the world’s most unequal country. 25 years of freedom have failed to bridge the divide’. Available at <https://edition.cnn.com/2019/05/07/africa/south-africa-elections-inequality-intl/index.html> accessed on 3 June 2019.

SECTION 4



4 Reflection on the Right2Protest

Ndakeni village protests

Ndakeni village is situated in Bizana in the Eastern Cape Province. Residents of this village have engaged in multiple service delivery protests against the Bizana Local Municipality. To date this community does not have any running water, and relies on rivers and man-made wells for water supply.⁴⁴ In seasons of drought, this community finds it very difficult to cope. On 17 May 2019, the R2P attorney had a telephonic interview with the community leader. The aim of the interview was to establish the role which R2P has played and continues to play in Ndakeni. The interview covers situations before and after the community knew about R2P.

Situation prior to knowing about R2P

In 2011, the community met with the mayor at the Dudumeni community hall to discuss their grievances relating to the lack of water. A conflict ensued and the police fired rubber bullets and tear gas at the disgruntled community. Several members of the community were arrested and charged with public violence.⁴⁵ In 2016, the community took to the streets to protest against the lack of service delivery. “At that time we did not know about the RGA, we knew was that we have constitutional right to protest,” said the community leader. The protest was violently stopped the Public Order Policing Unit (POP) who fired rubber bullets, live ammunition and tear gas. Three youths were arrested and charged with public violence. They appeared at the Flagstaff Magistrate’s Court and were each fined an amount of R6,000.00. The mayor then visited the community and made them a number of promises. Despite these promises, the community is still without water.

In 2018, the community blocked the R61 main road during a protest action. The road blockage happened at night and no community member was assaulted nor arrested because no police attended to the protest action.⁴⁶ On 28 June 2018, the community blocked the R61 main road with burning tyres and rocks. The POP unit arrived and started firing rubber bullets, live ammunition and tear gas. The protesters fled the scene. Three women were arrested, charged with public violence and detained for eight days. They appeared at the Flagstaff Magistrate’s Court without legal representation and were fined R8,000.00 each.

⁴⁴ R2P has successfully referred this matter to CALS and it is still ongoing.

⁴⁵ It is not clear whether the accused persons were convicted.

⁴⁶ The R61 is a provincial route in South Africa that connects Beaufort West with Port Shepstone via Graaff-Reinet, Queenstown, Mthatha and Port Edward. By blocking this road, the community knew that it will the attention of the municipality that would hopefully assist in having their concerns resolved.

Situation after knowing about R2P

In November 2018, the R2P attorney visited the community for a consultation and workshop at a local soccer ground. The community came in numbers. The workshop and consultation was successful. The community's matter regarding lack of water is currently being handled by CALS.

“After knowing about R2P and engaging with them, we know about the RGA and that we are required to give a notice prior to convening a protest,” said the community leader. He continued, “R2P has given us hope that our matter will be resolved. CALS has commenced engaging with our local municipality on our behalf and that is a sense of relief on our side. I am thankful that R2P gave me a platform to meet Commissioner Nissen from the South African Human Rights Commission and I explained the plight that the community of Ndakeni is facing.”⁴⁷

This interview illustrates the efforts taken by R2P to ensure the advancement and promotion of the constitutional right to protest. It further shows how R2P equips people with knowledge regarding the law that regulates protests. Lastly, it shows that the referral network of R2P not only deals with the right to protest but stretches out to other the rights in the Bill of Rights.⁴⁸

National shutdown against gender based violence

On 25 September 2018, the R2P attorney and project co-ordinator consulted with the Gauteng of the #TotalShutDown protests against gender-based violence. The shutdown was convened by women across South Africa with an aim of bringing a stop to gender-based violence and it took place on 1 August 2018. The shutdown was perpetuated by violence against women, children and the LGBT+ community. In Gauteng, participants of the shutdown marched to the Union Buildings in order to serve a memorandum on the Presidency.

Initially, the R2P attorney was not allowed to be part of the consultation. The Gauteng made it clear that men were not allowed to engage in any process of the shutdown. It was only after the R2P project co-ordinator motivated for him to be admitted on the basis that he would be better equipped to advise the on the law regarding the constitutional right to a peaceful protest that he was invited in. Indeed the R2P attorney sat in the consultation and played more of a listening role and then advised the convener.

⁴⁷ R2P invited the community leader to workshop on 18 - 19 March 2019 at Kempton Park, Johannesburg, entitled ‘Strengthening the Role of Civil Society in Holding the Police Accountable for Human Rights Violations Workshop’ organised by the Omega Research Foundation, SERI, APCOF and the Institute for Security Studies.

⁴⁸ Section 27 (1) (a) of the Constitution provides that everyone has the right of access to water.

This matter illustrates that protesters are usually distressed people and need to be given the space to decide who should be part of their struggle. Understanding the issues of protesters and their needs plays a huge role in assisting them. The shutdown was against the behaviour, attitude and actions of men towards women, children and the LGBT+ community.

#FeesMustFall

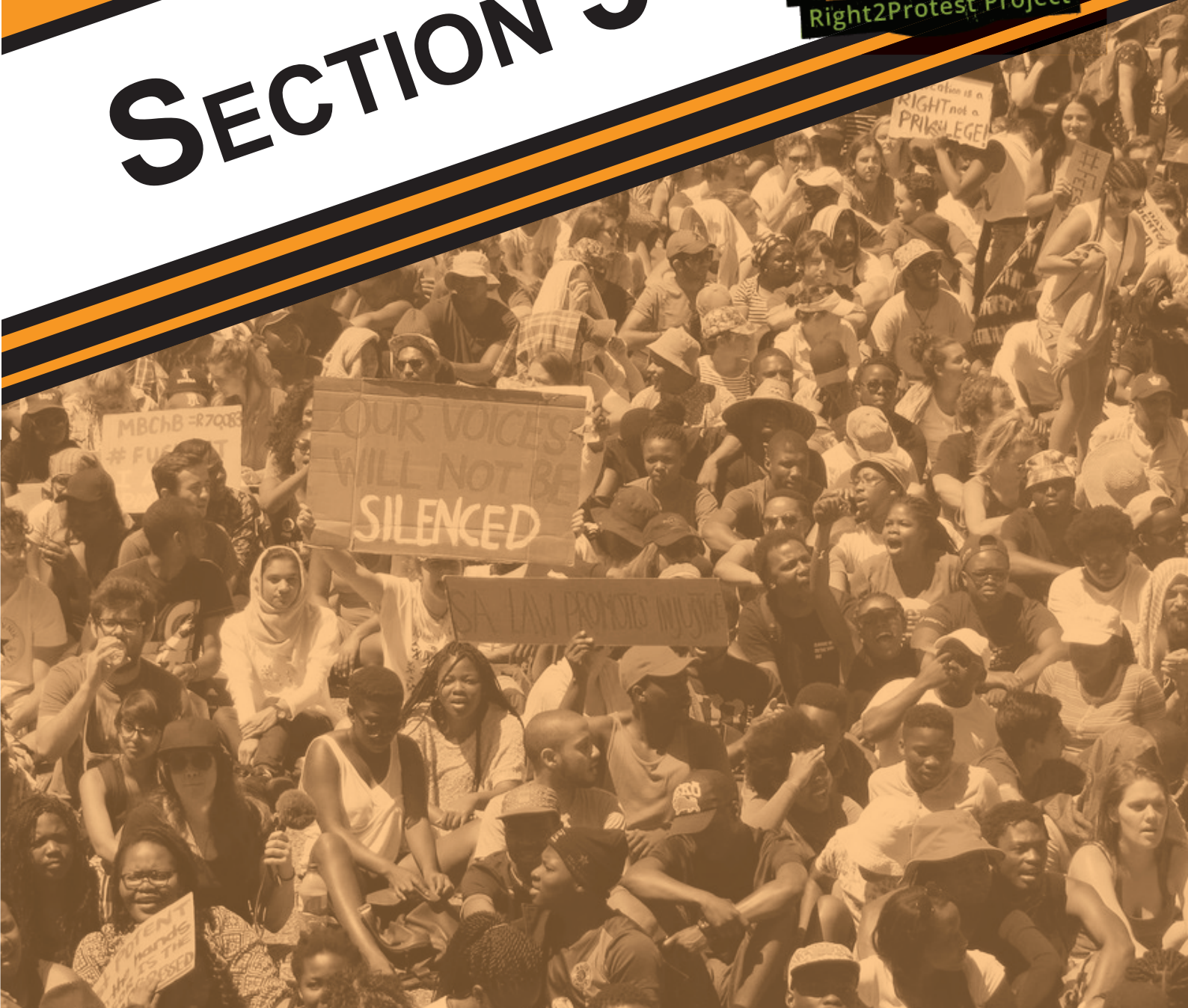
In 2015, mass protest action erupted in universities across the country. The protests were, amongst other things, prompted by high tuition fees at tertiary institutions and the call for decolonisation of university curricula. R2P was formed in part as result of the need for legal services for the protesting students across the country.

On 3 July 2019, the R2P attorney had a telephonic interview with a former #FMF student from the University of Kwa Zulu-Natal Westville Campus. The reason for the interview was to reflect on the #FMF protest action in order to identify how the constitutional right to protest was utilised as a gateway right to access the right to higher education. According to the student, the constitutional right to protest paved the way for the students across the country to raise their concerns against the respective universities and the Department of Higher Education.

Despite the above, the student noted some difficulties in relation to exercising the constitutional right to protest. Police brutality and victimisation of student leaders form part of the many issues. The student explained how he would be blamed for each and every violent act which erupted from a peaceful protest. “About thirty students from my campus were arrested and at the end I was the only one who faced the wrath of the South African criminal justice system,” he said. “Luckily, I was not convicted on any of the charges which were levelled against me”. He further added that students would actually refrain from giving notice and instead opted to protest at night so as to avoid victimisation from the police. However, this did not serve as a solution because it invited the deployment of private security who are not trained to deal with protests.

Similarly, the media had a critical role to play during the protests. Unfortunately, many outlets framed the movement as violent while under-reporting police brutality and violence at the hands of private security. He concluded by saying that both students and police need training on the scope and application of the constitutional right to protest. “This will allow South Africans at large to have safe space for dissent and for the police to understand their role in protest actions.”

SECTION 5



5 Landmark right to protest judgment

In 2018, the Constitutional Court handed down a landmark judgment in *Mlungwana and Others v State and Another*. The matter was primarily focused on section 12 (1) (a) of the Regulation of Gatherings Act 205 of 1993 (RGA). According to the section at hand, any person who convenes a gathering without giving notice in terms of section 3 of the RGA shall be guilty of an offence. Section 12 (1) (a) criminalised a convener for failure either to give notice or give adequate notice to a local municipality when convening a gathering.

Facts

On 13 September 2013, 15 members of the Social Justice Coalition (SJC) organised a gathering at the Civic Centre in Cape Town. They chained themselves together in groups of five and walked up to the staircase leading to the entrance of the Civic Centre building. Subsequently, they chained themselves to the railings. The group deliberately divided itself into groups of five in order to avoid giving notice in terms of section 3 of the RGA. The group was however aware that more members of the SJC would join the gathering.

Indeed more members joined the gathering but it nevertheless remained peaceful. Members of the public were not denied access into the Civic Centre building. The police arrived and requested the protesters to disperse and, when the protesters refused to do so, they were then arrested. The Magistrate found that the protesters contravened sections 12 (1) (a) and 12 (1) (e) of the RGA. During sentencing, the Magistrate took cognisance of the fact that the protesters did not harm anyone, nor did they damage any property. Thus the protesters were cautioned and discharged.

Issues before the court

The Constitutional Court had to decide whether section 12 (1) (a) of the RGA limits the right entrenched in section 17 of the Constitution and, if so, whether the limitation is reasonable and justifiable in open and democratic society based on human dignity, equality and freedom.

Findings of the court

The focal point of the matter was the criminalisation of a person who convenes a gathering without giving notice in terms of section of the RGA. According to the court, section 12 (1) (a) of the RGA “targets persons

who, in the exercise of their constitutional rights, convene a gathering without notice by criminalising non-compliance with its provisions”. The section criminally punishes the convener only and not all the participants of the protest. The court drew a distinction between a demonstration and a gathering and found that the difference lies with the number of people in attendance. A demonstration comprises of less than 15 people whilst a gathering consists of 15 or more people. Thus, written notice is not required for a demonstration.

Turning to a gathering, the court found that the convener only has a duty to give notice. The convener is under no obligation to seek “approval” for the gathering. In essence, the purpose of the notice is to allow the responsible officer to ensure the safety of the protesters and society during the gathering. Where the responsible officer is not satisfied that the safety is guaranteed, she may call for a meeting the convener, authorised member of SAPS and any interested party. The meeting may result in conditions put in place to ensure that the gathering takes place in line with the Constitution.

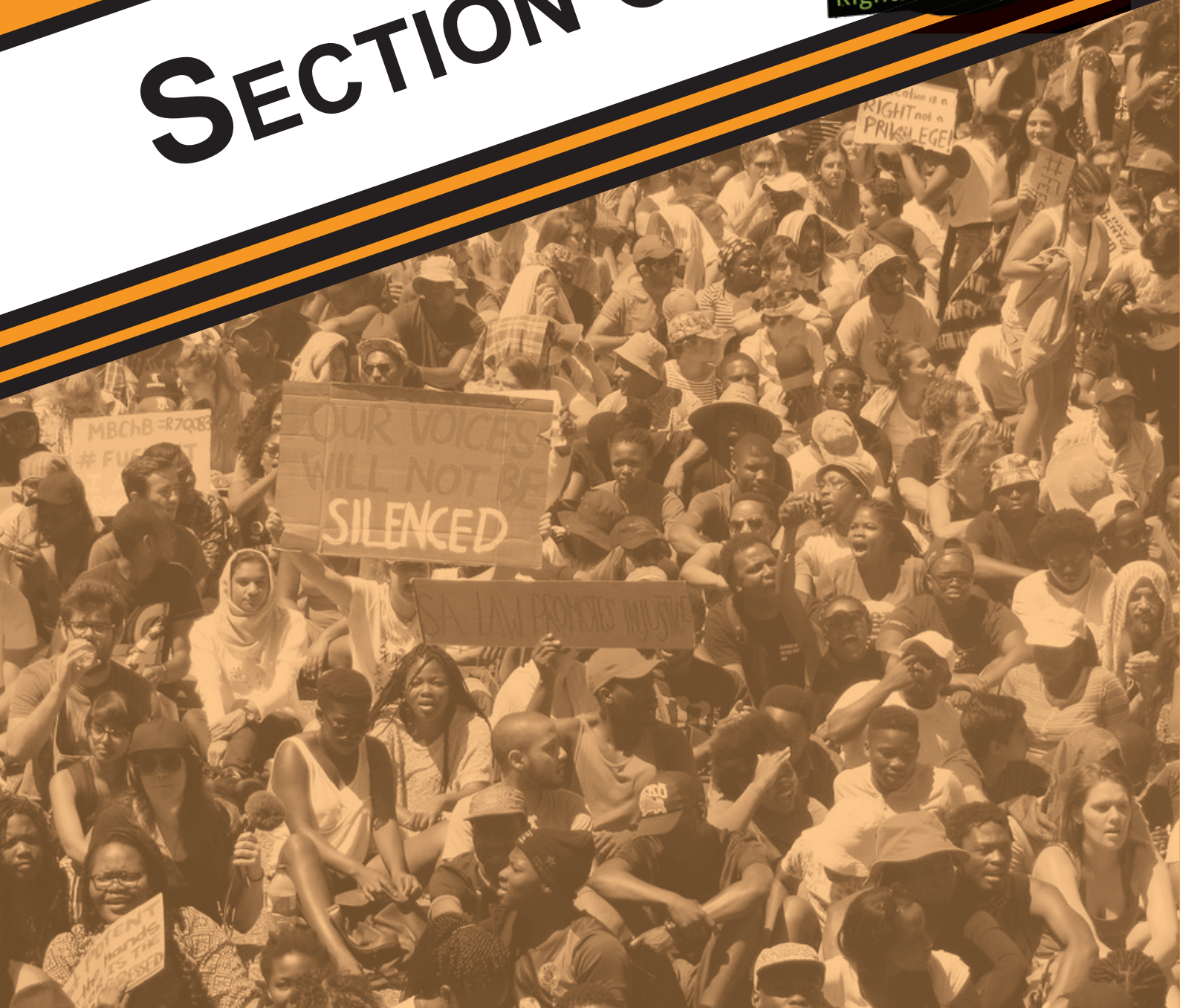
Although the responsible officer is given the power to request the convener to comply with the provisions of the RGA, she cannot prohibit a gathering only on the lack of a written notice. According to the RGA, a mere failure to give notice does not render a gathering unlawful. The RGA requires that a gathering must have been prohibited in terms of the Act in order to render the gathering unlawful. The court found that a gathering with prior notice is not necessarily unlawful and attendance of such a gathering is not a criminal offence.

It would be against the principle of legality to interpret section 12 (1) (a) RGA in a manner which non-compliance with the section leads to criminalisation under section 12 (1) (e) of the RGA. The court tested section 12 (1) (a) of the RGA and found that the limitation is unjustifiable under section 36 of the Constitution. Section 17 of the Constitution is an unequivocal right, thus it cannot merely be limited without reasonable justification. The court interpreted this right to include everyone; young, old, poor or rich. Anything which prohibits peaceful and unarmed protesters from protesting unjustifiably limits section 17 of the Constitution.

The findings of the court are in harmony with several legal bodies. For example, Article 21 of the International Covenant on Civil and Political Rights recognises the right peaceful assembly. Limitations placed on this right must conform to the values of a democratic society, in the interest of national security, public tranquillity and the rights and freedoms of others.

The Constitutional Court found that section 12 (1) (a) of the RGA is unconstitutional to the extent that it criminalises a convener for mere failure of giving a notice prior to convening a gathering. The criminalisation of the convener for failure to give notice is unconstitutional regardless of whether the protest turned violent or not.

SECTION 6



6 Conclusion and recommendations

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

1. Recommendation to Municipalities

Municipalities across the country must refrain from imposing by-laws which seek to undermine the right to protest and shrink the space for dissent. In cases where s have satisfied the provisions of the RGA, municipal by-laws shall be applied if necessary to further facilitate the peacefulness of the intended gathering. Thus, municipal by-laws should be present to alleviate the frustration of the s and protest participants.

2. Recommendation to Responsible Officers

Responsible officers play a vital role in respect of whether an intended protest becomes violent or peaceful. Therefore the attitude and the manner in which they conduct a section 4 meeting is very important. R2P recommends that responsible officers must uphold their statutory duty and ensure that negotiations in a section 4 meeting take place in good faith. The first stance of responsible officers should be to support the intended protest. The discussions and negotiations should focus on the contents of the notice.

3. Recommendation to South African Police Services

It is imperative that the relevant unit of police be deployed in protest actions. Thus, R2P recommends that only the Public Order Policing Unit should be deployed to manage and control protest action. This unit should refrain from using lethal force or force capable of causing bodily injuries. Furthermore, we recommend that this unit refrain from prematurely stopping protest actions. In the event that the unit does make use of force, such as rubber bullets, POP officers must refrain from directly firing at protesters. Thus we call for more work to be done on training POP officers on the use of force during protests.

4. Recommendation to s and Marshals

Conveners and marshals must co-operate with the Public Order Policing Unit and avoid acting out of the bounds of the Constitution and the section 3 notice. This includes carrying weapons and deviating from the designated route during protest actions.

5. Recommendation to the civil society and the R2P network

We need to continue working jointly in order to achieve an environment whereby the constitutional right to protest is not suppressed. The network shall endeavour to be proactive as opposed to being reactive.

6. Recommendation to the Judiciary

With reference to the charge of public violence, the judiciary, after a thorough consideration of the application of the law, should be in favour of granting bail. This charge tends to be used as a mechanism to stifle the right to protest.

Edited images include:

“Mass meeting 22 October” by tony4carr via Creative Commons

HD photo of a crowd by palesa08 via Unsplash

“Fees Must Fall (South Africa)” by Kgomotso Neto via Creative Commons

HD photo of a police officer by jawelj via Unsplash

“Kliptown protest” by Lee-Anne Bruce

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