



# The State of Protest Report

Right2Protest Project report on the state of protest in South Africa

October 2016 – September 2017



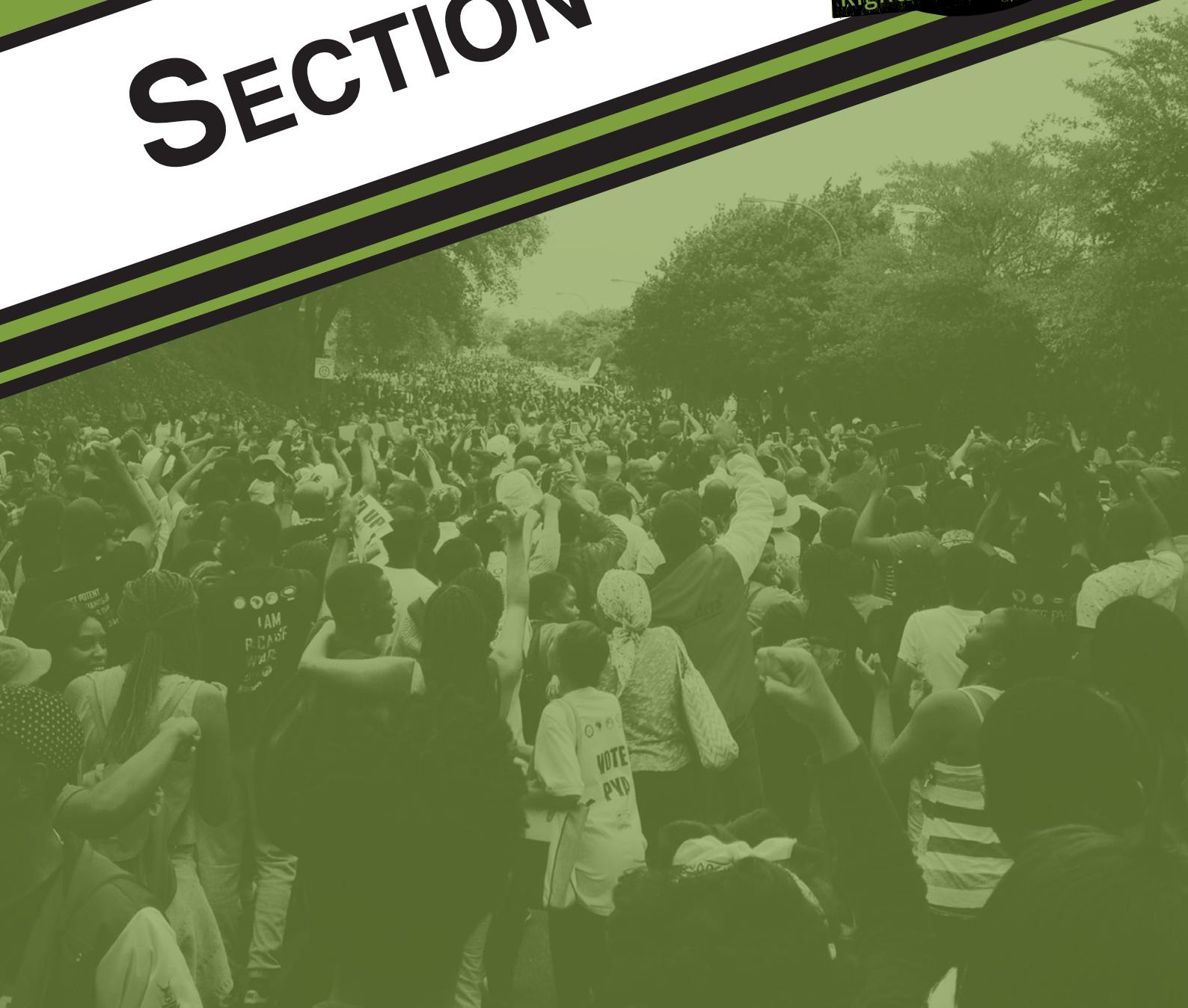
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# SECTION 1



# 1 Introduction

This report by the Right2Protest Project (R2P) examines the state of protest in South Africa from the period of October 2016 until September 2017. In a democracy where space for government accountability is contested, protest has become an accessible and effective method of holding government to account. South Africa appears to be experiencing an increase in the number of protests<sup>1</sup>, which is attributed to reasons such as a lack of service delivery<sup>2</sup>, high crime rates, lack of participatory processes, corruption, growing inequality, unfair labour practices<sup>3</sup> and conditions of tertiary education<sup>4</sup>.

Protest action has a deep-rooted and rich history in South Africa. In light of that history, the importance of protest in a democracy is entrenched and recognised in our Constitution as a right. Section 17 of the Constitution<sup>5</sup> caters for the right to “peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions”. Protests are used as a method of bringing pertinent societal issues to the attention of government, the private sector and society. It is ‘an essential form of democratic expression’.<sup>6</sup> However, civil society is increasingly concerned that the gap between the law and practice regarding protest is widening.<sup>7</sup>

The accessible nature of protest as a form of democratic expression has resulted in the youth utilising protest as a means of holding government to account and accessing their constitutionally entrenched rights. In our digital age, protesters are able to use social media and the digital space to initiate, plan and gain momentum for their protest. This was particularly evident in 2015 when university students across South Africa commenced #feesmustfall protests against universities and government for the exorbitant cost of higher education.

In our current political climate, the right to protest is being increasingly stifled.<sup>8</sup> This is often perpetuated by a public narrative that is painted by mainstream media and political officials, which portrays people use protest to hold government to account because all other methods and institutions have failed as overwhelmingly violent and criminal.<sup>9</sup>

This report has been compiled through legal case studies and R2P’s work through all its member organisations. The report highlights the key themes that have emerged around stifling the right to protest in the period under review.

1 Alexander P, and others, Frequency and turmoil: South Africa’s community protests 2005–2017, (2018) SA CRIME QUARTERLY. Available at <https://journals.assaf.org.za/sacq/article/view/3057>

2 People’s Assembly: Infographic on service delivery protests for period of 2007 – 2015. Available at <https://www.pa.org.za/blog/service-delivery-protests>

3 Grant L, “Taking to the streets: Who is protesting and why?,” M&G Online. Available at: <https://mg.co.za/data/2014-04-28-taking-to-the-streets-who-is-protesting-and-why>

4 Quintal Q, “What you need to know about #feesmustfall,” M&G Online, available at <https://mg.co.za/article/2015-10-19-four-things-you-need-to-know-about-feesmustfall>

5 The Constitution of South Africa, Act 108 of 1996

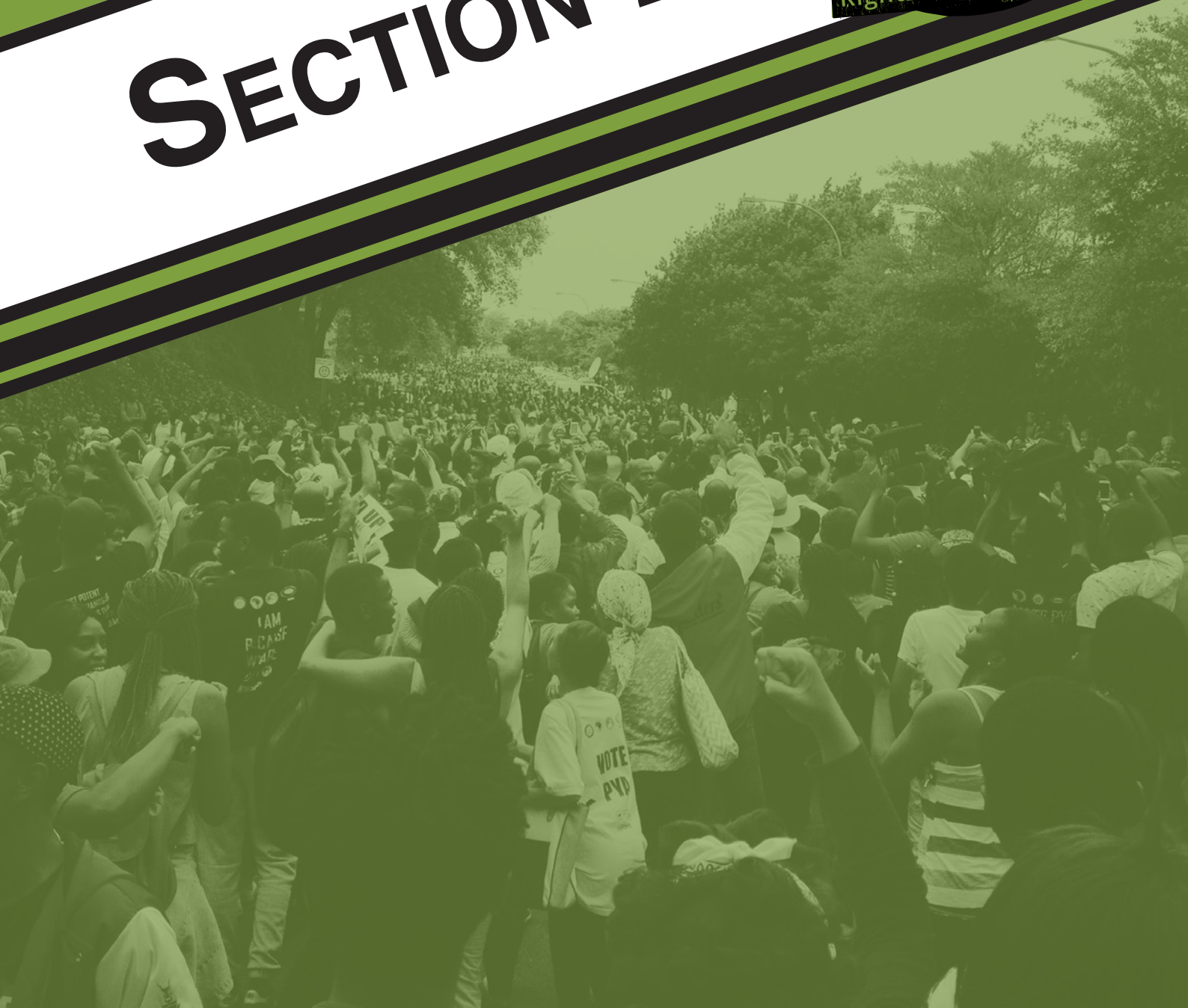
6 Duncan J ‘The Struggle of Street Politics’ (2012) SACSIS available at <http://sacsis.org.za/site/article/1203> last accessed on 30 August 2017

7 Alexander P *Rebellion of the poor: South Africa’s service delivery protests- a preliminary analysis* (2010) Review of African Political Economy at 25–40; Vally Natasha ‘National trends around protest action: mapping protest action in South Africa’ The paper was presented at the Development Studies seminar, Centre for Sociological Research, University of Johannesburg, 20 February 2009

8 Socio Economic Rights Institute (SERI), “An anatomy of dissent and repression: The criminal justice system and the 2011 Thembelihle Protest” (2014). A report published by the Socio-Economics Rights Institute (SERI) available at [http://seri-sa.org/images/Thembelihle\\_FINAL\\_web.pdf](http://seri-sa.org/images/Thembelihle_FINAL_web.pdf)

9 Duncan J *Protest Nation: The Right to Protest in South Africa*, 2016, at 142

# SECTION 2





# 2 The Right2Protest Project

## 2.1 History of R2P

Protest as a civil and political right is central to the South African political space. However, over some years civil society organisations noted a growing intolerance of protest and dissent in the country, most especially away from South Africa's urban centres. This was evident from the disproportionate use of force by police officials in managing protests and the misuse of laws to criminalise protesters.<sup>10</sup> Protesters often turned to civil society for practical advice and legal support in such situations, but a number of organisations noted a lack of a centralised system to support protesters in realising their right and began from 2013 to conceptualise a legal hotline and referral service to be jointly hosted by civil society organisations.

In 2015, the explosion of protests on university campuses presented a renewed need for pro bono legal assistance. As a response, civil society structures set up an informal referral service to assist students during this period. In 2016, the R2P Project was formalised, and a dedicated hotline was created to provide protesters with advice on their right to protest and legal support through a referral network of attorneys countrywide.

## 2.2 What is the Right2Protest Project ("R2P")?

R2P is a coalition of civil society organisations that are listed below. The project is currently housed at the Centre for Applied Legal Studies ('CALS'), University of the Witwatersrand. The project operates nationally and is staffed by a project co-ordinator who co-ordinates legal assistance through the coalition and referral network nationally; and an attorney who assists with legal representation and providing legal advice nationally. The project has a dedicated toll-free hotline that protesters can use to enquire about their right to protest and obtain legal advice as well as to 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 their right to protest.

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.

### R2P COALITION MEMBERS

#### The Steering Committee of R2P

- The Centre for Applied Legal Studies (CALS);
- Freedom of Expression Institute (FXI);
- Lawyers for Human Rights (LHR); and
- The Right2Know Campaign (R2K).

#### The Ordinary Members of R2P

- Centre for Child Law (CCL);
- Centre for Environmental Rights;
- Equal Education Law Centre (EELC);
- Ndifuna Ukwazi (NU);
- ProBono.Org;
- Section 27;
- Socio-Economic Rights Institute (SERI); and
- Social Justice Coalition (SJC).

<sup>10</sup> De Vos P, "#Feesmustfall: On the right to mass protest and the use of force by police" available at <https://constitutionallyspeaking.co.za/feesmustfall-on-the-right-to-mass-protest-and-the-use-of-force-by-police/>;

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## **2.3 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, peacebuilding, intersectional and innovative interventions in order to defend and advance the realisation of the constitutional right to assembly, 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 will also aim to provide a collaborative platform for activities that defend and advance the right to protest.

## **2.4 How does R2P realise and advance the right to protest?**

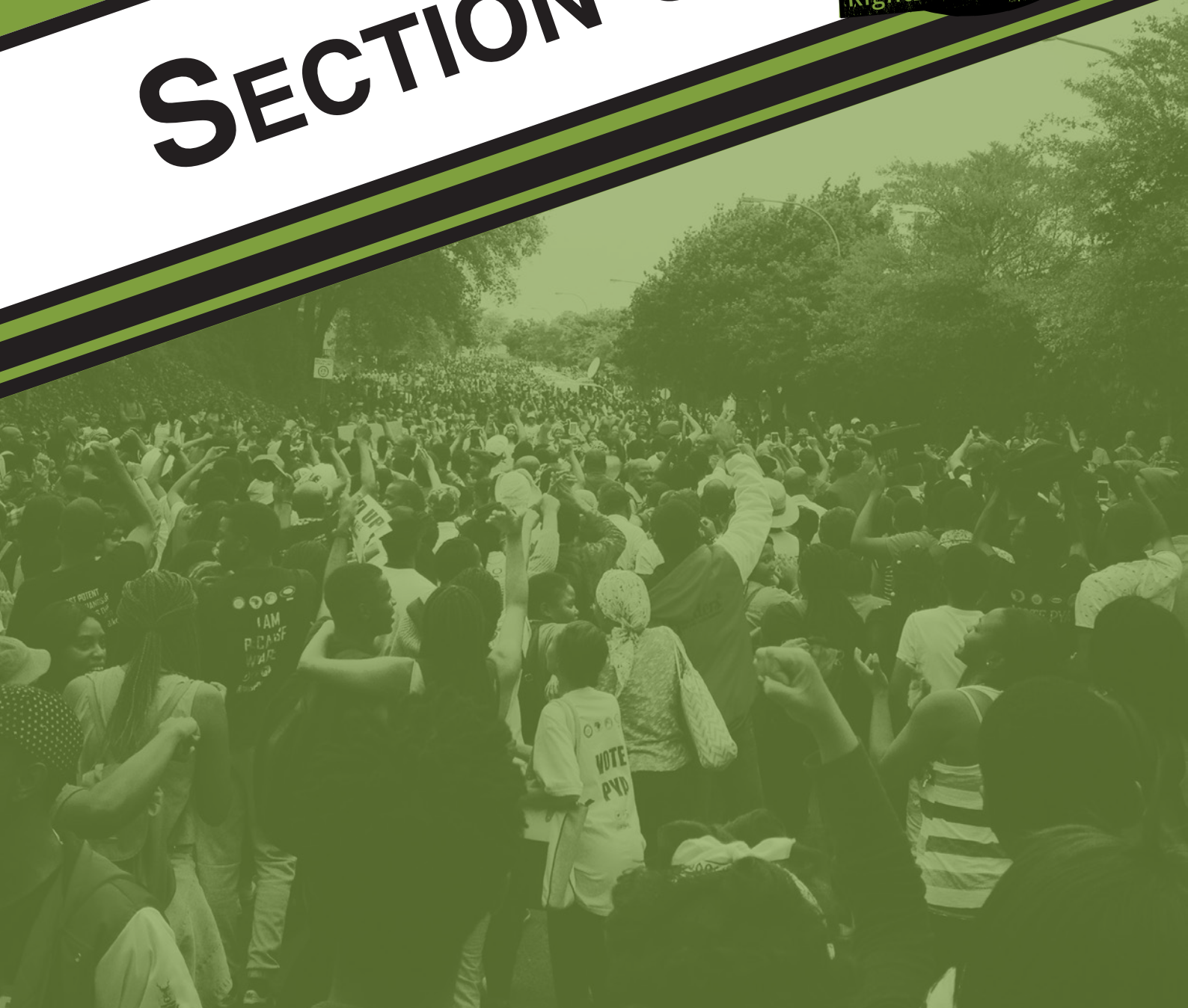
R2P advances and realises the right to protest by operating a dedicated telephonic hotline to provide legal support and related assistance for people requiring assistance in exercising their right to protest. The project provides pro bono legal representation through either the R2P attorney or the R2P network of attorneys where possible. R2P equips communities and protesters with the knowledge they need when engaging in protest action through the workshops that the project will conduct countrywide; as well as the educational material that is provided to communities and available on the R2P website.

R2P further serves as a platform for civil society organisations involved in work related to the right to protest to share information and strategies so that the collective resources of civil society can be mobilised most effectively and strategically to advance the right to protest.

Protesters are equipped with the support, knowledge and assistance that they need in order to freely exercise their right to protest. Further, through the work of R2P there will be a central depository of all data and statistics on the right to protest in South Africa.

This data allows a clear analysis and reflection on the state of protest in South Africa. This report captures the state of protest in South Africa over the year that R2P has been in existence, and highlights the many trends that R2P has observed that inhibit protest in the next section of this report.

# SECTION 3





# 3 Exercising the right to protest

## ***Legislative framework***

Section 17 of the Constitution of South Africa, 1996 states that ‘[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions’.

The Regulation of Gatherings Act 205 of 1993 (“RGA”) is the legislation that gives effect to this constitutional right. The RGA provides for a notification procedure for anyone who wishes to hold a gathering of 15 or more people. The conveners of a gathering would need to give notice to the relevant authorities of their intent to hold a gathering.<sup>11</sup> The notice should be given at least seven days prior to the gathering.<sup>12</sup> If this is not possible, it should be given at the earliest opportunity. If the notice is given less than 48 hours before the proposed protest, the local authority may prohibit the march without providing reasons.<sup>13</sup> The convener of the protest must be called to a meeting with SAPS and the local authorities within 24 hours of providing notice, if this does not happen, the protest may proceed as intended in the notice provided.<sup>14</sup>

## ***When may a protest be prohibited?***

In terms of the RGA, a protest may only be lawfully prohibited when credible information on oath is brought to the attention of the responsible officer that the proposed gathering will result in serious disruption of vehicular or pedestrian traffic; injury to participants in the protest or other persons; or extensive damage to property and that SAPS or traffic officers will not be able to contain this threat.<sup>15</sup>

## ***Trends observed around protest action in South Africa***

Despite the right being a constitutionally protected right and available to all, the right is being restricted in South Africa, with many people not being able to voice their concerns and participate in the political space.

In the period from 1 October 2016 until 30 September 2017, R2P received a total of 820 cases through its hotline and secured legal assistance for approximately 547 arrested people and assisted approximately 981 people. Of those, 430 arrests related to protests on and around university campuses and the remaining 117 were related to community protests. Of these, about half came from community organisations in Gauteng, while the remainder came from predominantly rural areas of South Africa or on the outskirts of urban centres. Many of the community protests were related to service delivery, lack of public participatory processes, lack of basic services, housing allocation, unemployment and corruption.

<sup>11</sup> Section 3(2) of the RGA

<sup>12</sup> Ibid

<sup>13</sup> Section 3(2) of the RGA

<sup>14</sup> Section 4(3) of the RGA

<sup>15</sup> Section 5(1) of the RGA

During the first year of R2P's existence, the hotline has provided the project with an indication of where its services are needed most.

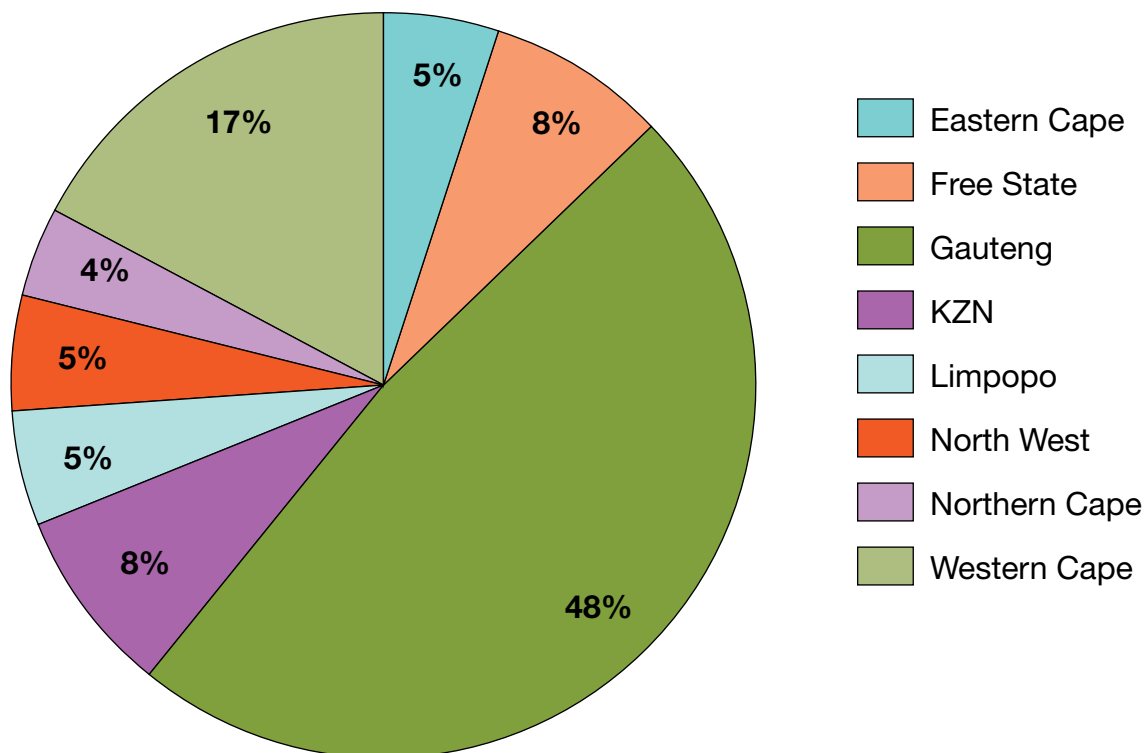
**The major takeaways from the reporting period include:**

- R2P is strongest in Gauteng. 39 cases (47.5%) came from that province.
- R2P is strongest on campuses. 62 cases (76%) related to campuses.
- R2P was predominantly contacted for help with arrests. 69 cases (84%) were for legal representation after arrests, not pre-protest advice.

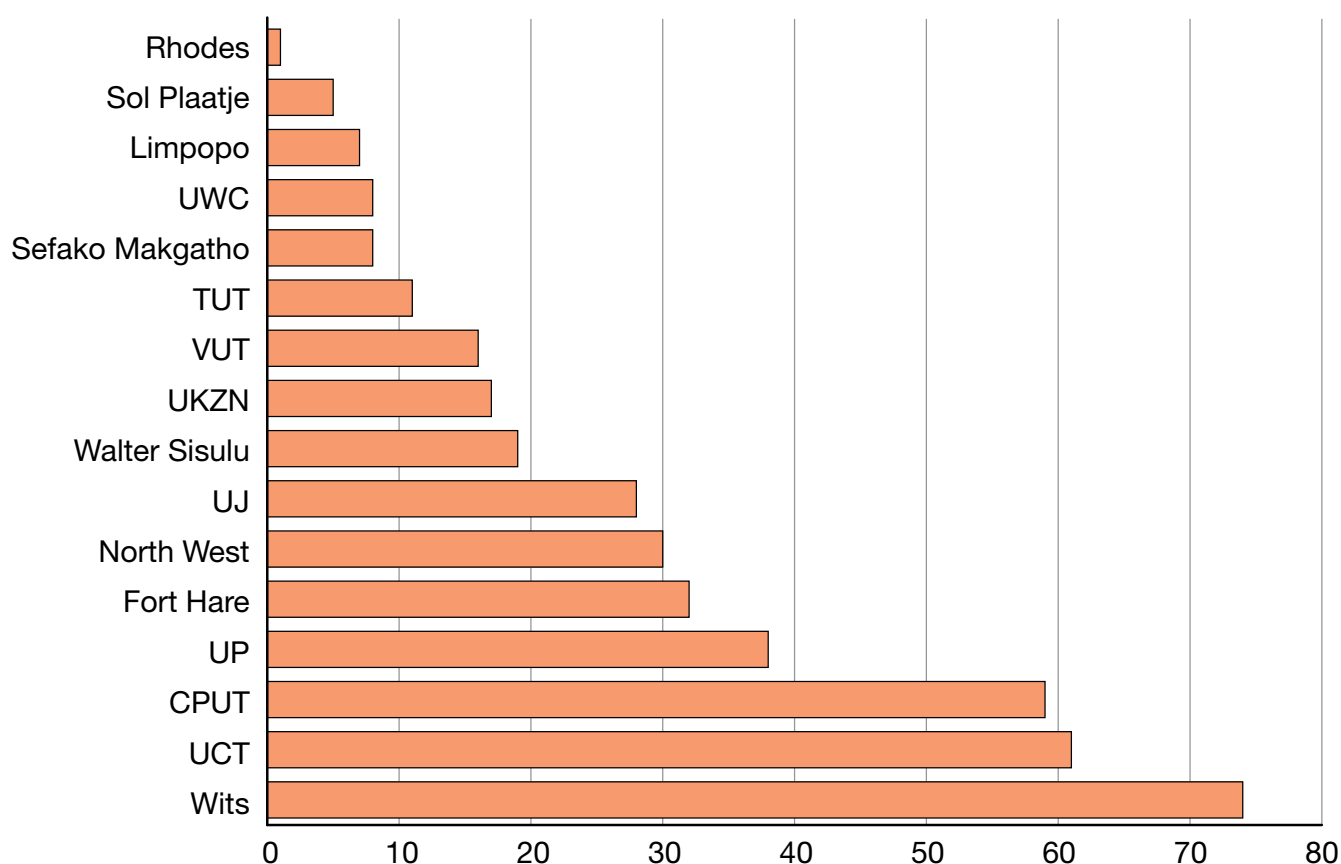
It should be noted that the information recorded about cases has evolved in the first year of the project, and certain information about cases was not always recorded – such as the outcomes of cases. In some instances, the charges that arrested persons faced was not recorded due to police denying attorneys access to clients while they were in detention or only pressing charges at the latest possible stage of detention. We therefore do not have enough data in R2P's first year to provide detailed statistics about patterns of arrests and charges in protest cases. However, our overall experience suggests that malicious arrests and prosecutions are very common, and that in very many instances charges are eventually withdrawn.

**Graphs:**

**Calls per province**



## Arrests



These statistics point to the value of R2P’s mission as a centralised legal advisory and referral network. The statistics also underscore the importance of continuing to raise awareness of the project and grow its reach to the communities that need it most- this will be dealt with in the conclusion of this report.

Through its hotline and community engagements, R2P has identified the following trends that have been used by various actors to stifle the right to protest:

### 3.1 Misapplication of the RGA by local municipalities

R2P has observed that the RGA is not applied correctly and consistently by municipal officials. In order to legally gather and protest, most protesters try to comply with the RGA by providing notice to their local municipality or police station. However, the notification procedure is conflated with a permission-seeking procedure, and municipalities have different practices that they occasionally claim to be “by-laws” (although we often find these to be informal unlawful practices rather than a law) and requirements that make the notification procedure in terms of the RGA difficult. There is suspicion that the misapplication of protest laws is done deliberately to curb dissent and stifle protests. These practices or “by-laws” can range



from having to pay a fee to protest; ensuring the entity or person against whom you are protesting against will accept your memorandum, to a complete deviation from the RGA provisions. These laws undermine the right to protest and make it extremely difficult for protesters to exercise their constitutional right. R2P has further observed that some municipalities are eager to deny protests. In order to comply with the RGA, the protest is often denied on the basis that the relevant official states that ‘there is credible information on oath that there will be severe traffic disruption or threat of violence’. It is unfortunate that the RGA does not provide for a counter-affidavit procedure to disprove the allegations of the official.

### ***Below are case studies illustrating the misapplication of the RGA***

#### **Case Study 1**

#### **Lephalale Unemployment Forum**

In October 2016, in the town of Lephalale in Limpopo, a group called the Lephalale Unemployment Forum held a protest through the town to highlight the lack of employment opportunities in the town as well as the environmental effects that the Medupi power station has on them. The Forum lodged their notice with the Lephalale Local Municipality seven days prior to the day that they wished to protest. The municipality did not respond to the protesters within 24 hours. The conveners of the protest wrote a letter to the municipality three days prior to the protest day to which they have still received no response. The Forum went ahead with the protest which would have consisted of them peacefully marching through the town. The protesters were met with a brutal Lephalale police force that stopped the march at its inception at 6am. A few of the protesters were arrested, many of whom the police identified as the leaders of the march. The following day, many of members of the Forum arrived at the police station to find out why their comrades had been arrested. A further five of these comrades were arrested at the police station. They were all charged with public violence. At their bail application, the magistrate advised them to “always seek permission before protesting” despite the uncooperative behaviour of the municipality.

As stated above there are very specific and narrow circumstances in which a protest may be prohibited. However many municipalities disregard the RGA and refuse marches and protest on frivolous grounds. The Lephalale Unemployment Forum has since tried several times to arrange marches against a mine operating in the area. They were denied ‘permission’ to march by the municipality because the mine would not accept their memorandum. The Lephalale Municipality has adopted a practice that a protest will only be allowed if the entity against whom they are protesting will accept the memorandum. This enables someone to ensure a planned protest against them will be prohibited, simply by refusing to accept a memorandum.

## Case Study 2

### Newcastle Mining Communities

R2P conducted two workshops in the Normadien area near the small town of Newcastle in Kwa-Zulu Natal, where there are several rural communities on the outskirts of Newcastle that have been infiltrated by numerous coal mines. The workshops were conducted in November 2016 and February 2017 respectively. The community relies on one bus that makes four trips a day to the town of Newcastle. They rely on the town of Newcastle for purchasing groceries, medical attention and other pressing needs. The community has no electricity or running water. The community planned a march in October 2016 against the pollution experienced as a result of the mining and the lack of service delivery in the area. The community was informed by the Newcastle local municipality that they needed to travel to Pietermaritzburg to apply for the march, which is about 265km away from the town. After doing this, the community was then informed by the municipality that they also need to pay a fee if they were going to march on a public road. R2P wrote a letter to the Newcastle Municipality after its workshop with the community in November 2016 informing them that the right to protest is protected in the Constitution as well as the relevant provisions of the RGA and that these practices are unacceptable. The community has reported that since the submission of our letter to the Newcastle Municipality they no longer have to pay a fee to protest or travel to Pietermaritzburg. R2P in February 2017 invited the municipality and the Newcastle Police Station to our workshop that we had with the community. A Ward Councillor and a member of the South African Police Services (SAPS) attended. The community has reported that since the workshop with the Ward Councillor and SAPS present, giving notice to protest and reporting on issues that affect the community has become easier to do. However protests are now constantly being denied at the last moment on the claim that there is a legitimate threat of violence.

## Case Study 3

### Right2Know Thabazimbi March

The municipality of Thabazimbi had a municipal practise around protest that deviated from the RGA. The residents of Northam which falls part of the Thabazimbi municipality wanted to protest about a lack of service delivery in the area on 22 March 2017. They were informed by the municipality they needed to give notice twenty-one days prior to the protest day. This is a clear deviation of the RGA that requires seven days' notice. The Right2Know campaign in collaboration with the R2P staff, wrote a letter on 15 March 2017 clearly stating the laws regarding the right to protest. The municipality thereafter complied with the 7 days' notice

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procedure and allowed to march to go ahead. However, the day before the march, the municipality sent a letter to the conveners asking them to re-arrange their march for another day as the municipality was having a very important meeting and no one will be available to accept their memorandum. The community protested nonetheless and demanded that their memorandum was accepted.

#### **Case Study 4**

#### **Eldorado Park Civic United**

The Eldorado Park Civic United organisation has spent most of 2017 protesting about the lack of adequate housing in the area. The grievances of the community stem from over two decades of failed and unfulfilled promises by government in addressing the lack of adequate housing in the area. In May 2017, the organisation gathered the community and began to occupy land and also block the Golden Highway in Gauteng as a means of protest and gaining the attention of government. The protests had caught the attention of the media and government, and government had soon made promises to the community on addressing the housing concerns in the area. Then Minister of Housing Lindiwe Sisulu addressed the community on 23 July 2017 on the progress of government in solving the housing crisis in the area. The Eldorado Park Civic United applied to the Johannesburg Metropolitan Police Department (“JMPD”) to hold a rally at the stadium where the Minister was to address the community. JMPD prohibited this rally, alleging that there were bomb threats circulating on social media that were to occur on the day of the Minister’s visit.

The social media user claimed to be a part of the Eldorado Park Civic United organisation, but the leaders of the organisation have denied the allegations made by the social media user. The following month, the organisation wanted to protest again and the same reason was provided by JMPD. The social media user went further and started intimidating the leaders of the organisation using social media platforms. The social media user was known to the community and a case of intimidation was opened against the user. JMPD eventually allowed the march to go ahead. This case provides an interesting look into the role of social media in protest; the exposure of surveillance in social media and how it affects protest, especially since protesters have no control over fake media and troll accounts online.



## Case Study 5

## Equal Education Scholar Transport Protest

The erroneous application of the RGA has not spared its application to minors exercising their right to protest. On 11 July 2017, activists and high school learners belonging to the social movement Equal Education (“EE”) sought to stage a creative form of protest outside the provincial Department of Education (“the Department”) offices in Pietermaritzburg. The protest was aimed at highlighting the plight of learners who are in need of scholar transport, and the failure of the government to provide the same. The intention of the protest was to host a film screening about the issue, projecting the film onto the outside walls of the Department’s office. Despite following all relevant procedures, the peaceful protest was unlawfully disrupted and dispersed by the Department’s officials and police, with threats of teargas and violence. The protest was ultimately halted.

Since 2014, EE has been campaigning for the provision of safe, subsidised scholar transport. This campaign was initiated after its members, who are predominantly high school learners from poor communities, raised the challenges that they face every day because of the long distance that they walk to get to school and back. These long distances are exacerbated by rough, treacherous terrain, and extreme weather. These conditions have the effect of compromising learners’ rights to equality, dignity, safety, health, and basic education.

Despite EE’s numerous attempts to engage government, there has been a dire fail to provide adequate scholar transport. As a consequence, EE launched legal proceedings aimed at securing improved provisioning of scholar transport. As part of the movement’s ongoing campaign work, and to bolster public knowledge of the campaign and the litigation, EE planned to screen a film, “Long Walk to School”, outside the KwaZulu-Natal Department of Basic Education’s (“KZNDoE”) office. The short film illustrates the difficulties faced by learners who have to walk long distances to school, and the work of EE and the Equal Education Law Centre to use activism and law to ensure justice is achieved.

EE took all necessary steps in order to comply with the RGA when organising the protest. Almost two weeks before the protest was scheduled to take place, and in accordance with section 3 of the RGA, the conveners of the protest submitted a completed notice to the relevant authority.

In accordance with section 4 of the RGA, a week before the protest, the conveners attended a meeting with the relevant authorities. The intended protest was acknowledged by authorities in the meeting, which included members of the SAPS and Crime Intelligence. No objection was made to the film screening or venue at this meeting.

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During the week before the protest, a government official contacted the conveners asking them to sign an “approval document” issued by the City Manager. This approval document recorded the approval of the gathering contemplated in the notice, and noted the conditions of the gathering. Despite the fact that this document is not a prerequisite for a gathering to take place, EE nonetheless had one in their possession on the day of the protest.

On the morning of the protest, one of the conveners received a call from a warrant officer asking whether the protest was to continue as planned, which the convener duly confirmed. After EE members, including high school learners, began gathering outside the KZN DoE office, two warrant officers approached EE and were shown the approval document. They indicated that the protest could proceed.

Shortly thereafter, the Head of Security at the KZNDoE, together with one of the warrant officers, approached EE again and said that they were not permitted to continue with the film screening, for the following reasons:

- The ‘permit’ provided by the municipality to confirm the gathering did not indicate the location or time of the protest, which the authorities claimed as evidence that the document was fraudulent.
- The learners at the protest should have their school’s permission in order to protest, especially since many of the learners were dressed in school uniform.
- EE needed the DoE’s permission to gather and protest against the DoE.

The reasons advanced have no basis in law. EE initially refused to cancel the protest and offered to have the officials discuss the matter with EE’s lawyers at the Equal Education Law Centre. The officials refused this offer, and ordered the warrant officer to disperse the EE members at the gathering. When EE objected saying that this was a violation of the protesters’ constitutional right, the official stated that EE could take the KZN DoE to court. At this point, officials and police officers made threats to act violently against EE members, including threats of using teargas to disperse them. Due to the threats of violence against a group made up largely of children, the conveners and EE members were forced to end the film screening prematurely and disperse.

The effect of these threats and the unlawful dispersion of the protest were keenly felt by the learners, many of whom are minors.

“I was really scared and thought of the massacres that the police have been responsible for,” said one EE member in Grade 10.

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“I felt threatened when a lot of police came because I don’t know what tear gas do[es] to people,” said an EE Community member. “When police arrive, I should feel safe, but I didn’t because they were angry and threatened me and EE members. I felt really scared and imagined myself at a police station or prison.”

As set out above, initially, when the state officials threatened to disperse the protest, EE attempted to discuss the matter and have the officials talk to EE’s lawyers at the EELC. The officials flatly refused to do this and instead proceeded to threaten the protesters with the use of force by the SAPS.

Since the unlawful dispersal of the protest, EE has consulted with attorneys at the EELC on legal remedies which can be pursued, and has addressed a letter to the Department and to SAPS recording the fact that the dispersal of the protest was unlawful and unconstitutional.

In November 2017, Equal Education represented by the Equal Education Law Centre appeared in the Pietermaritzburg High Court and they won against the KZN Department and the KZN Department of Transport and as a result both the departments have committed to providing scholar transport for 12 schools in Nquthu by 1st April 2018.

## 3.2 Police brutality, intimidation and arrests

Police presence during protests has often been aggressive<sup>16</sup>. In fact, heavy handed police conduct has been noted as an escalator for conflict in protest situations which are then characterised as “violent”.<sup>17</sup> The use of force by police officials during protests is often not proportional to any threat. The United Nations Committee in 2016 expressed concern over the disproportionate use of force by police officials when monitoring public protests in South Africa.<sup>18</sup> The police have also been observed using various underhanded tactics to target protesters and activists. Activists complained of being harassed and their movements monitored by the police.<sup>19</sup>

In addition to the excessive use of force by police officials during protests, there have also been numerous cases of protesters targeted by the police and arrested in an apparent attempt to stifle the protest. R2P and its member organisations have observed a trend whereby the criminal justice system is abused or manipulated to intimidate or unfairly punish protesters.<sup>20</sup> The police often use the criminal justice system to criminalise protesters for exercising their right to protest. This is often done by arresting protesters for frivolous and unfounded charges of public violence; illegal protesting even though they have met the requirements of the RGA; attending an illegal gathering (which is not a criminal offence) and trespassing. The leaders of

<sup>16</sup> Bruce D, “The road to Marikana: Abuses of force during public order policing operations,” SACSIS. Available at <http://sacsis.org.za/site/article/1455>

<sup>17</sup> Duncan J *Protest Nation: The Right to Protest in South Africa* at 52

<sup>18</sup> United Nations Human Rights Committee “Concluding Observations on the initial report of South Africa” accessed on 17 September 2017

<sup>19</sup> See Duncan note 7 above

<sup>20</sup> D Knoetze D, “Criminalizing protest and dissent”, GroundUp. Available at [http://www.groundup.org.za/article/criminalising-protest-and-dissent\\_2256/](http://www.groundup.org.za/article/criminalising-protest-and-dissent_2256/) last accessed on 30 August 2017



the protest are usually targeted. This is strategically done in order to stifle the protest and the cause of the protesters. The aim is to keep protesters behind bars for as long as possible to intimidate and frustrate them, and let their cause lose momentum. As a result, the bail procedures are often manipulated and abused by the criminal justice system. The leaders of the protest are usually targeted with the most common charge being public violence. The charges are very often dropped after a few months of postponements and frustration on the part of the protesters.

### **Case Study 1**

#### **Eshowe Service Delivery Protest**

In May 2017 a community in Eshowe in Kwa-Zulu Natal protested over corruption and a lack of service delivery in the area. Fifteen protesters were arrested, many of whom were elderly women. They were not charged and the only reason they were being held at the police station was so that the leaders of the protest would come to the police station and they could then arrest the leaders. The 15 protesters were released after several hours of not being charged in fear of a civil claim against the police. This is a clear abuse of power by the police to intimidate protesters and stifle their protest.

### **Case Study 2**

#### **Douglas Service Delivery Protest**

Another example of dubious tactics by the police is in the town of Douglas in the Northern Cape, nine people gathered outside a Douglas Magistrate Court on 9 May 2017 in support of protesters that were arrested the week before. These nine people were arrested and charged with illegal protesting. The RGA only regulates gatherings of fifteen or more people, anything less is not defined as a gathering in terms of the Act, and thus not regulated by the Act. The protesters advised the police of this, but they were still arrested and charged. The charges have since been dropped.

### **Case Study 3**

#### **Warden Ezenzeleni Community Protest**

In the town of Warden, community activists have stated that unethical legal tactics and abuse of the criminal justice system is are used to silence protesters. The Ezenzeleni community in Warden gathered at the local community hall after their memorandum had been handed over to the Phumelela Municipal office on 10 January 2017.<sup>21</sup> The memorandum raised concerns relating to governance and the service delivery issues in the area. The Phumelela Municipality was then given 14 days to respond. However, the community was ignored and given no choice but to resort to protest to voice their grievances.

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<sup>21</sup> Matandela M & Naidoo S, "Demand the Right to Protest", Daily Maverick. Available at: <https://www.dailymaverick.co.za/article/2017-01-24-op-ed-demand-the-right-to-protest/#.WRgj4lOGNo4> last accessed on 25 September 2017

The police arrested seven people who were protesting peacefully. At this gathering, the protesters were accused of trespassing and charged with public violence. Their bail application was postponed for seven days for further investigation.

However after these seven days, the state requested another postponement for further investigation again. The reasoning of the investigating officer was that he was only handed the docket two days prior and needed to verify the addresses of the protesters, check whether they have any previous convictions and the public needed to be consulted.

It is a disservice to accessing justice and ensuring fair trial that none of this was done in the 10 days that the protesters were incarcerated and because of this, the liberty of the protesters was at the mercy of the investigating officers. The seven protesters who were arrested were targeted and were clear victims of the delaying tactics of the police officials. The investigating officer failed to verify their addresses and criminal record, but further opposed bail because 'public violence is becoming a common crime in the country and should be treated seriously'.

The postponement request was eventually denied by the court, but this did nothing to ease the growing frustrations of the community whose concerns over service delivery and other pressing issues fall on deaf ears.

#### **Case Study 4**

#### **Benoni Service Delivery Protest**

The conservative and speculative manner in which our courts and criminal justice system views protesters was particularly evident in the Benoni Magistrate Court in July 2017. On 26 June 2017, the communities of Actonville and Wattville took to the streets to march over the lack of adequate housing in the area. R2P represented nine protesters that were arrested during the protest. The charges ranged from public violence to theft and arson. The nine accused appeared on 28 June 2017, but their bail application was postponed for seven days for further investigation. The accused were due to appear on 4 July 2017, but this was postponed due to the "court rolls being too full too accommodate the accused". Their bail application was then set down for 14 July 2017. The court officials expressed their annoyance at the protesters, describing the inconvenience, and alleged mayhem and destruction that was caused by the protesters.

*continued ...*

On 14 July 2017, the State requested a postponement for video evidence that they believed was pertinent to the bail application. The R2P attorney opposed this postponement, as a result the magistrate opted to hear the bail applications of the accused on 14 July 2017 and view the video footage on 17 July 2017. The judgement on the bail application was set down for 3 August 2017. After remaining in custody for approximately six weeks, the magistrate had denied bail to the accused. The magistrate largely focused on the merits of the case, regardless of the fact that the R2P attorney brought it to her attention on numerous occasions during the proceedings that the protesters have the right to bail and that the bail procedures should not be used to punitive as they are innocent until proven guilty. The magistrate remarked, “We have become a society of no respect for public and private property... you[the protesters] are like a swarm of locusts just destroying everything and that is what protests nowadays can be equated to.” The clients were reluctant to take up the matter further and appeal the decision of the magistrate. They expressed that they felt defeated and frustrated and just wanted to stand their trial and have it completed as they have already been incarcerated for almost two months. The accused were thereafter represented by Legal Aid South Africa for their trial.

### **Case Study 5**

### **Tsakane Service Delivery Protest**

On 27 July 2017, a service delivery protest in Tsakane, Gauteng was met with police violence and repression. The protest took place in frustration at lack of housing provision by the MEC for Human Settlements, Paul Mashatile. protests around housing and service delivery have been taking place in Tsakane since 2007, and they have never before been violent. But the protest in August was dispersed forcefully with rubber bullets. One man has been left with a SAPS round lodged in his chest which a doctor is unwilling to remove; a number of residents believe that live ammunition was used although it has not been possible to verify this yet.

According to a member of the Kwatsaduza Community and Workers’ Forum (“KCWF”), one of the organisers of the protest, the police did not converse with the protesters before they opened fire. “They just came and shot, and even when people ran away they continued shooting at them.” He says that 15 people were arrested. Some were released on the same day and some on the day after. No one was officially charged with any crime.

According to eyewitness accounts, the arrests were random, and people were taken from their houses, and schoolchildren from the street, to the police station, where they faced charges of public violence and intimidation.

*continued ...*

The organisers had not given notice of their gathering in terms of the RGA. However, two weeks later, the community along with R2K did attempt to follow RGA processes in notifying for a protest, and were routinely delayed and refused.

## Case Study 6

## #FeesMustFall2016

Since 2015 tertiary campuses across the country were dominated by protests, on issues ranging from the high costs of tertiary education, to calls for insourcing of staff and decolonisation of curriculum. The #FeesMustFall movement continued to protest in late 2016 at the inception of this reporting period.

Protests were met with hostility from the state and management of universities countrywide. During the period of October 2016 to September 2017, R2P received approximately 62 cases in relation to student protests, totalling 430 arrested people. Of those, R2P was able to help 351 in obtaining legal representation, while the remaining 79 already had legal representation.

It is well-documented that students were faced with extreme brutality and aggression from the police and private security on campus<sup>22</sup>.

Over the course of this period, several common trends were observed in relation to state responses to protesting students which suggest that the criminal justice system was being abused:

- Students were arrested on trumped up or unfounded charges;
- Attorneys assisting these students were often denied access to consult with these students at the police stations where they were being held;
- Denial of police or prosecutorial bail;
- Delaying of bail procedures in an apparent attempt to keep detained people behind bars for as long as possible. This often took the form of delays in laying charging and requests for postponements of bail procedures because detainees' addresses were not verified within the 48-hour holding period.

The police and prosecutorial authority often showed extreme hostility towards students. In one trial, a public-order police officer reportedly admitted under oath that he was given specific instructions to "arrest as many students as possible"<sup>23</sup>. Prior to one bail application, R2P staff observed a prosecutor saying, "These students want to overthrow the state and we are going to get them."

*continued ...*

<sup>22</sup> SERI, "A double harm: Police misuse of force and barriers to necessary health care services," (2017). Available at: [https://seri-sa.org/images/A\\_Double\\_Harm\\_Wits\\_Report\\_FINAL.pdf](https://seri-sa.org/images/A_Double_Harm_Wits_Report_FINAL.pdf)

Some prosecutors in Johannesburg alleged that between October 2016 and November 2016, whenever a student was arrested, the matter had to be referred to the Director of Public Prosecutions for consideration of bail, regardless of the seriousness and nature of the charge. Almost a year later after the mass arrests of students countrywide from the 2016 #FeesMustFall protests, in many cases charges have been withdrawn<sup>24</sup>. This strongly suggests that the justice system was abused in order to intimidate students and undermine their right to protest.

### 3.3 Interdicts:

#### Case Study 1

#### Ekhuruleni Technical College

A large group of students had a stay away and protested peacefully off campus. The students tried to deliver a memo and get a meeting with the principal who was very adversarial. Private security was called onto the campus. The private security was heavy handed with the protesting students which resulted violence breaking out on the campus. A few students were arrested and released soon after. The College obtained an interim interdict two weeks after the incident prohibiting the protest action. Lawyers for Human Rights (LHR) were approached by the students to assist them in preventing the interdict being made final. On the return date, the LHR attorneys arrived in court only to find that the matter had not been properly set down and placed on the court roll. The interim order had then been extended until the new date that the matter was to be set down on. On this date, the matter was still not set down properly and the interim order was extended once again. This pattern continued throughout the 2016 school year until LHR were able to get the judge to order that the interdict had lapsed when it was not placed on the roll. The actual merits of the case were never finalised. In January 2017, the College proceeded to get another interdict prohibiting protest action on their campus prior to any protests occurring. The evidence that the College used in obtaining this interdict is a newspaper article citing a call for a national shutdown of all TVET colleges by a private organisation not present at the College. The interim interdict was granted regardless of the fact that the proposed national shutdown date had already passed. LHR once again represented the students. On the return date, the matter was once again not properly set down in the court and placed on the roll. This has become a common occurrence in our courts, with interdicts never being finalised; adequately defended nor judgements being given

*continued ...*

<sup>23</sup> Brooks, S, "Post #FeesMustFall prosecutions of students compound an initial injustice," Daily Maverick. Available at: <https://www.dailymaverick.co.za/opinionista/2018-03-29-in-the-aftermath-of-feesmustfall-ongoing-prosecutions-of-students-compound-an-initial-injustice/#.WrwiY5ubIU>

<sup>24</sup> Furlong, A, "Charges dropped against UWC students after 16 months," GroundUp. Available at: <https://www.groundup.org.za/article/charges-dropped-against-uwc-students-after-16-months>



on these interdicts. This results in the jurisprudence never being developed in this area of law and this makes it difficult to challenge laws around interdicts. This manipulation and abuse of court processes is done to terrorise and intimidate protesters in order to stifle protest action, and the law is used as a tool to facilitate this behaviour.

## Case Study 2

### **Rhodes University v Student Representative Council of Rhodes University and Others:**

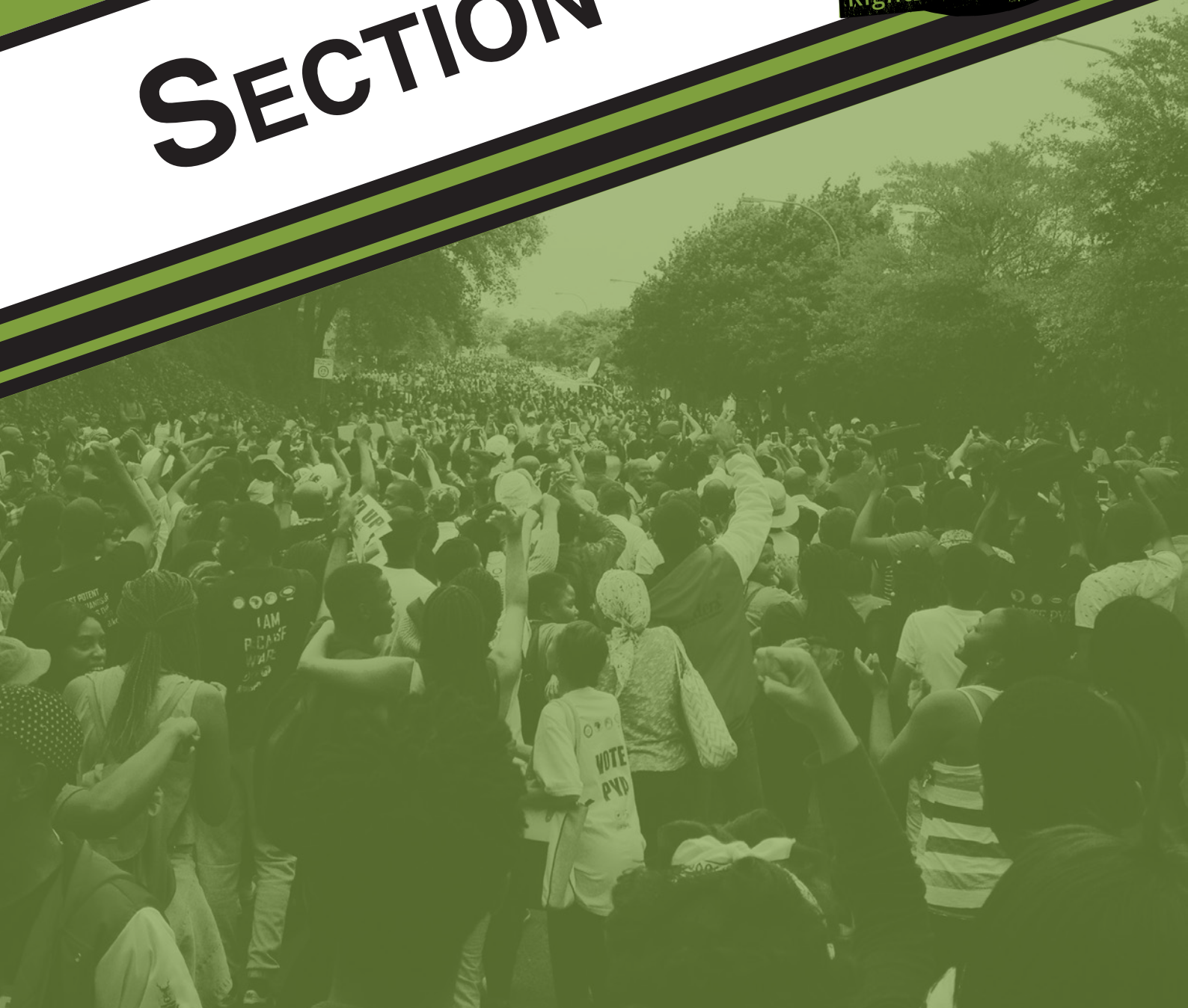
In April 2016 Rhodes University students protested against gender-based violence at Rhodes University. The #RU Reference List formed part of the protest where the names of alleged rapists at the university were published on social media. Student protesters engaged in a number of peaceful yet disruptive acts in their protest such as the blockading of roads and university entrances. There were also unlawful acts such as kidnapping and assault that took place during the protest. The University sought an interdict that listed the first respondent as the Rhodes University Student Representative Council; the second respondent as a class of “students of Rhodes University engaging in unlawful activities on the Applicant’s [Rhodes University] campus”; the third respondent as a class of “persons engaging in or associating themselves with unlawful activities on the Applicant’s campus”; the fourth; fifth and sixth respondent were named Rhodes students that have been identified by the university as leaders in the movement.<sup>25</sup> The High Court of South Africa, Eastern Cape Division, Grahamstown (Grahamstown High Court) granted the interdict regardless of the fact that the second and third respondent were an unascertainable class of persons and the lawfulness of such a wide-ranging interdict had not been tested in South African Courts. The interim interdict prohibited unlawful conduct on the campus as well as lawful conduct albeit it was disruptive in certain instances such as blockading entrances.

The Grahamstown High Court dismissed the University’s application for the interdict to be made final in December 2016, however a narrower interdict was granted against the three named students (the fourth; fifth and sixth respondent). This interdict still prohibited lawful conduct. The interdict was appealed to the Supreme Court of Appeal (SCA) but their leave to appeal was dismissed. The matter was then appealed to the Constitutional Court on the basis that the interdict prohibited lawful conduct and that a cost order was granted against the students.<sup>26</sup> The CC dismissed the appeal on the merits but upheld the appeal on the cost order. As a result the lawfulness of using interdicts to prohibit lawful conduct during protests remains uncertain.

<sup>25</sup> University v Student Representative Council of Rhodes University and Others (1937/2016) [2016] ZAECHGHC

<sup>26</sup> Ferguson and Others v Rhodes University [2017] ZACC 39

# SECTION 4



## **4 Reflections on the state of protest in South Africa for the period of October 2016 until September 2017:**

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R2P as a coalition has observed through its hotline and the cases that it has worked on that the right to protest is being stifled in South Africa. The space for dissent is shrinking. Despite the right being constitutionally recognised and there being an enabling legislation to this right, the application of the legislation is manipulated around the country and applied inconsistently. It is arguable that perceptions and the narrative around the protester feed into how administrators apply the legislation. The protester is often viewed as a criminal that is lazy and just wishes to create destruction and disruption. This is disheartening as protest is considered to be a working class right.<sup>27</sup> It is unmediated and one of the most effective methods of ensuring accountability. The majority of South Africa's working class is poor and black. Protest is often the only tool for the working class to participate in the political space and have their voices heard as government institutions have weakened and their grievances often fall on deaf ears. Administrators often abuse the vulnerable position of the working class protester and overwhelm them with legalese and procedure as well as intimidate them at the section four meeting. It is vital that progressive lawyers and civil society organisations such as the organisations in the R2P network ensure the effective and consistent application of RGA across the country and help all people in South Africa exercise their right to protest.

The RGA compares relatively well internationally in terms complying with the international human rights law to freedom of peaceful assembly, however there are several shortcomings to the Act, particularly around its notification procedure.<sup>28</sup> At present the procedure is overly bureaucratic and is intimidating and complex for the indigent protester. Further, protesters often have to give notice to the very same municipalities that they are protesting against. In light of the vulnerable position of the protester, a lot of abuse occurs around the notification process.

The work of R2P since its existence has aimed to educate the protester and assist them with these complex procedures involved in exercising their right to protest. The establishment of R2P and its hotline provides protesters with a resource to utilize for advice and assistance with protest laws and the notification procedure. Further, R2P has conducted workshops with various communities where they were informed of their rights and the laws around protest. R2P also provides educational material in English and IsiZulu that are available on the R2P website and also distributed during workshops. R2P has also provided protesters with the security of being afforded legal assistance for legal proceedings arising out of protest actions.

<sup>27</sup> See Duncan note 7 above 5

<sup>28</sup> See Duncan note 7 above at 48

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The abuse of the notification procedure and the criminal conviction that results out of failing to comply with this procedure is being challenged in the South African courts currently. The case is explained further below:

## **#SJC10**

The notification process and the criminality of failing to give notice was challenged in the Cape Town High Court.<sup>29</sup> Twenty-one activists of the Social Justice Coalition (SJC) were arrested for contravening the RGA in 2013 after protesting peacefully outside the City of Cape Town's mayor's office. The 10 elected leaders of the protest were identified and convicted of contravening the RGA by failing to give notice.<sup>30</sup> The 10 elected leaders now known as the #SJC10 contend that the criminalisation of a gathering of more than 15 people merely because no notice was given violates section 17 because:

- a) It makes it a crime to convene a peaceful, unarmed gathering merely because the gathering is attended by 15 or more people and prior notice was not given;
- b) It deters people from exercising their fundamental constitutional right to assemble peacefully and unarmed.

The Western Cape High Court, Cape Town held that the “criminalisation of a gathering of 15 or more people on the basis that no notice was given violates section 17 of the Constitution as it deters people from exercising their fundamental constitutional right to assemble peacefully unarmed”.<sup>31</sup> As a result, section 12(1)(a) of the RGA was declared unconstitutional. This means that a convener cannot be held criminally liable for failing to provide notice for a gathering on 15 or more people.

Although this was a positive outcome for ensuring that those who take part in protests are protected and the spaces of dissent are kept open, this decision of the Western High Court is now subject to an appeal by the State on the basis that the decision undermines the importance of the notification procedure.

## **Recommendations:**

Protest is an important and essential right in any democracy. The South African Constitution does recognise the importance of this right in our democracy and has the legal mechanisms in place to ensure that it can be exercised. However the law is not being applied consistently and other legal mechanisms such as interdicts are being used to stifle protest. In concluding, R2P makes the following recommendations:

### ***R2P recommends to SAPS and municipalities that:***

There needs to be a more consistent application of the RGA throughout the country. Municipalities and police officials cannot use their own unlawful practices to override the RGA and undermine the right to protest.

<sup>29</sup> *Phumeza Mlungwana and Others v The State* (A431/15) (“*Mlungwana*”)

<sup>30</sup> Section 12(a) of the RGA

<sup>31</sup> *Mlungwana* supra (note 16) para 95

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R2P further recommends that policing around protest needs to be urgently demilitarised in line with the recommendations of the Farlam Commission. Police officials are very often aggressive and heavy handed in policing protests. The police presence often creates a fearful and apprehensive atmosphere to the protest. R2P is also concerned over the trend of police officials identifying and targeting protest leaders. These protest leaders are often arrested after the protest in their homes or place of employment, and the charges against them in many cases are frivolous and unfounded.

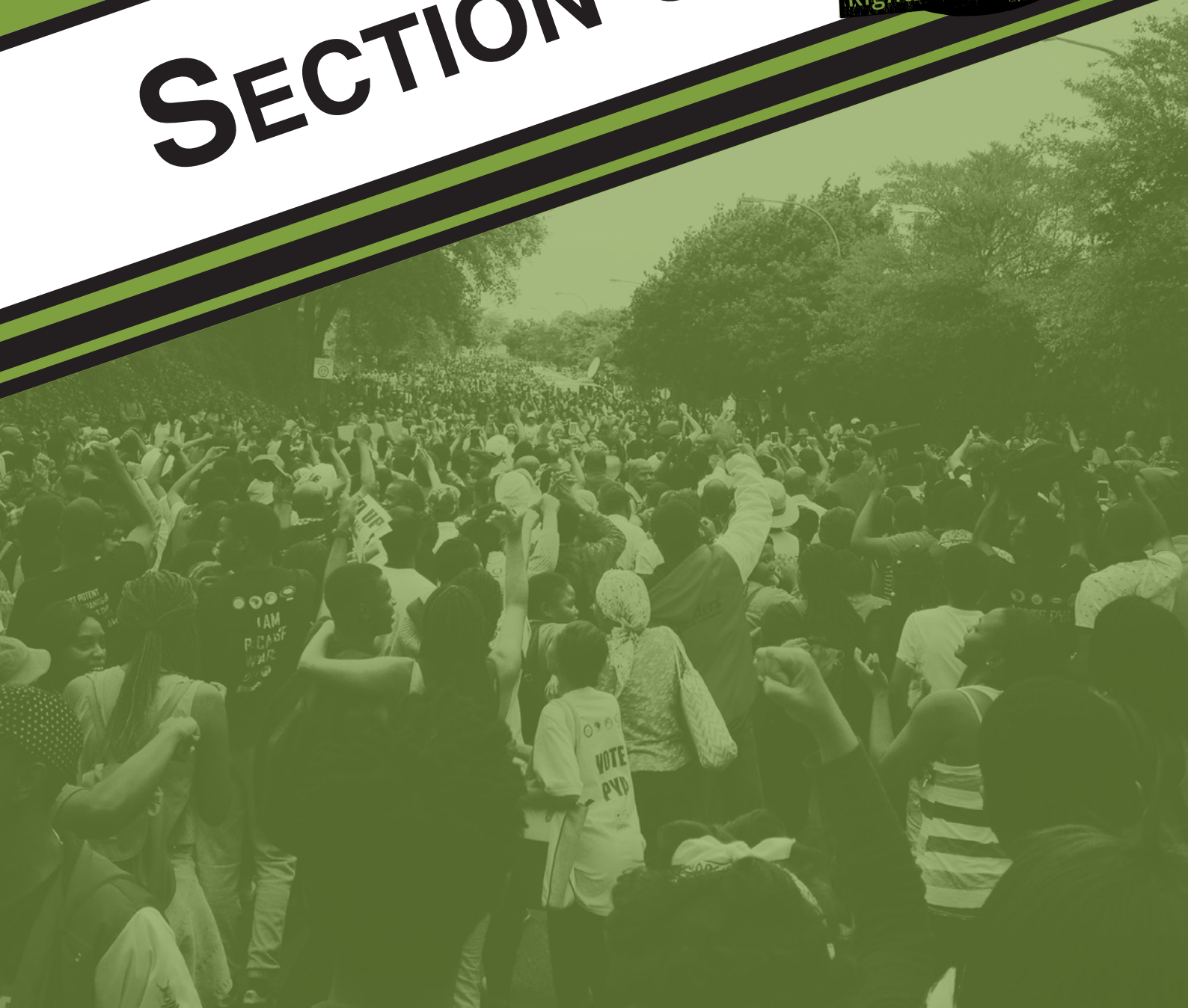
***R2P further recommends to civil society and progressive lawyers that:***

There needs to be a stronger network of progressive lawyering to challenge municipalities that act outside the ambit of the law to stifle protest. Progressive lawyers also need to push back with greater force against the private sector that uses the law to stifle protests. Further, R2P through its coalition needs a greater reach to raise awareness among more communities and protesters on their rights and the laws around protest to ensure they can assert their rights. There is a need more progressive lawyering outside the urban centres of South Africa, where a lot of abuse around protest laws and procedures occurs and usually goes unnoticed.

R2P and its member organisations should invest in communications and raising awareness of the hotline service, especially outside of campuses and outside of Gauteng and the Western Cape. In its first year, R2P was predominantly used to coordinate legal support after protesters had been arrested. R2P could reduce the strain on legal support capacity by making clients aware of the hotline services before protests take place, to increase the opportunities for legal advice and interventions that may help protests go ahead without clampdowns or arrests.



# SECTION 5



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## 5 Resources for protest:

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- Right2Protest Project website: <http://www.r2p.org.za/>
- R2K Activist Guide: Your Right2Protest: [www.r2k.org.za/protestguide](http://www.r2k.org.za/protestguide)
- Student Protests: A legal and practical guide: [http://www.seri-sa.org/images/Students\\_rights\\_guide\\_FINAL\\_Nov2017.pdf](http://www.seri-sa.org/images/Students_rights_guide_FINAL_Nov2017.pdf)

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## **Acknowledgements**

The Right2Protest Project wishes to thank all those who have supported the work done by the coalition. R2P would like to thank its funding partner, Open Society Foundation for South Africa for their continued support.



**Right2Protest Hotline: 0800 212 111**

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

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