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17 April 2013

COMMENTS

to the

DIRECTOR-GENERAL OF THE DEPARTMENT OF TRADE AND INDUSTRY
(for the attention of Ms. Baneke Dalasile)

about the proposed

LICENSING OF BUSINESSES BILL, 2013
[made known under Notice 231 of 2013]

Economic growth and licensing

Commenting on the substance only of the proposed *Licensing of Businesses Bill* does not adequately deal with the economic consequences of the implementation of such laws.

Whatever the proposed purpose might be, there is no doubt that **licensing will impact negatively on the economy and most particularly on the poorest people in the country**.

The proposed licensing laws run directly counter to the policies that are necessary to bring about growth, employment and a reduction in poverty.

We attach two documents that deal in broad terms with the essential elements of economic policies that result in high growth:

- **FMF Submission to the National Planning Commission on the National Development Plan Economic Overview / South Africa's Economy from an Economic Freedom Perspective**
  [See below]

- **Habits of Highly Effective Countries: Lessons for South Africa**
  [Download:
  http://www.freemarketfoundation.com/publications/habits-of-highly-effective-countries]

The attached documents should be read together with our submission on the content of the Bill.

1. Introduction

1.1. The Free Market Foundation (also referred to here as 'the Foundation' or 'the FMF') submits written comments as follows on the proposed 'Licensing of Businesses Bill' (hereinafter referred to as 'the proposed Bill' or 'the draft Bill').

1.2. The proposed Bill was published by the Minister of Trade and Industry under a General Notice[1] in the *Government Gazette* on 18 March 2013.[2]

2. Deadline for comment

2.1. The Notice states that the proposed Bill is published for public comments, and that interested persons may submit written comments on the Bill.

2.2. The website of the Department of Trade and Industry states that comments can be e-mailed[3] by no later than Thursday, 18 April 2013.[4]

3. Executive summary

3.1. This proposed Bill will be draconian and unworkable and should be withdrawn.

3.2. The Bill requires every business in the country to obtain a licence. It applies to every provider of any goods or services. This is wide enough to cover every grocery and greengrocer, car dealer, pharmacy, and seller of livestock. It includes every factory and wholesaler of heavy machinery and raw materials. It also includes every service provider, from lawyers and hospitals to hotels, carparks, airports, freight carriers and advertising agencies. It is doubtful if each licensing authority will exercise its powers to grant exemptions generously.[5]

3.3. The Bill will criminalise all businesses, existing or new, who don't obtain a licence.[6]

3.4. The Bill provides no clear transitional period to enable all existing businesses to obtain licences. Licensing authorities will be swamped with applications.[7]

3.5. The Minister says optimistically that licensing will be easy. This is unlikely. The licensing authorities will be municipalities. The Financial and Fiscal Commission said last year that lack of capacity is crippling municipalities due to their high vacancy rates, skills deficits, inappropriate staffing and poor accountability for performance.[8]

3.6. It is not clear that licensing authorities will be obliged to issue licences to businesses that qualify. The Bill does not say that a licensing authority 'must' issue licences to businesses which satisfy the requirements. It says instead that the licensing authority 'may' issue a licence.[9]

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1 Notice 231 of 2013.
2 *Government Gazette* 36265 of 18 March 2013.
3 To Ms Baneka Dalasile at bdalasile@thedti.gov.za.
4 DTI website, *http://www.dti.gov.za/default.jsp* , 'Call for comments on the Licensing of Businesses Bill'.
5 See part 4 below.
6 See part 5 below.
7 See part 6 below.
8 See part 7 below.
9 See part 8 below.

3.7. Licensing authorities can impose any licence condition in their sole discretion, and amend any licensee's licence conditions unilaterally.[10]

3.8. The Bill envisages 'deemed licences'. This will be unworkable in practice. The Bill says that, if the licensing authority has not issued or renewed a licence within a specified time after receiving the application, the application must be deemed to have been approved and the licence must be 'deemed as having been issued'. This won't work. Businesses will be at risk of being penalised for being unable to produce a licence. Inspectors are given powers to impose fines on a licence holder who 'fails to produce a business licence' upon request, and to 'close any premises pending further investigation'. In practice, applicants to whom licensing authorities have not promptly issued licences and whose licences are 'deemed as having been issued' will be penalised as if they were unlicensed.[11]

3.9. The Bill will have draconian consequences for persons convicted of contravening the counterfeit-goods, tax, food-safety or immigration laws. It would empower municipalities to order persons found guilty of contravening such a law to stop business.[12]

3.10. The Bill will create barriers to entry by small businesses into the economy. Since the greatest share of the future business growth in this country will be in the hands of small entrepreneurs, government must ensure that no statutory constraints, intended or unintended, are placed on small business growth. Legislation that requires a person to obtain a licence before carrying on business inhibits economic growth by preventing or restricting people from entering the economy. This is especially true of people who are poor, uneducated, or disadvantaged in some way.[13]

3.11. Licensing laws protect existing businesses by preventing new entrepreneurs from entering into the economy and competing with them. Licensing laws reduce productivity and impose financial costs and administrative burdens on small businesses. Because established (licensed) businesses are protected by licensing laws from free and open competition, they do not have to work as hard to satisfy their customers by improving goods and services and keeping prices down. Thus, whilst licensing laws are described as being introduced to protect the consumer, the effect is the opposite.[14]

3.12. Licensing laws criminalise ordinary economic activity and create opportunities for corruption.[15]

3.13. Many licensing laws once considered essential have been repealed.[16]

3.14. Licensing as a method of obtaining information of persons active in business is unnecessary.[17]

3.15. Licensing laws should not disqualify applicants who have prior convictions. The applicant has already been sentenced by a court of law to a penalty deemed appropriate to the crime, the circumstances of the accused, and the needs of society. Nevertheless, the licensing law is used to inflict further punishment on the applicant.[18]

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[10] See part 9 below.
[11] See part 10 below.
[12] See part 11 below.
[13] See part 12 below.
[14] See part 13 below.
[15] See part 14 below.
[16] See part 15 below.
[17] See part 16 below.
[18] See part 17 below.

4. Bill imposes new licensing requirement for any sale of goods and any service

4.1. The Bill applies to 'any person carrying on business or who seeks to carry on business within the Republic'.[19]

4.2. The Bill says that '"business" means the offering of goods or services for sale to the public'. [20] And '"carry on business" includes the opening or keeping open of any premises for such purpose'.[21]

4.3. It would include every business supplying any goods for sale to the public, including, for example—
Foodstuffs and groceries; flowers, fruit and vegetables; clothing and footwear; jewellery; gold and silver coins; stationery; telephones, computers, televisions and other electronic goods; cameras; liquor; petroleum products; tools, implements, hardware and cutlery; light motor vehicles, pedal cycles, trailers, parts and accessories; pumps; pharmaceutical products; boats; clocks and watches; musical instruments; furniture and bedding; lamps and lights and their fittings; toys, games and sports equipment; paintings, sculptures and other artworks; curios and souvenirs; tobacco, cigarettes and cigars; disinfectants, insecticides, fungicides, poisons and herbicides; leather, saddles, harness, travel goods and handbags.

4.4. The Bill applies to the sale of 'goods'. The term 'goods' probably embraces all movables, which are commonly bought and sold in the course of business,[22] including livestock,[23] gold coin,[24] and fruit and vegetables produced upon the seller's own property.[25] The sale or leasing of fixed property, being immovable, would appear to be excluded.

4.5. The Bill goes further. It says that '"sell" includes exposing for sale or having in possession for sale or purposes of sale *or any purpose of trade or manufacture* or (among other things) to transmit, deliver for sale, or to dispose of to any person in any manner for consideration or not.[26]

4.6. This is very wide, in saying sale includes having in possession for 'any purpose of trade or manufacture'. It goes beyond ordinary sales to the public. It would include sales of raw materials and capital goods to manufacturers and others. Raw materials and capital goods could include, for example—
Livestock, poultry, fish and shellfish; silk, wool, cotton and general textiles; trees and wood; cork and straw; malt, starches and oil seeds; straw and fodder; earths and stone; lime and cement; building material; ores, metals and minerals; iron, steel and aluminium and other metals; gums and resins; heavy motor vehicles, trailers, parts and accessories; agricultural machinery; electrical generators, converters, transformers, rectifiers and inductors; electronic transistors and integrated circuits; pharmaceutical preparations; fertilisers; explosives; plastics and rubber; paper pulp, paper, board, cartons and boxes; labels and tape; boilers, machinery, mechanical appliances and nuclear reactors; electrical machinery and equipment and parts; railway locomotives and rolling stock; railway traffic signalling equipment; ships; optical, measuring, checking, precision, medical and surgical instruments; arms and ammunition; signs and nameplates; prefabricated buildings;

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19 Bill cl 3.
20 Bill cl 1 definition "business".
21 Bill cl 1 definition "carry on business".
22 *R v Greenspan* 1945 AD 474.
23 *R v Nyembe* 1957 2 SA 357 (T).
24 *Commr of Customs v Sallie* 1920 CPD 530; *R v Collins* 1923 CPD 518.
25 *R v Brown* 1940 EDL 168.
26 Bill cl 1 definition "sell".

chemicals; tanning and dying products; tubes and pipes; insulating and refractory goods and ceramic products.

4.7. The Bill also covers the supply of services. This is wide enough to include provision of any service to the public, including—
Legal services; accountancy and auditing; medicine and dentistry; engineering and architectural design; building construction and repair; conveyance of persons and goods; driving lessons, provision of accommodation; cinemas and theatres; nightclubs; amusement parks, massage services; advertising and marketing services; auctioneering; barbering and hairdressing; gardening services; kennelling; laundry services; vehicle repair and servicing; conducting a parking garage; motor vehicle attendance; pawn broking services; photography; private investigation; warehousing.

4.8. Each licensing authority will have power, in consultation with the Minister and the Minister for Local Government and a provincial MEC, on its own initiative or on application by any person, to exempt 'certain categories of persons' from provisions of the Bill.[27] It is doubted that a licensing authority will readily exempt any category of business in its area of jurisdiction. Licensing can be a source of official revenue. The Bill says that licence applicants will have to pay an application fee.[28]

5. Bill criminalises all businesses who don't obtain a licence

5.1. The Bill says that no person may carry on business without a valid licence issued in respect of the premises by the relevant licensing authority.[29] Any person who contravenes this provision is guilty of an offence and may on conviction be liable to a fine or imprisonment.[30]

5.2. The Bill states that it applies to any person 'carrying on' business or who 'seeks to' carry on business within the Republic.[31]

5.3. This means that the Bill applies to all existing businesses supplying goods or services, as well as to any future businesses.

6. No clear transitional period to enable existing businesses to obtain licences

6.1. The Bill does not provide a transitional period for all existing businesses to obtain licences.

6.2. The only transition provided for in the new Bill[32] is for pending applications under the Businesses Act, 1991.[33] The Bill will repeal that Act, [34] but says that pending applications under that Act must be finalised despite its repeal.[35] That Act requires licences[36] for only three categories of business

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27 Bill cl 4(1).
28 Bill cl 6(1)(d).
29 Bill cl 25(1). This clause states that no person may 'carry on business or sell goods as a hawker' without a valid licence issued in respect of that premise [sic] or place by the relevant licensing authority. Presumably this does not mean that no person may 'carry on business as a hawker or sell goods as a hawker' without the licence: It is assumed that the clause means that no person may 'carry on business from fixed premises, or sell goods as a hawker,' without a valid licence.
30 Bill cl 27(1). The clause is not well drafted.
31 Bill cl 3.
32 Bill cl 44(2) and Schedule 1.
33 Act 71 of 1991.
34 Bill cl 44(1).
35 Bill Schedule 1 para (1).
36 Businesses Act 71 of 1991s 2(3).

(the sale or supply of meals or perishable foodstuffs from fixed premises; the provision of certain types of health facilities or entertainment;[37] and hawking in meals or perishable foodstuffs).[38]

6.3. Licensing authorities will be swamped with applications from existing businesses for licences.

7. Licensing authorities will probably not have necessary capacity

7.1. The Minister of Trade and Industry has reportedly[39] said:

There ought to be a cheap, easy and accessible process of registering any business activity at local level. Anybody who is legally entitled to business activity will have a right to register. … So we're introducing a new Bill which will deal effectively with the licensing of business activity in public.

7.2. The Bill says that municipalities are to be the licensing authorities envisaged in the Bill.[40]

7.3. It is doubted that municipalities will have the necessary capacity to carry out the functions of licensing authorities for all the applicable categories of business.

7.4. The Financial and Fiscal Commission observed last year:[41]

Local government performance is uneven not only because of capacity constraints, but also (perhaps more importantly) as a result of tensions in intergovernmental roles and responsibilities, the political-administrative interface, high vacancy rates and instabilities in administrative leadership, skills deficits, poor organisational design, inappropriate staffing, low staff morale and poor accountability for performance.

7.5. It is likely that licensing authorities will not be efficient in discharging their duties as licensing authorities.

8. Not clear that licensing authorities obliged to issue licences to businesses that qualify

8.1. The Bill does not say that a licensing authority 'must' issue licences to businesses which satisfy the requirements. It says instead that the licensing authority 'may' issue a licence where requirements are met.[42]

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[37] The carrying on of business by—

providing turkish baths, saunas or other health baths;
providing massage or infrared treatment;
making the services of an escort, male or female, available to another person;
keeping three or more devices used for playing a game, recreation or amusement, the operation of which involves payment, whether by insertion of a coin or token or in any other manner;
keeping three or more snooker tables;
conducting a night club or discothèque;
conducting a cinema or theatre;
conducting adult premises referred to the Films and Publications Act, 1996.

[38] Businesses Act 71 of 1991 Schedule 1 items 1, 2 and 3.

[39] *FinWeek*, 22 March 2013, 'Business Licensing Bill', *http://finweek.com/2013/03/22/business-licensing-bill/* (accessed 11 April 2013).

[40] Bill cl 1 definition "licensing authority".

[41] Financial and Fiscal Commission, Policy Brief 9/2012: 'Lack of Capacity is Crippling Delivery of Services in Municipalities'.

[42] Bill cl 6(2).

8.2. The word 'may' is usually permissive. However, the word 'may' can sometimes be interpreted in a statute to mean 'must' or 'shall', and to impose a duty to act.[43] But employing the word 'may' would raise an unnecessary question of interpretation, and create unwelcome uncertainty.

9. Licensing authorities can impose any licence condition in their sole discretion

9.1. The Bill says that a licensing authority may issue a licence 'with such conditions [as] the licensing authority deems fit'.[44]

9.2. Similarly, the licensing authority can renew a licence with such conditions as it deems fit.[45]

9.3. And the licensing authority can approve an application to transfer a licence to another person, 'subject to conditions'.[46]

9.4. The Bill lays down no criteria or guidance regarding the type of conditions which a licensing authority should be able to impose. Licensing authorities are left with an unfettered discretion as to what conditions to impose.

9.5. The Bill will also authorise licensing authorities to amend any licence condition in their sole discretion 'where it will be in the public interest to do so'.[47]

10. Proposed 'deemed licence' will be unworkable

10.1. The Bill says that, if the licensing authority has not issued a licence applied for, within 30 days after receipt of the application[48] or any extension of that period,[49] the application must be deemed to have been approved and the licence must be 'deemed as having been issued'.[50]

10.2. There are similar provisions in the case of an application for renewal of a licence.[51]

10.3. Presumably these clauses mean that a licence applicant who has not been issued a licence within the period or extension will nevertheless be regarded as licensed and entitled to proceed or continue to carry on business.

10.4. This will be unworkable in practice, for the following reasons.

10.5. The Bill says that 'no person' may 'fail to produce' a trading licence upon request by the licensing authority.[52] Any person who contravenes is 'guilty of an offence'.[53] An inspector can impose an administrative fine on a licence holder who 'fails to produce a business licence' upon request.[54]

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[43] It is only by considering the general provisions of the law in question and the purview of the whole legislation on the subject that we can tell whether *may* confers a discretionary power or imposes an obligatory duty. No definite rule can be laid down: *R v Dietrich* 1946 EDL 62. (And see, generally, Claassen, R.D., *Dictionary of Legal Words and Phrases*, 'May'.) The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. It is easier to show that there is a right where private interests are concerned: *R v Tithe Commissioners* 14 QB 474 at 244; *South African Railways & Harbours v Transvaal Consolidated Land & Exploration Co Ltd* 1961 (2) SA467 (A) at 480.

[44] Bill cl 6(2).

[45] Bill cl 12(2).

[46] Bill cl 21(2)(b).

[47] Bill cl 22(1) and (3).

[48] Bill cl 6(2).

[49] Bill cls 7(1) and (3).

[50] Bill cl 8.

[51] Bill cl 14, read with cl 12(2) and cls 13(1) and (3).

10.6. An inspector will have the power to 'close any premises pending further investigation'.[55]

10.7. In practice, an applicant to whom the licensing authority did not promptly issue a licence, and whose licence must therefore be 'deemed as having been issued', will be penalised as if it were an unlicensed business.

11. Bill empowers municipalities to order persons convicted of contravening counterfeit-goods, tax, food-safety or immigration laws to stop business

11.1. The Bill provides draconian consequences for persons convicted of contravening certain laws.

11.2. The Bill empowers the licensing authority (municipality) to revoke a person's licence or order the person to stop trading, if the person has been found guilty of contravening the laws governing counterfeit goods.[56]

11.3. The Bill also says that the licensing authority can revoke a person's licence or order the person to stop trading, if the person has been found guilty of contravening the laws governing customs and excise[57] or 'any applicable tax legislation'.[58] (This reference to being found guilty of contravening 'any applicable tax legislation' presumably refers to the provisions of the statute governing tax administration[59] which create a variety of criminal offences relating to non-compliance with tax laws (including the laws governing income taxation[60] and value-added tax[61])[62] and relating to tax evasion.[63])

11.4. The Bill says furthermore that the licensing authority can revoke a person's licence or order the person to stop trading, if the person has been found guilty of contravening the laws governing safety of foodstuffs, cosmetics and disinfectants.[64]

11.5. And, says the Bill, the licensing authority can revoke a person's licence or order the person to stop trading, if the person has been found guilty of contravening the laws governing immigration[65] or employing an illegal foreigner[66] or refugees.[67]

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52 Bill cl 25(3). This is so widely written that it applies to every person in the Republic, and not only to a person carrying on or reasonably suspected of carrying on a business for which a licence under the Act is required.
53 Bill cl 27.
54 Bill cl 35(a).
55 Bill cl 32(1)(h).
56 Counterfeit Goods Act 37 of 1997: Bill cl 18(1)(c).
57 Customs and Excise Act 91 of 1964.
58 Bill cl 18(1)(d).
59 Tax Administration Act 28 of 2011.
60 Income Tax Act 58 of 1962.
61 Value-added Tax Act 89 of 1991.
62 Tax Administration Act s 234(a)—(o).
63 Tax Administration Act s 235(a)—(e).
64 Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972: Bill cl 18(1)(e).
65 Immigration Act 13 of 2002.
66 The Immigration Act defines an 'illegal foreigner' as a foreigner who is in the Republic in contravention of the Act.
67 Refugees Act 130 of 1998.

12. Bill creates barriers to entry into the economy for small businesses[68]

12.1. Business-licensing laws and bureaucratic requirements and practices at any level of government act as barriers to entry by small and other businesses into the economy.

12.2. Laws should be judged by their consequences rather than by their intentions. Since the greatest share of the future business growth in this country will be in the hands of small entrepreneurs, government must ensure that no statutory constraints, intended or unintended, are placed on small business growth. All entrepreneurs require a business environment that is conducive to risk-taking and that does not burden them with unnecessary costs and time-wasting compliance requirements.

12.3. In the absence of a conducive policy environment, official small-business assistance programmes (welcome though they might be for the small enterprise community) are doomed to failure.

12.4. Licensing laws protect existing businesses by preventing new entrepreneurs from entering into the economy and competing with them. In the past, white-dominated licensing authorities often found some pretext for refusing business licences to persons of colour. Group areas legislation was later introduced to achieve this result more effectively.

12.5. Licensing legislation requires a person to obtain a licence from a government authority before he or she can carry on a specified type of business. Anyone who contravenes the law is guilty of a criminal offence. It does not matter whether the permission is called a licence, permit, authority, consent, approval, or certificate of acceptability. The effect is the same in every case: a person is prohibited from carrying on the activity without the licence or permission.

12.6. Legislation that requires a person to obtain a licence from a government authority before he or she can carry on a business inhibits economic growth by preventing or restricting people from entering the economy. This is especially true of people who are poor, uneducated, or disadvantaged in some way. Where no such requirement exists, people are much more likely to start a business.

12.7. Licensing laws prescribe certain requirements that applicants must satisfy in order to obtain a licence; applications that do not meet these requirements are rejected by the licensing authorities. The effect of any licensing law, therefore, is always to limit the number of people carrying on a particular business, since it ensures that not everyone who wants to carry on that business activity is allowed to do so. That, in turn, means that customers have fewer choices.

13. Licensing legislation reduces productivity at public expense

13.1. Because established (licensed) businesses are protected by licensing laws from free and open competition, they do not have to work as hard to satisfy their customers by improving their goods and services and keeping their prices down.

13.2. If there were no entry limitations, customer dissatisfaction would encourage new entrants to open competing businesses to supply the quality of products and services that customers are seeking. Thus, whilst licensing laws are generally described as being introduced to protect the consumer, the effect is invariably the opposite. Consumers benefit most from having the greatest possible choice.

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[68] The material in this and subsequent paragraphs of this submission can also be found in Moore, G., & Davie, E., *Laws Affecting Small Business: Licensing*, compiled by the Free Market Foundation, 1997, Friedrich-Naumann-Stiftung.

13.3. Limiting the number of businesses that may participate in a sector not only reduces the level of quality and service but also raises costs. Licensees in such a sector become members of a government-created cartel. In the absence of the cartel, high returns would encourage more investors to enter the industry and prices would tend to decline.

13.4. Licences enrich some people at the expense of the public and create what has been called a tyranny of beneficiaries. They reduce the number and variety of businesses that would otherwise exist, and keep up the prices charged by the persons who are permitted to carry on the licensed businesses.

13.5. The people who introduce and administer licensing laws argue that the laws are required in the public interest, and that the motives for introducing them are altruistic. In other words, they justify the laws by referring to their good intentions, and ignore the harmful effects. Noble intentions, however, are no assurance of beneficial outcomes and do not justify the inflicting of harm on consumers. Moreover, hidden behind most proposals for licensing control are the vested interests of the promoters. Whatever altruistic arguments they put forward, their aim is almost always to protect the existing businesses in an industry from new competitors.

13.6. For example, businesses in a particular industry may urge that a licensing law is necessary to protect the public from dishonest and unscrupulous suppliers: they say there is a need to ‘clean up the industry’ and ‘clear out the fly-by-nights’. This often occurs in regard to new and fast-growing industries. However, the people who argue for minimum entry standards tend to forget that if the standards they propose had been in existence when they started, many of them would not have been able to comply.

14. Licensing laws criminalise ordinary economic activity and create opportunities for corruption

14.1. Licensing legislation makes criminals of ordinary small business people who are making a living for themselves and their families, providing goods and services, and creating employment. Their only crime is that they have not taken out a licence.

14.2. Another pervasive consequence of the laws is that they create opportunities for official corruption. Dishonest law enforcement officials often use the fact that businesses are operating without licences to extract bribes from them, particularly in the case of activities such as liquor sales and gambling.

15. Many licensing laws once considered essential have been repealed

15.1. Some progress has been made towards repealing licensing laws. At one time it was thought necessary to require a person to hold a licence before being permitted to carry on any of a very wide range of trades and occupations. These licensing laws are no longer regarded as necessary.

15.2. As a result of the enactment of the Businesses Act, 1991,[69] a person has been free to start up a business in any of the following trades without first having to apply to a licensing authority for a licence to do so:
Accommodation establishment, advertising agent, auctioneer, baker, barber, bicycle dealer, building contractor, butcher, café, cartage contractor, commercial traveller, driving instructor, fishmonger, gardening services contractor, general dealer, hawker, hiring service, kennel, laundry, livestock or produce dealer, mail order undertaking, market agent, motor garage, motor graveyard, motor vehicle attendant, motor vehicle dealer, parking garage, pawnbroker, photographer, poultry farm,

[69] Act 71 of 1991.

private investigator, quarrier, recreation ground, rickshaw hauler, riding school keeper, salesman, vending machine keeper, warehouse, and workshop.

15.3. The draft Bill now proposes going back to the old order. The Bill will require licences, not only for those businesses that required licences under the licensing laws repealed by the Businesses Act, 1991, but for every business that supplies or provides any kind of goods or services, without exception.

16. Licensing as information of persons active in business is unnecessary

16.1. It is argued that a licensing requirement is necessary as a source of information for the authorities so that they can keep track of persons active in a business sector, and to enable officials to inspect and to enforce other laws.

16.2. In fact, however, licensing laws do not meet this requirement in many cases.[70] Government authorities rarely have enough inspectors to enable them to police industries proactively by visiting all the business premises on their list. In most cases, inspectors and police officials respond only to complaints received, and they therefore investigate breaches of rules and regulations reactively. Because most violations are brought to the attention of the authorities by a complaint received from a member of the public, licensing as a source of information about businesses is redundant.

17. Licensing laws should not disqualify applicants who have prior convictions

17.1. Frequently, a licensing law lays down that the licensing authority must not grant a licence if the applicant has been convicted of certain offences.

17.2. The applicant has already been sentenced by a court of law to a penalty that the court deemed appropriate to the crime, the circumstances of the accused, and the needs of society. Nevertheless, the licensing law is used to inflict further punishment on the applicant. The convicted person, although having already paid a debt to society, is prevented from rehabilitating himself or herself by starting or returning to business in the licensed industry.

17.3. It could be argued that to permit persons convicted of certain offences would be to admit undesirable people into the industry. But a prohibition against granting licences to persons with previous convictions would not prevent these persons from being employed by other persons in the industry who have licences.

17.4. A disqualification for offences does not guarantee that persons who are granted licences will observe the law.

[70] For example, there are probably more unlicensed liquor retailers in South Africa than there are licensed ones.

17.5. Taken to its logical extreme, a disqualification for criminal convictions would mean that people with prior convictions would be prohibited from earning their living in any industry, sector or field of endeavour. The only areas of activity that would remain open to them would be criminal activities such as theft or robbery.

Leon Louw
Executive Director, Free Market Foundation

Gary Moore
Legal Consultant, Free Market Foundation

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About the Free Market Foundation
The Free Market Foundation (FMF) is an independent non-profit policy organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships. The Foundation is a registered Non Profit Organisation and a Public Benefit Organisation with Section 18A(1)(a) approval.

FMF Submission to the National Planning Commission on the National Development Plan

Economic Overview

South Africa's Economy from an Economic Freedom Perspective

1. Misconceptions about capitalism / free markets/ economic freedom / free enterprise

Many misconceptions about the nature of capitalism, free markets, economic freedom, and free enterprise, cause politicians to make decisions that are harmful to the economies of their countries, the best interests of citizens, and inescapably, to the objectives they themselves claim to be intent upon achieving. In this paper these concepts are used to describe, not ideologies, but similar attributes of a state of being; circumstances in which people peacefully engage with each other in voluntary exchanges free of third party intervention.

This contribution to the debate in which the National Planning Commission is engaged, provides a vision of the South Africa economy based on the use of economic freedom to improve conditions for all the country's people.

2. Governance that is consistent with economic freedom

The primary function of government is to achieve the most congenial conditions for interactions between citizens. Limited government supporters maintain that such conditions would be achieved if government were to concentrate almost exclusively on keeping citizens safe; with the accent on (a) a professional, well-trained and impartial police force to apprehend criminals, deter people from committing crimes, and reduce crime to a minimum; (b) a highly efficient, learned, and independent judiciary, which has the task of impartially dispensing justice, determining the punishment to be meted out to the guilty, and adjudicating in civil disputes; and (c) an army to defend citizens from invasion or the threat of foreign invasion.

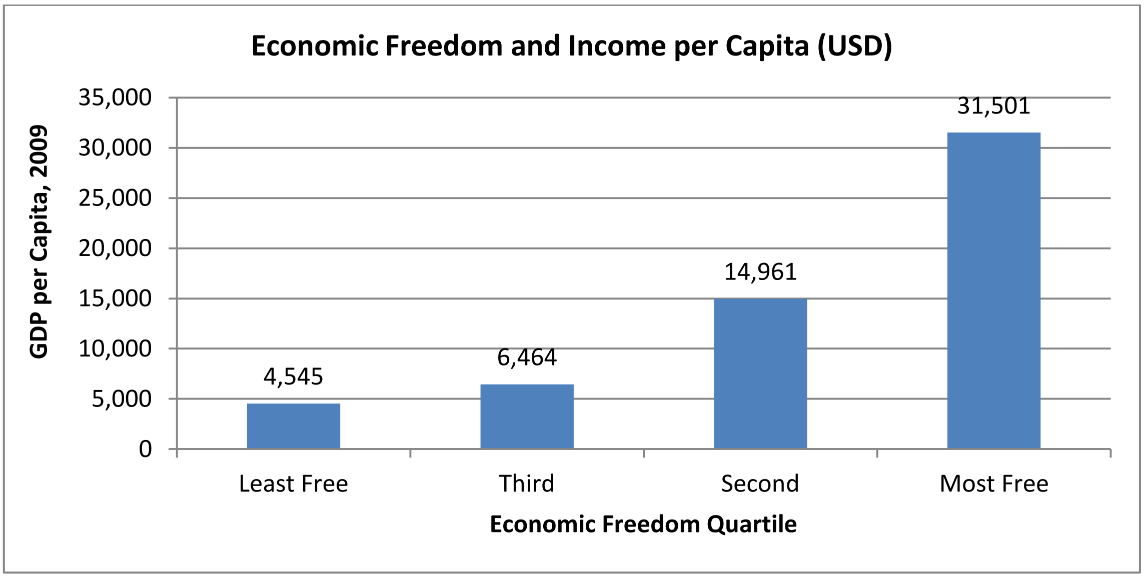
Government can do more for the welfare of the people of South Africa by doing less. Many interventions in the economy over the past decade have been costly, have not had the positive results that they promised, and have interfered in the ability of businesses to efficiently conduct their affairs. Increasingly, the country's people are being strangled by red tape, are operating in an environment characterised by uncertainty due to constant rule changes, and find themselves fearfully looking over their shoulders, waiting for the next threat to their ability to earn a living.

The poor business and jobs environment in South Africa is reflected in this country's poor showing on the economic freedom ratings as well as almost all rankings and ratings that compare various aspects of country economies. Most disturbing is the apparent belief that the problems in the economy can be solved by a more authoritarian approach, for government to intervene to an even greater extent in the economy, to be more prescriptive, and to burden the country with additional red tape and a larger and costlier bureaucracy. Comparing economies across the world shows clearly that authoritarian government leads to economic decline, unemployment and poverty, and produces strong arguments for government to deliberately free up the economy. What South Africa needs is a programme of action to increase the economic freedom of its citizens, and to place the country in the top ranks of countries for ease of doing business.

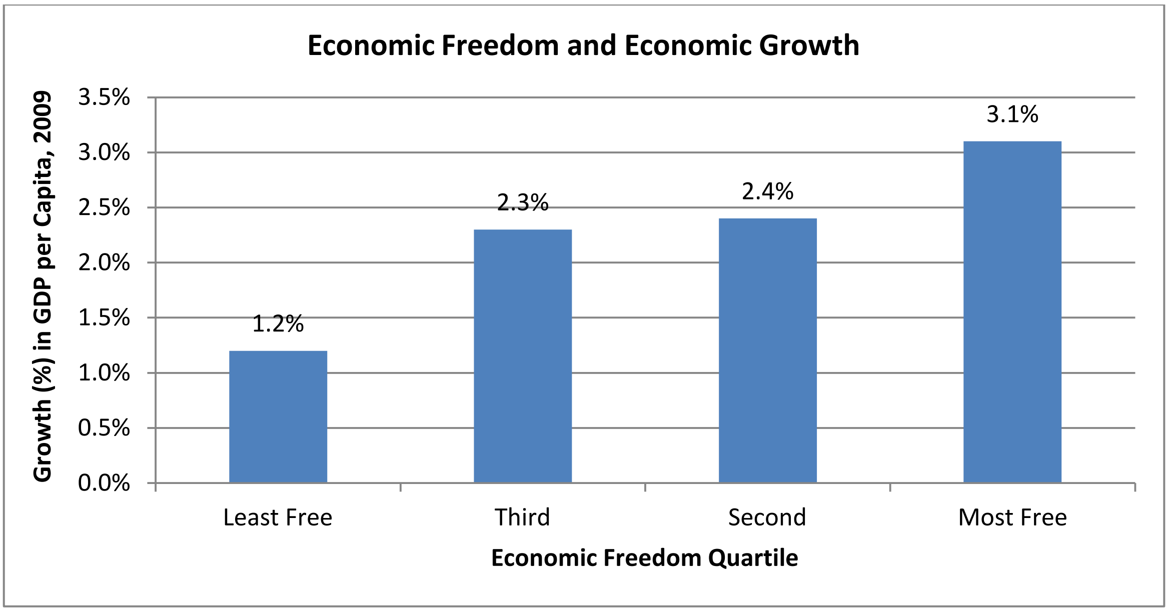
3. Graphic illustration of the benefits of economic freedom

The graphs below illustrate simple relationships between economic freedom and other indicators of economic freedom. The graphs begin with data on the relationship between economic freedom and the level of per-capita GDP and economic growth. In recent years, numerous scholarly studies have analysed these relationships in detail. Almost without exception, these studies have found that countries with higher and improving economic freedom grow more rapidly and achieve higher levels of per-capita GDP.

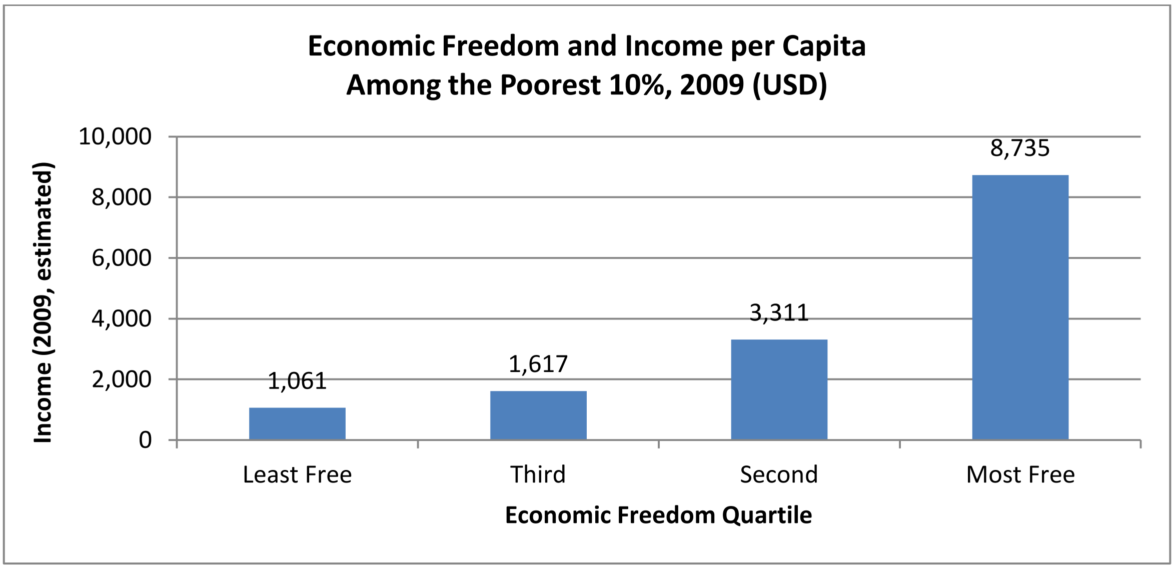
Many of the relationships illustrated in the graphs below reflect the impact of economic freedom as it works through increasing economic growth. In other cases, the observed relationship may reflect the fact that some of the variables that influence economic freedom may also influence political factors like trust, honesty in government, and protection of civil liberties. There is consequently not necessarily a direct causal relationship between economic freedom and the variables considered below. Scholarly investigation is required to control for other factors. Nonetheless, the graphs provide some insights about the contrast between the nature and characteristics of market-oriented economies and those dominated by government regulation and planning. For purposes of the following graphic illustrations the data from 1990 to 2009 has been broken into four quartiles, ordered from least free to most free. (Gwartney, Lawson and Hall, Pg 20)



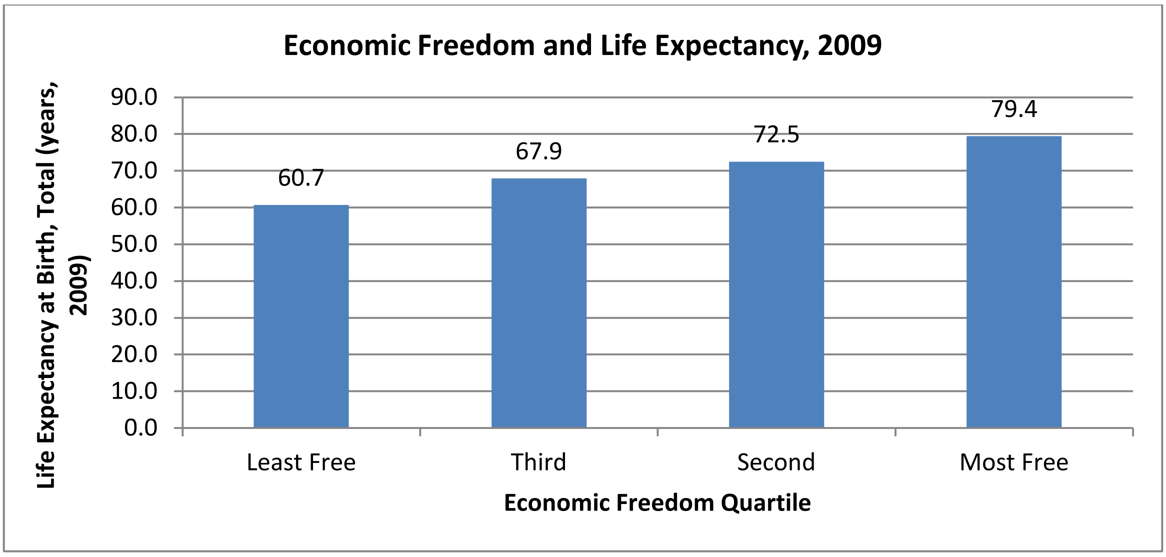
Source: Economic Freedom of the World Annual Report 2011



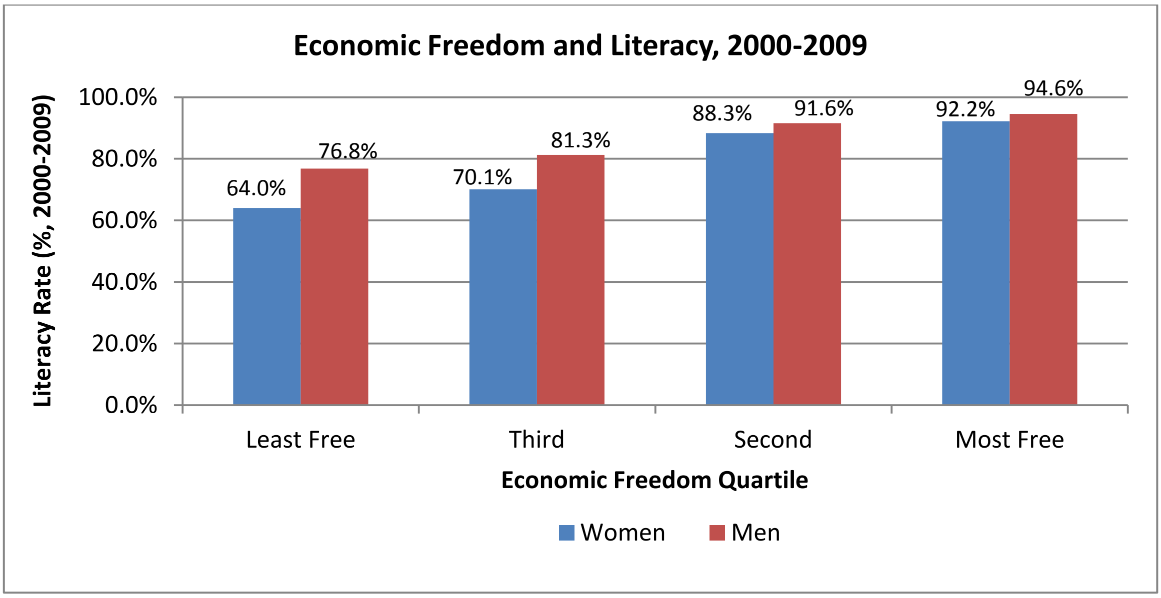
Source: Economic Freedom of the World Annual Report 2011



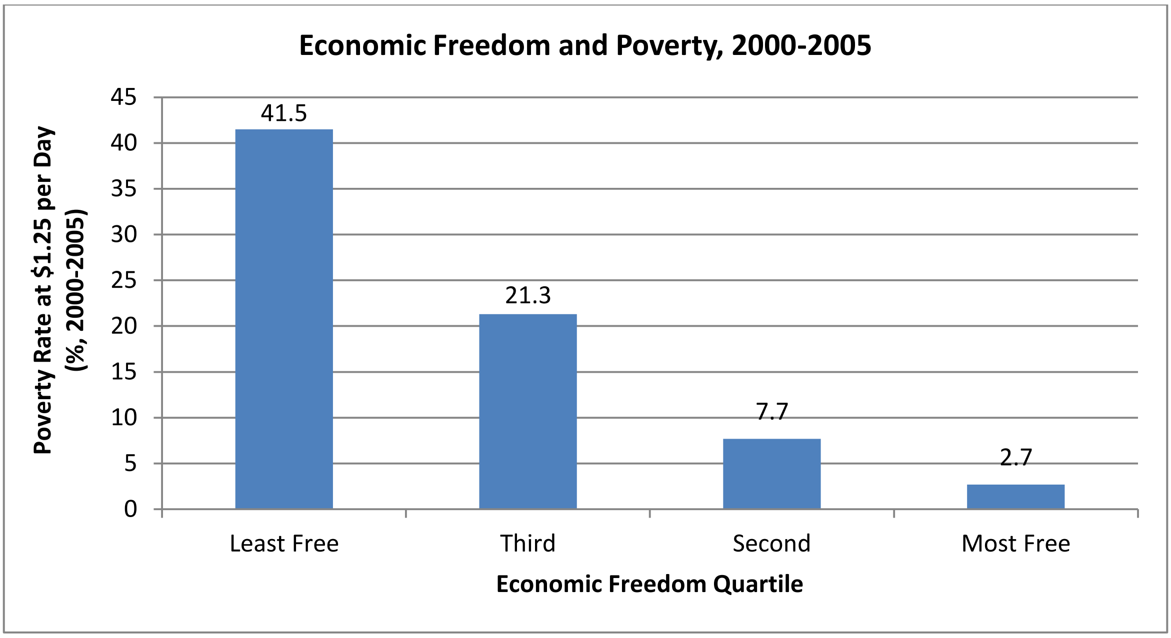
Source: Economic Freedom of the World Annual Report 2011



Source: Economic Freedom of the World Annual Report 2011



Source: Economic Freedom of the World Annual Report 2011



Source: Economic Freedom of the World Annual Report 2011

4. Improving South Africa's overall economic freedom rating

Empirical studies, such as those published in *Economic Freedom of the World*[i] *(EFW),* which has measured levels of economic freedom in more than 100 countries over more than three decades, suggest that greater economic freedom results in higher economic growth rates. An accumulating body of literature analysing the relationship between economic freedom and investment, income, growth, reductions in poverty, improvements in human welfare, co-operation, tolerance, peaceful relations, entrepreneurship, and honesty in government, has found positive consequences for the people of countries with high and increasing levels of economic freedom. The National Planning Commission (NPC) appears to be asking similar questions to those posed by the various authors that have carried out the analyses and the literature therefore offers a fruitful source of answers to some of the NPC's questions regarding South Africa's most troubling problems.

The *Economic Freedom of the World: 2011 Annual Report* states that, "the key ingredients of economic freedom are: personal choice, voluntary exchange coordinated by markets, freedom to compete in markets, and protection of persons and their property from aggression by others."
These fundamental core ingredients, established with the involvement of many eminent economists, have been utilised as a basis for measuring and comparing the world's most important economies. The government cannot afford to ignore what the EFW figures are telling us about the South African economy.

The EFW index measures the degree of economic freedom present in five major areas: (1) Size of Government: Expenditures, Taxes, and Enterprises; (2) Legal Structure and Security of Property Rights; (3) Access to Sound Money; (4) Freedom to Trade Internationally; and (5) Regulation of Credit, Labour and Business. The index is derived from 42 distinct variables measuring various aspects of the economies of the countries in the foregoing five areas. The full data set is available from http://www.freetheworld.com/datasets_efw.html

A close examination of the South African economy utilising the analyses contained in the EFW studies will provide a clear insight into the factors and institutions that make up a free economy and the benefits that citizens can expect when their country becomes freer. This examination will be carried out utilising the areas and factors published in *Economic Freedom of the World: 2011 Annual Report*. It will focus on those of the 42 variables in the five major areas of the economy in which South Africa has the poorest ratings, with suggestions as to how the ratings, measured from a low of 0 to a high of 10 could be improved.

Area 1: Size of Government (Overall rating 5.02)

The South African government is currently embarking on increasing its role in the economy. The stated intention is to improve the economy and lives of the country's people. This initiative no doubt reflects the views of the socialist/communist members of the tripartite alliance. This development is unfortunate as all the indicators predict that this policy will lead to less rather than more economic growth, with unfortunate consequences for the poor and unemployed.

A fallacy involved in decisions on increased government participation in an economy was described by the 19th century economist Frédéric Bastiat who wrote about what is "seen" and what is "not seen". When government builds bridges, roads, harbours and railways, using current and future taxpayers' money, the activities are immediately visible. What are not visible are the thousands of investments that taxpayers would have made if the additional taxes and other resources taken to carry out the public works had not been taken from them. This does not suggest that infrastructure is not necessary; it does suggest that they can be done without imposing an impossibly high cost on the country's people.

An alternative and more promising approach for government to embark upon, rather than the massive initiative it has in mind, is to reduce rather than increase the role of government in the economy. Such a reduction, if done in an innovative and bold manner, would bring about far-reaching benefits for the people of South Africa, especially the poorest among us. It would also give the economy an impetus that no other policy would be capable of doing.

Instead of burdening government, the economy, and the country's people with huge debts and high taxes, the government should consider a massive reduction in its participation rate. It should also carefully examine the areas of the economy that are currently reducing the freedoms of the people. In the following paragraphs we will examine the specific components of the economy that the EFW report has identified as being problematical.

A. Government consumption (Rating 4.26)

Government consumption expenditure has been relatively high as a percentage of GDP for many years; higher than can generally be afforded by a developing country. This expenditure could be reduced considerably by utilising the substantial state assets accumulated prior to 1994 to improve conditions for the people. Every low-income person who is legitimately and permanently living in a state-owned house, or on state-owned land, should be given freehold title to the property. On community owned land, freehold title to homesteads could be given without disturbing the traditional processes of the communities. This substantial transfer of property (called "dead capital" by Hernando de Soto) from the state to the people would transform the lives of low-income South Africans, reduce the level of government's consumption expenditure, and bring about a transformation in the lives of the affected people. It would also allow a metamorphosis of the artificially created apartheid "townships" into towns and suburbs through transformation of the land use in these areas.

C. Government enterprises and investment (Rating 2.00)

On size of government South Africa is ranked 97th out of the 141 countries rated in the EFW report. The lowest rating is on "government enterprises and investment". It stands to reason that the greater the percentage of ownership and control of property and the means of production, the less space there is for the population to invest in, thus reducing their freedom of activity. In making large investments in the provision of services such as electricity, railways, harbours and airports, government also tends to crowd out the private sector's ability to borrow funds to finance its enterprises. If government were to sell such enterprises so that those services are run by privately owned companies, there would be increased competition and substantially more investment could be drawn from foreign sources. This would lighten the load on the government budget and on taxpayers. The benefits are innumerable, not least of which will be the substantial funds that would be available from the sale of public enterprises for government to invest in improving conditions for the poor.

In the component measuring government enterprises and investment, the second worst of all 42 ratings in compiling the index, South Africa has a rating of 2 out of a possible 10. And government appears intent on making this even worse. If we were merely dealing here with differing opinions, any one of which had the potential to produce positive outcomes for the economy, a high government participation rate would not be marked down so badly in this component of the EFW study.

A policy of divestment of public enterprises would create the following huge benefits for the economy;

- Government enterprises could be converted into public companies with listings on the stock exchange and all low-income people could be given shares. Designated unit trusts could be appointed to exchange shares in the new companies for units in their trusts at a specified rate for a specified minimum period to give share recipients an investment alternative. The new public companies should, in the interests of all citizens, not be given statutory monopolies in their fields of activity.
- The following benefits could be expected:
    - Low-income people would be enriched by the shares they would receive and the need for welfare expenditure would decline.
    - The new public companies would be subject to the disciplines of the market place, would be able to raise capital without putting pressure on the Treasury or taxpayers, and would rapidly expand their businesses and increase their services.
    - Matters relating to the activities of the new companies would be removed from the political arena and become routine economic matters.
    - Open competition would function in all aspects of the activities of the new companies to the benefit of citizens.
    - The EFW rating of South Africa would improve and the country's attractiveness to investors would increase considerably.
    - There would be an improvement in GDP.

D. Top marginal tax rate (Rating 6.00)

South Africa has a high marginal tax rate by international standards, which reduces savings and investment. The marginal income tax rates of countries that have more competitive rates than South Africa are: United Arab Emirates 0 per cent, Russia 13 per cent, Mauritius 15 per cent, Hong Kong 17 per cent, Singapore 20 per cent, Botswana 25 per cent, Costa Rica 25 per cent, Brazil 28 per cent, and Kenya 30 per cent.

On each reduction of Russia's marginal tax rate, first from 80 per cent to 30 per cent, and then to 13 per cent, the total tax receipts increased. According to economist Arthur Laffer, tax reductions cause taxpayers to spend more time on increasing their incomes and less time on plans to minimise their tax liabilities. They also decide at some level that taking the risk of illegal tax evasion is not worth the taxes saved. If the government were to embark on the asset transfers to low income people as suggested above, it would be in a position to make the country more tax-competitive to attract investment and arguably increase the total tax receipts in the process.

Area 2: Legal Structure and Security of Property Rights (Overall Rating 6.16)
Economic freedom cannot exist in an environment in which the rule of law and security of property rights are not respected and maintained. The rule of law is one of the founding principles of the South African constitution but there is an inadequate understanding of what it means and how it is to be implemented.

South Africa scores badly on two of the seven components measuring the country's legal structure:

E. Integrity of the legal system (Rating 4.7)

This component is based on a section of the *International Country Risk Guide* which deals with "the strength and impartiality of the legal system" and "popular observance of the law". South African courts, which have maintained a good reputation under difficult conditions, appear to be under increasing pressure from government regarding decisions that have gone in favour of citizens in disputes with government.

New legislation from various government departments attempts to create quasi-courts and invest them with powers equal to the High Court. Increasingly, government officials are invested with discretionary powers that are inconsistent with the requirements of the rule of law. The separation of powers between the executive and the judiciary is in danger of becoming blurred, which is antithetical to the proper application of the rule of law. A high level of criminality and low rate of apprehension in cases of serious crimes are disturbing, as is the low conviction rate.

The 2011 rating for this component was 4.17 out of 10 and it will require a great deal of intensive effort to improve conditions to the point where citizens and outside observers build up confidence in the legal system, which is critically important if there is to be high growth and rapid alleviation of poverty.

F. Legal enforcement of contracts (Rating 3.93)

This component is based on the World Bank's *Doing Business* estimates for the time and money required to recover an undisputed debt. The time from the filing of the case to the date of payment and the cost of a case as a percentage of the debt are taken into consideration in arriving at the rating.

Efficient and well-functioning courts are necessary to ensure that justice is delivered swiftly and at a cost that can be afforded by average citizens who become involved in civil disputes.

Discretionary Powers and the Security of Property Rights

There is a long history of philosophers, judges, and scholars warning against the granting of discretionary (arbitrary) powers to executive arms of government. Increasingly, in South Africa, law and regulation is being determined by civil servants and not by Parliament. The Constitution should prevent Parliament from abdicating its powers and Members of Parliament should be required to maintain vigilant supervision over all laws and regulations that are promulgated. The following excerpts give an indication of the historical roots of this controversy:

In 1624 Sir Edward Coke warned the English Parliament in his *Institutes of the Laws of England* "to leave all causes to be measured by the golden and straight mete-wand of the law, and not to the uncertain and crooked cord of discretion." Though the two meanings of "arbitrary" were long confused, it came to be recognised, as Parliament began to act as arbitrarily as the king, that whether or not an action was arbitrary depended not on the source of the authority but on whether it was in conformity with pre-existing general principles of law. The points most frequently emphasised were that there be no punishment without a previously existing law providing for it, that all statutes should have prospective and not retrospective operation, and that the discretion of all magistrates should be strictly circumscribed by law.

The philosopher John Locke, in his *Second Treatise on Civil Government*, was concerned with the practical problem of how power, whoever exercises it, can be prevented from becoming arbitrary: "Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where that rule prescribes not: and not to be subject to the inconstant, uncertain, arbitrary will of another man."

Sir William Blackstone, in *Commentaries on the Laws of England* described the importance of the separation of powers: "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the Crown, consists one main preservative of public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be regulated only by their own opinions, and not by any fundamental principles of law; which, though legislatures may depart from them, yet judges are bound to observe."

The rule of law requires that government should enact only such laws as are general in nature, are applicable to everyone including itself, and which do not attempt to bring about particular outcomes. The rule of law was described by Nobel Laureate Friedrich Hayek in his book The Constitution of Liberty:

> *The conception of freedom under the law ... rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because the lawgiver does not know the particular cases to which the rule will apply, and it is because the judge who will apply them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule. Because the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it, the law is not arbitrary. This, however, is true only if by "law" we mean the general rules that apply equally to everybody.*

Total power became so much a part of previous administrations that the elements of despotism are not recognised by most South Africans, not even by those who suffered most as a result of the bias and discretionary powers contained in legislation. In order to create the free society for which the majority of South Africans have been yearning for so long, it will require a conscious effort on the part of government to root out all provisions of a despotic nature contained in existing legislation. It will also be essential to ensure that no new despotic legislation is added to the statute book.

The infamous apartheid period was only possible because the rule of law was ignored and extensive arbitrary powers were given to the civil service to follow differing rules in dealing with different citizens of the country. The greater part of those arbitrary powers continue to exist and there is clear evidence that the civil service is asking for even greater powers. Citizens need protection against this trend. Two possible methods of affording that protection are:

1. That the Members of Parliament resolutely refuse to approve any legislation that is not in accordance with the rule of law as described above, and particularly, that they refuse to approve provisions in legislation that grant arbitrary discretionary powers to the civil service.
2. That the courts have the task of reviewing and controlling the acts of the administrative branch of government, especially to ensure that they do not exceed the powers that Parliament intends to grant when approving legislation.

Area 3: Access to Sound Money (Overall Rating 7.92)

Access to sound money is one of the areas of measurement in determining what level of economic freedom exists in a country.

Depriving an economy of sound money with relatively stable purchasing power deprives economic decision-makers of accurate information upon which to base their decisions. In a sound money environment, prices most closely reflect what is actually happening in the economy and act as messengers that tell producers where there are shortages and surpluses. Price increases should be an indication of an increase in the demand for a product or service but currency debasement leads to price increases that are indicators of a reduction in the purchasing power of money rather than an increase in demand for any particular product. Currency debasement is therefore one of the most significant burdens that can be imposed on any economy as it interferes with the ability of producers to supply the needs of consumers.

D. Freedom to own foreign currency bank accounts (Rating 5.00)

South Africa's foreign exchange controls result in a low rating for this component. Abolition of exchange controls would not only improve the rating but also improve the economy and the prospects of Foreign Direct Investment and foreign trade and investment in general.

An opportunity for South Africa to become Africa's financial "Hong Kong"

Given the problems faced by the dollar, South Africa has the opportunity of instituting a gold-backed rand, abolishing exchange controls, allowing private banks to open currency accounts in any currency of their choosing, and have South Africa become the financial "Hong Kong" of Africa. Operating in an open and flourishing financial market the South African banking system would easily absorb the thousands of people with a vested interest in the retention of exchange controls who are currently employed in the Reserve Bank and elsewhere to implement and monitor exchange controls. Legal Tender laws could be confined to the payment of taxes in order to allow importing and exporting firms to conduct their business in any currency of their choice, including the payment of salaries and wages. The notion of "foreign reserves" would disappear along with the existing implicit guarantee that the Reserve Bank will provide foreign exchange to any legitimate importer who requires it to pay for imports.

South Africa rates well on three out of the four components in the area Access to Sound Money yet there are members of the Tripartite Alliance in government that are constantly criticising the Reserve Bank, arguing for a loose money policy. As it is, the Reserve Bank, while managing the rand better than the manner in which many of the world's currencies have been managed by their central banks, has in recent times excessively increased the quantity of notes and coins in issue, causing inflation to increase beyond the bank's inflation target. The target should, in fact, be zero debasement of the currency

One of the problems facing countries worldwide is that the world's reserve currency, the US dollar, has been seriously debased, causing its purchasing power to spiral downwards. As many commodities are priced in dollars for purposes of international trade, commodity prices, including gold, have increased to record heights. Countries that have currencies that have been debased to a lesser extent than the dollar find themselves in the position of having "strong" currencies. Their exporters are clamouring for a more rapid debasement of the local currencies to keep pace with the debasement of the dollar so that their products are not "priced out of the market", a course that will lead to hyperinflation. As keeping pace with dollar debasement is a path to worldwide fiat currency destruction, all countries wishing to have stable currencies will have to consider linking their currencies to a commodity such as gold.

The World Crisis is a Financial and Currency Crisis

Capitalism, and by inference economic freedom, is being blamed for the global crisis that has caused recessions in most countries and threatens to do a great deal more harm before a measure of stability returns. Some commentators erroneously describe the tumult as a "crisis of capitalism". The truth is that it is a "crisis of government" together with a "crisis of central banks".

The world crisis is a financial crisis caused by the debasement and manipulation of currencies. All governments, without fail, have instituted monopoly control over the creation of national currencies. All of them, since the removal in 1971 of the discipline exerted by gold in monetary systems, have debased their currencies to a greater or lesser extent. Since 1961 the rand has lost 90 per cent of its purchasing power compared to the US dollar. During the same period the US dollar lost 87 per cent of its purchasing power as measured by the Consumer Price Index. The debasement of the rand and US dollar occurred at the expense of South African and US citizens.

The most visible cost is the erosion of peoples' purchasing power, especially those with fixed incomes or long term fixed investments. The less visible cost is the quantity of malinvestment that occurs, which is investment that takes place based on the erroneous signals that money manipulation sends to investors. For instance, the excessively low interest rates that resulted from monetary inflation in the US misled home purchasers into basing their purchasing decisions on a belief that the low interest rates would persist. They based their decisions on the "affordability" that existed at the time of their purchases, with the encouragement of the US government and its agencies. The private banks may have acted recklessly under the circumstances but without the dollar debasement and concomitant low interest rates engineered by the Federal Reserve none of this would have happened. Hardly a crisis of capitalism!

Area 4: Freedom to Trade internationally (Overall rating 6.40)

South Africa's rating and ranking in the area of international trade could improve considerably by removal of the restrictions that result in extremely low ratings in two components of the rating. The critics of foreign trade fail to realise that if imports are halted there is no purpose whatsoever in exporting, that in the absence of imports South Africa would merely accumulate investments in foreign countries as the Chinese government has been doing with a substantial part of the proceeds of China's exports.

A (iii) Standard deviation of tariff rates (Rating 3.93)

According to the EFW study "compared to a uniform tariff, wide variation of tariff rates exerts a more restrictive impact on trade and, therefore, on economic freedom."

Government protection of local industries involving the application of different tariff rates to different types of goods implies knowledge of potential economic outcomes that the tariff setters cannot have. By implication, tariffs are pro-producer and anti-consumer. Can government be sure that the overall outcome for citizens of South Africa will not be better in a zero tariff environment such as that maintained in Hong Kong? In such an environment, investors are compelled to seek out economic opportunities in areas where South Africa has a comparative advantage. In a no-tariff environment, consumers have the benefit of the best quality goods at the lowest prices. In many cases the goods are subsidised by the taxpayers of other countries which results in a transfer of wealth from the citizens of the exporting country to those of the importing country. There appears to be no good reason to reject such transfers.

E (iii) Capital Controls (Rating 0.77)

The international monetary fund reports on 13 types of capital controls and South Africa's exchange controls will include a large number of them. Abolition of exchange controls and removal of restrictions on the operation of foreign currency accounts by private banks (as discussed in the area Access to Sound Money) would considerably improve this rating.

Area 5: Regulation of Credit, Labour and Business (6.96)

The lowest ratings in this area are in respect of components dealing with labour, administrative requirements and bureaucracy costs.

B (i) Hiring regulations and minimum wage (Rating 4.43)

This component of the rating is based on the World Bank's *Doing Business* Hiring Index, which is described as follows: "The difficulty of hiring index measures (i) whether fixed-term contracts are prohibited for permanent tasks; (ii) the maximum cumulative duration of fixed-term contracts; and (iii) the ratio of minimum wage for a trainee or first-time employee to the average value added per worker." Countries with higher difficulty of hiring are given lower ratings.

B (ii) Hiring and firing regulations (Rating 2.49)

This component of the rating is based on the *Global Competitiveness Report* question: "The hiring and firing of workers is impeded by regulations (= 1) or flexibly determined by employers (=7)." The result is converted for the EFW report to a rating measuring from 0 to 10.

The fact that an estimated 7 million people in the country are involuntarily unemployed should send a message to government that the labour regulatory environment is fatally flawed. Government will soon be compelled to choose between changing the labour laws and regulations in order to allow the unemployed to work, marginally reducing the job security of those who are already employed, or face a greater potential threat in the form of widespread civil unrest than that of labour union opposition to the changes. Delaying the labour reforms is making the situation steadily worse, as the unemployed lose skills and become entrenched in possible illegal activities that they have entered into in order to survive. The longer the period of unemployment, the less employable people become.

B (iii) Centralised collective bargaining (Rating 3.58)

The rating is derived and adapted from the *Global Competitiveness Report* question: "wages in your country are set by a centralised bargaining process (= 1) or up to each individual company (= 7)".

The curtailment of centralised bargaining and replacement with firm-based bargaining in New Zealand led to a substantial reduction in labour disputes. This was carried out in conjunction with a remarkable series of reforms in that country which propelled it up to 3rd place on the EFW rankings and brought about a resurgence in its economy.

C (i) Price controls (Rating 5.00)

The survey data of the International Institute for Management Development's *World Competitiveness Yearbook* and other data were used to rate countries for this component.

Price controls deprive producers and suppliers of information regarding increases and, less frequently, reductions in demand for their products and services. If an increase in demand does not convert into increased prices, the producers and suppliers will be totally unaware of a looming shortage as occurred recently with LP gas. In rare instances, such as happened with price controls on soft drinks, prices declined when the price controls were removed.

C (ii) Administrative requirements (Rating 3.33)

This component is based on the *Global Competitiveness Report* question: "Complying with administrative requirements (permits, regulations, reporting) issued by the government in your country is (1 = burdensome, 7 = not burdensome)" and adapted to the EFW 0 to 10 rating.

The rating for this component does not adequately reveal the huge and increasingly costly burden being imposed on South African businesses and citizens. The cost is further escalated by the appointment of an army of officials to monitor compliance with the administrative requirements, a cost that has to be borne by taxpayers. The burden in the form of executive and staff time that could otherwise have been spent productively in supplying goods and services to customers is enormous.

C (iv) Bureaucracy costs (Rating 3.10)

This component is based on the *Global Competitiveness Report* question: "Standards on product/service quality, energy and other regulations (outside environmental regulations in your country are (1 = lax or non-existent, 7 = among the world's most stringent)?"

The bureaucracy costs in South Africa are increasing at an alarming rate and a fashion has developed for legislation and regulations to include fines and imprisonment for compliance failures on the part of business people that are greater than those imposed by the courts on people convicted of crimes such as rape, assault and murder, which is an absurd approach to dealing with people who may have been guilty of nothing more serious than administrative neglect.

5. Comparative Analysis of South Africa's rankings and ratings

5.1 Improvement in South Africa's ranking and rating post-1994

As would be expected, transition to democracy and the abolition of all apartheid controls and prohibitions on black members of the population brought about a substantial increase in economic freedom in the country. In line with the increased freedoms, South Africa's economic freedom ranking improved from 53rd in 1990 to 42nd in 2000 out of 123 countries for which data were available.

5.2 Decline of 42 places in the EFW rankings, from 42nd to 84th

Unfortunately, between 2000 and 2009, South Africa's ranking has declined from 42nd in 2000 (rating 6.96) to 84th in 2009 (6.39) out of the 141 countries measured. A decline of 42 places in the world ranking of countries is not merely of academic interest, it is a matter for grave concern. There are two potential reasons for a lower position in the rankings. The first is that other countries are freeing up their economies and overtaking South Africa. This accounted for a fall of 15 places in the rankings. The other is that South Africa's level of economic freedom declined, accounting for another 27 places in the rankings.

5.3 Countries that have overtaken South Africa

The figures show that South Africa has been overtaken by African, Eastern European, Middle Eastern, Asian and a few South American countries that have been freeing up their economies.

	2000 ranking	2009 ranking	Change in ranking
Albania	83	12	+71
Lithuania	70	45	+25
Malta	65	46	+19
Romania	112	49	+63
Russia	109	77	+32
Rwanda	105	81	+24
Slovak Republic	77	14	+63
South Korea	54	23	+31
Turkey	96	55	+41
Zambia	50	25	+25

Source: Economic Freedom of the World Annual Report 2011

5.4 Countries that have become rapidly less free in the past decade

From three decades of studying the effects of advances and declines in economic freedom ratings and rankings it has become clear that they accurately predict improvements and declines in both the economic conditions and civil liberties of the inhabitants of the countries measured. The drastic decline of 42 places in South Africa's EFW ranking and the direction of change is of great concern as it predicts a worsening of conditions in the country. The direction of change is of particular importance as improving EFW scores clearly predict improvements in the economy and declining EFW scores predict a worsening of economic conditions.

	2000 Ranking	2009 Ranking	Change in Ranking
Argentina	32	102	-70
Belgium	13	42	-29
Bolivia	43	86	-43
Botswana	35	68	-33
Egypt	53	74	-21
Greece	48	75	-27
Iceland	12	63	-51
Ireland	7	26	-19
Israel	56	81	-25
Italy	34	66	-32
Jordan	30	55	-25
Malaysia	44	64	-20
Mali	73	94	-21
Nepal	96	113	-17
Netherlands	9	31	-22
Philippines	41	80	-39
Portugal	21	52	-31
South Africa	42	84	-42
Spain	24	50	-26
Sweden	18	34	-16
Trinidad and Tobago	33	64	-31
United States	3	10	-7
Uruguay	46	68	-22
Venezuela	101	121	-20

Source: Economic Freedom of the World Annual Report 2011

The validity of the predictive value of EFW scores can be checked by observing the economic improvements or retrogression in the economies of countries that have experienced such changes. When entire economies are generally free they function best. Substantial government interventions in a specific area of an economy can have a disproportionate retarding effect, preventing it from functioning properly even though there is a high level of economic freedom in other areas of the economy.

5.5 Greatest improvements in EFW ratings and rankings between 1990 and 2009

Countries that have shown the greatest improvements in their rankings (1990 and 2009 rankings shown) and EFW ratings (measured out of 10) over the past two decades are shown in the following table. All these countries have overtaken South Africa in the ratings and rankings.

	1990 Rank	2009 Rank	Change in ranking
Albania	99	12	+87
Bulgaria	101	35	+66
Cyprus	45	15	+30
Nicaragua	113	59	+54
Peru	102	28	+74
Uganda	112	39	+73
Zambia	108	25	+83

Source: Economic Freedom of the World Annual Report 2011

5.6 What is Albania doing right?

Comparing Albania, as an example, to South Africa we find the following differences in ratings (out of 10) for the various areas of activity measured (1) Size of Government – 9.06 vs. 5.02 (2) Legal Structure and Security of Property Rights – 6.19 vs.6.16 (3) Access to Sound Money – 9.63 vs. 7.92 (4) Freedom to Trade Internationally – 6.50 vs. 6.40 (5) Regulation of Credit, Labour and Business – 6.44 vs. 6.42 (6) Summary rating – 7.54 vs. 6.39.

The largest differences between the economies of Albania and South Africa are: (1) Direction of change – Albania's EFW score has risen steadily as it has introduced reforms; South Africa's score has declined as the level of economic freedom has been eroded. (2) Size of Government: General government consumption expenditure for Albania is equivalent to 10.43% of GDP, SA's is 25.53%; Government enterprises and investment is a substantial 28.93%, SA's is a massive 40.63% (and scheduled to increase), Albania's marginal tax rate is 10%, SA's 40% (3) Albania does not have foreign exchange controls, South Africa does.

5.7 Remarkable progress in former Eastern Bloc countries

Eight former centrally planned countries have made remarkable progress during the past decade and a half (1995 to 2009). Five of these countries are in the top 40 of the EFW rankings. Other currently high ranking countries in this grouping are the Czech Republic, Latvia and Lithuania.

	1995 Ranking	2009 Ranking	Change in ranking
Albania	99	12	+87
Bulgaria	107	35	+72
Czech Republic	71	58	+13
Estonia	76	19	+57
Hungary	59	17	+42
Latvia	94	62	+32
Lithuania	96	45	+51
Slovak Republic	78	14	+64

Source: Economic Freedom of the World Annual Report 2011

The "advantage" these former Soviet-dominated countries have is that their people have lived under communist authoritarian rule and want no more of it. There is a certain amount of consistency in the policies revealed by the EFW analyses across these countries. Most of them have relatively high subsidies and transfers as the state has the responsibility of caring for the elderly who had no opportunity to save for retirement under communism. Albania, Bosnia and Herzegovina, Bulgaria, the Chez Republic, Estonia, Kazakhstan, Latvia and Mongolia have marginal tax rates of 10% and many more of the countries in the region have tax rates of 20% and less. A general problem the former communist countries face is building up the integrity of their legal systems and ensuring the independence of their judiciaries. Almost without fail the monetary systems are managed exceptionally well, inflation rates are low and there are no foreign exchange controls. International trade is relatively open and regulation not excessive.

Remarkable improvements in EFW rankings and ratings, and improved economic results are their reward.

5.8 Changes in EFW rankings and ratings for some African countries between 2000 and 2009

Improvements and declines in the EFW scores of a selection of African countries over the past decade are shown in the following table.

	2000 Ranking	2009 Ranking	Change in ranking
Botswana	35	68	-33
Ghana	90	37	+53
Kenya	46	36	+10
Malawi	114	97	+17
Mauritius	20	17	+3
Namibia	64	70	-6
Rwanda	105	81	+24
South Africa	42	84	-42
Uganda	55	39	+16
Zambia	50	25	+25

Source: Economic Freedom of the World Annual Report 2011

News reports about events in these African countries tend to corroborate the fact that gains and losses in economic freedom lead to improvements and deteriorations in their economies. Ghana’s economy, for instance, receives positive mentions in press reports. While the country has benefited from the discovery of oil, the country also benefited from a reduced government participation rate in the economy, a reduction in the marginal tax rate, abolition of exchange controls and a reduction in the rate of increase in the growth of the money supply and the volatility of inflation.

5.9 EFW rankings for the currently most free economies and changes between 2000 and 2009

The rankings and ratings for the world’s freest economies, which consist of small and large territories and countries, provide evidence that economic freedom provides benefits to citizens whatever the size of their economies.

	2000 Ranking	2009 Ranking	Change in ranking
Hong Kong	1	1	0
Singapore	2	2	0
New Zealand	5	3	+2
Switzerland	4	4	0
Australia	10	5	+5
Chile	28	6	+22
Canada	8	7	+1
United Kingdom	6	8	-2
Oman	39	9	+30
United States	3	10	-7
Finland	16	10	+6

Source: Economic Freedom of the World Annual Report 2011

Events in the economies of the freest countries and territories in the world clearly reflect that more economic freedom results in better general conditions for their populations and declines in economic freedom signify troubled times. A decline in the United States' rating from 8.45 to 7.58 and its ranking from 3rd to 10th in a decade warns of a potential substantial deterioration in the outlook for the country's economy. The decline in the US economic freedom rating results from an increase in the involvement of government in the economy, a large decline in the quality of the legal structure and security of property rights, reduced freedom of the American people to trade internationally, government intervention in private sector credit, and a significant increase in bureaucracy costs.

6. Conclusion

All well-disposed people wish to see South Africans develop into a thriving nation with high economic growth, low unemployment, high per capita incomes, low crime rates, high life expectancy, excellent education, high quality healthcare, and all living together contentedly in enduring peace. While all may share the same end goals, there will be a vast difference in views on how those goals are to be achieved.

Modern democracies have strayed so far from the original philosophy supposedly undergirding the concept of a free society that elected governments have become guilty of neglecting their primary "limited government" purpose.

Criminality has increased in most countries, policing budgets are inadequate, police forces are understaffed, police officers are not properly selected, paid, or trained, or given the status they need to efficiently carry out their functions. If budgets and priorities were to be determined by citizens in referendums they would be inclined to demand better selection, better training and higher salaries for the police, and vote the necessary funds to achieve the objective of a crime-free society, even if it meant having a policeman/woman on every block in every city and town in the country, and on patrol in every rural area. In addition, citizens would be inclined to vote to remove laws and regulations that create victimless crimes and increase bureaucracy.

In order to dispense justice in a manner that gives citizens the greatest degree of confidence and trust, the law courts must function entirely separately from government. In order to achieve that objective, the officers of the courts must be properly paid, the resources must be adequate to ensure that the courts can deliver justice expeditiously, and the selection process must be carried out entirely on merit. In a budget referendum this branch of government would also receive a vote to ensure adequate funding. For instance, if there is to be an inquiry into the functioning of the South African judicial system it should be carried out by a judicial commission selected from senior retired judges from countries with similar judicial systems, not by a government department or a group of political appointees.

The size and cost of a defence force should be appropriate to the potential threat to the country's citizens from a foreign invasion. A referendum on a budget vote for a defence force is likely to reflect the concerns or lack of concern of citizens regarding such an eventuality, and also the views of citizens regarding fighting wars on foreign soil.

Above all, policies should be based on evidence of past success and failures, wherever they might be. Institutions that make a positive contribution to the welfare of the country's people, such as a Constitution and Bill of Rights that protect citizens from authoritarian government, a judicial system that functions according to the rule of law, secure property rights, and a central bank that ensures that the country has sound money and a non-inflationary environment, deserve the support and protection of all the country's people. Without sound institutions no country or its people can prosper.

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[i] James Gwartney, Robert Lawson and Joshua Hall *et al, Economic Freedom of the World: 2011 Annual Report*, Fraser Institute (Free Market Foundation - South Africa Edition)