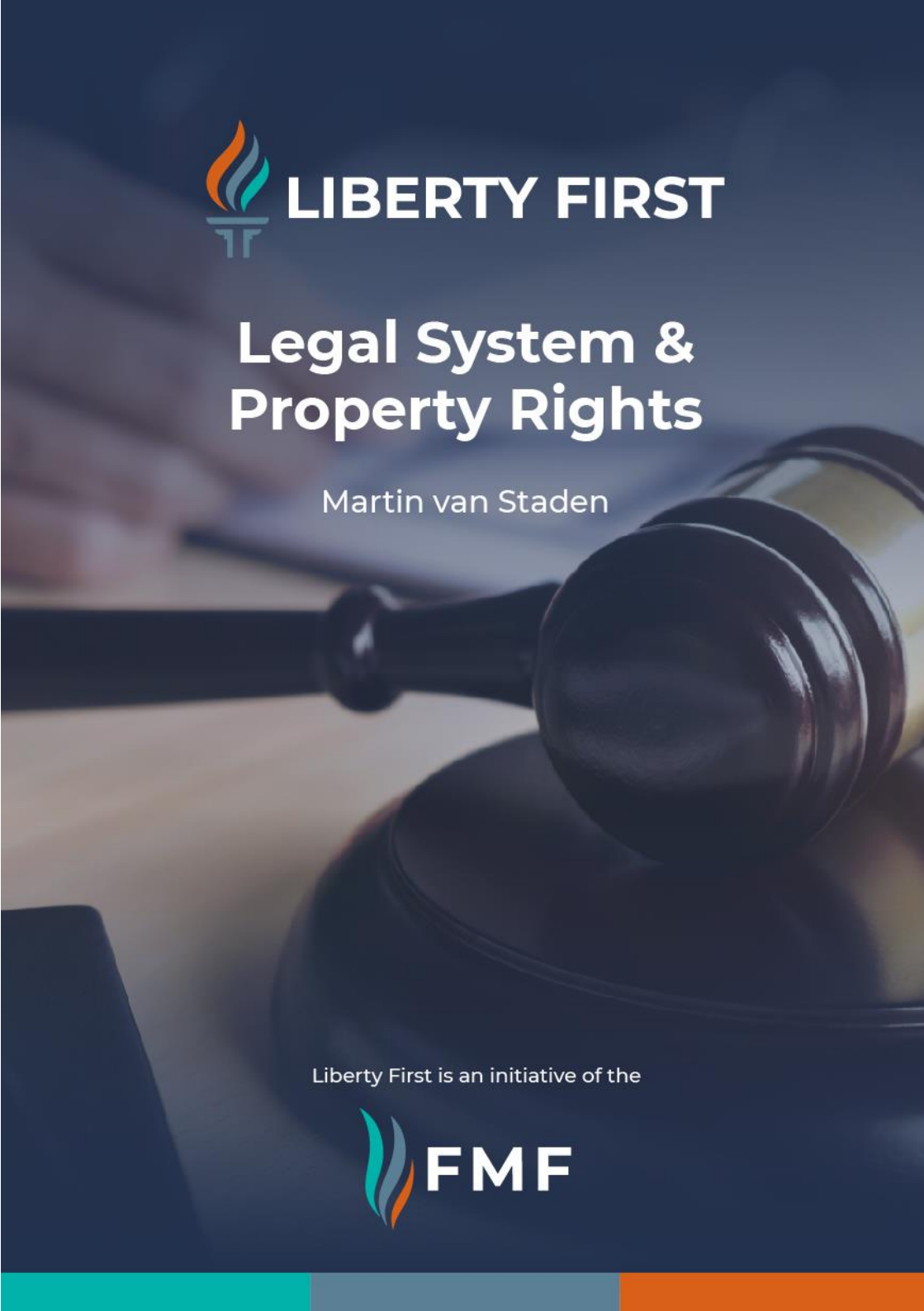

LIBERTY FIRST

Legal System & Property Rights

Martin van Staden

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Liberty First

Legal System and Property Rights

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Series Preface

On 29 May 2024, South Africa conducted its 7th election since the transition to constitutional democracy three decades prior in April 1994. In 1994, the African National Congress (ANC) thundered to power and acquired 63% of the seats in the National Assembly, a percentage it improved to 66.5% in the 1999 election, and finally to 69.69% in 2004. Since then, the ANC has been progressively losing vote share.

The ANC's liberalisation of the economy in the 1990s rewarded it with increasing democratic mandates, culminating in its significant mandate in the 2004 general elections in 2004. However, in the wake of the global financial crisis and the election of Jacob Zuma to the presidency of the ANC in the late 2000s, the ruling party abandoned this policy approach and adopted something approximating outright socialism as the lodestar for policymaking. Predictably, this resulted in worsening socio-economic outcomes.

Today unemployment in South Africa stands at 32.9% – the highest in the world – and South Africa has for the past decade (since 2013) averaged less than 1% annual growth in GDP per capita.

At the 2024 general election, the ANC lost its absolute hold on political power when it secured only 40% of the seats in the National Assembly, forcing it, for the first time, to share power nationally with parties formerly in opposition. This led to, among others, the Democratic Alliance (DA), Inkatha Freedom Party (IFP), and the Freedom Front Plus (FF+), all parties with historically more pro-market policy perspectives, being included in the so-called "Government of National Unity" (GNU) formed on 30 June 2024.

The outcome of this election has, once again, left the door towards fundamental policy reform ajar. In recognition of this potential and of the severity of the present situation, the Free Market Foundation (FMF) has launched its *Liberty First* initiative to place practical solutions at the feet of policymakers that would meaningfully change socio-economic outcomes.

These solutions are premised on the Fraser Institute's *Economic Freedom of the World* (EFW) annual report, which clearly sets out the kinds of policies that produce "economic freedom" around the world, and those that detract from economic freedom. Where the EFW is compared to indices on human development, mortality, democracy, civil liberty, press freedom, happiness, and so forth, it is evident that countries scoring highly on economic freedom produce better social outcomes, than countries with more interventionist governments.

The FMF therefore published this series of papers, with each covering one of the five categories that the EFW measures – Size of Government, Regulation, Sound Money, Freedom to Trade Internationally, and Legal System & Property Rights – setting out the reforms the GNU, or any subsequent government, can implement to climb the EFW ranks and follow the charted course of prosperity for all.

Contents

Introduction

Legal and physical constraints on the power of the state are foundationally important to achieving economic freedom. The former is manifested in constitutionalism – the doctrine of jurisprudential limitations on the scope, size, and authority of government – and the latter is manifested in private property – that physical domain into which no third party, including government under most circumstances, may enter without consent.

The Fraser Institute's *Economic Freedom of the World* (EFW) annual report rightly, therefore, classifies "Legal System and Property Rights" as one of the five measurable areas of economic freedom. Without these two integral pillars supporting a market-based economy, any instances of *de facto* economic freedom are precarious and fleeting, which is the experience of much of Africa.

Viewed from this perspective, "economic freedom" is evidently not of the nature that many in South Africa's policy circles think it to be – something the state gives people, in the form of welfare cheques and leases to state-owned land – but something else entirely: the liberty of the people to take decisions about their economic affairs without outside interference.

And while the "Legal System and Property Rights" area of economic freedom is the one South Africa admirably ranks best in among its other EFW rankings, there are many challenges to South Africa's legal system and property rights to which most readers would not need much more than a cursory reminder.

Perhaps most prominently among them is South Africa's astronomical violent crime rates. On average, seven dozen South Africans are reportedly murdered every single day, and some five reported rapes take place every single hour. South Africa does not have the police, prosecutorial, or penal infrastructure necessary – in the form of either physical or human resources – to begin to solve this problem.

Related to this scourge is the crisis of public sector corruption, enabled almost exclusively by a lax legislative framework that enables politicians and officials to engage in rent-seeking and even outright theft within lawfully recognised powers. The South African Institute of Chartered Accountants reported in June 2021 that South Africa had lost R1.5 trillion between 2014 and 2019 as a result of corruption.[1]

Both private sector crime and public sector crime ultimately undermine the property rights of ordinary South Africans and their communities and businesses. When they are not fending off violent criminal trespassers and robbers, entrepreneurs must consider extra-commercial factors like political sway and sometimes bribery just to keep from having their businesses shuttered. Where there is corruption, violent crime, and a lack of secure private property rights, there follows a lack of significant and sustainable investment.

While there are early signs that the new government formed in 2024 had restored some investor confidence, former Minister of Finance Trevor Manuel noted in April 2024 that foreign investors had taken R1 trillion out of the country since 2014.[2]

The crisis of violent crime is not one of too little state power, but one of state power being abused to pursue partisan and political agendas rather than giving effect to the core mandate of government: the protection of liberty and property.

Added to this has been an ungrounded approach to policymaking, perhaps best illustrated by the Expropriation Bill and National Health Insurance Act, whereby policies are adopted and carried through to law without thorough costing exercises or studies into the potentially dire socio-economic consequences that such policies would have. Both these mentioned laws pose existential threats to the freedom of

[1] "SA lost R1.5 trillion to corruption in five years and continues to bleed – report." *News24*. https://www.news24.com/fin24/sa-lost-r15-trillion-to-corruption-in-five-years-and-continues-to-bleed-report-20210623.
[2] "South Africa lost R1 trillion in 10 years." *Daily Investor*. https://dailyinvestor.com/finance/49205/south-africa-lost-r1-trillion-in-10-years/.

choice and property rights of ordinary South Africans and businesses. Where policies and laws can simply be adopted in this haphazard, childish fashion, the rule of law must necessarily suffer.

The central government's inept handling of violent criminality and debilitating corruption, and its reckless approach to policymaking, are all exacerbated within the context of an over-centralised state apparatus. The concentration risk is immense, and has yielded deleterious consequences for communities all over South Africa. The centralisation of political power means that mistakes or malice at the centre become everyone's problem.[3]

This over-centralisation has also made capturing the centre a considerable temptation for increasingly radical movements that are upfront about their intention to undermine not merely the economic freedom of all South Africans, but to undo South Africa's very constitutional democracy wholesale, if they attain power. This radicalism, which is left predictably unaddressed by police and prosecutorial institutions even when there are clear criminal threats of violence involved, has contributed to the negative investment climate that reigns in South Africa.

The result of all of this is that many, perhaps most, South Africans (not to mention investors) have lost confidence in the legal system to protect them from criminal predation or political victimisation. Uncertainty, despair, and hopelessness are the order of the day.

In recognition of a momentous change in the dynamics of South African politics after the 2024 general election, the Free Market Foundation is putting forward several, though non-exhaustive, policy changes that would see South Africa ascend the EFW's ranking in the area of "Legal System and Property Rights." Improving South Africa's

[3] See "Ask Forgiveness, Not Permission: Practical Steps Towards Home Rule in South Africa." https://homerule.org.za/practical-steps/.

standing vis-à-vis these facets would buttress other necessary steps taken towards economic freedom and ensure prosperity for all.[4]

EFW SCORE AND WHY IT MATTERS

Overall economic growth in South Africa has consistently disappointed in recent years and the concomitant ills of unemployment and poverty have unfortunately accompanied the decline in economic prospects. However, it can be clearly gleaned from the underlying data that this has not always been the case – or at the very least that the extent to which our economy has been characterised by sclerotic expansion has not been equivalently dire in recent decades.

The following section will begin with a brief overview of the overall performance of the South African economy before identifying the key factors which have contributed to its more recent stagnation. As will become clear in the analysis, the relevant "turning point" in our economic prospects seems to have taken place in the post-2008/9 global financial crisis (GFC).

[4] See "Liberty First: A Policy Agenda for South Africa's 2024-2029 Parliamentary Term." https://libertyfirst.co.za/publications/.

Brief historical overview of the South African economy

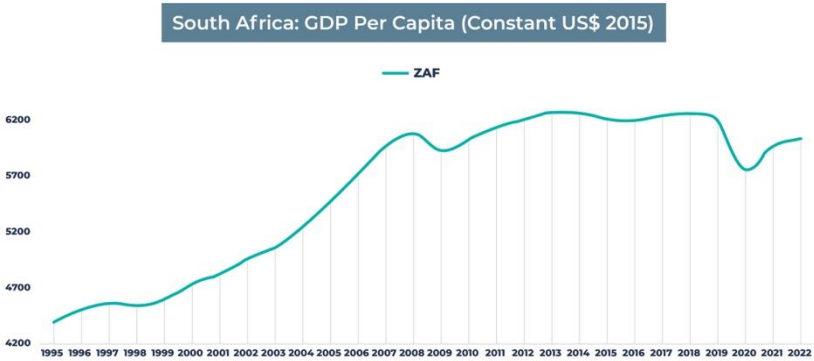

Figure 1: GDP per capita constant 2015 US dollars, South Africa 1995-2023

Figure 1 illustrates the extent to which growth in South Africa can be broadly broken down into three periods, each encompassing a decade in the democratic dispensation. The first period, in the 1990s was characterised by a reasonable, albeit relatively mild, recovery from the downturn on the 1980s. The second, taking place in the 2000s, represents the zenith of economic growth and development. Unfortunately, however, we have failed to replicate the results of either of the preceding periods since 2010 when an epoch of persistent overall stagnation and particular decline was introduced.

The vast gulf between the economic performance of our most recent period and that of the decade which preceded it can be ever more clearly illustrated not with reference to the above absolute performance in per capita GDP, but by looking at the rate of growth in real GDP per capita.

The following graph shows that whilst 2% real growth in per capita GDP had represented something of an expected minimum baseline

for development in the 2000s leading up to 2008, the economy has since then struggled to reach even half that previous baseline.

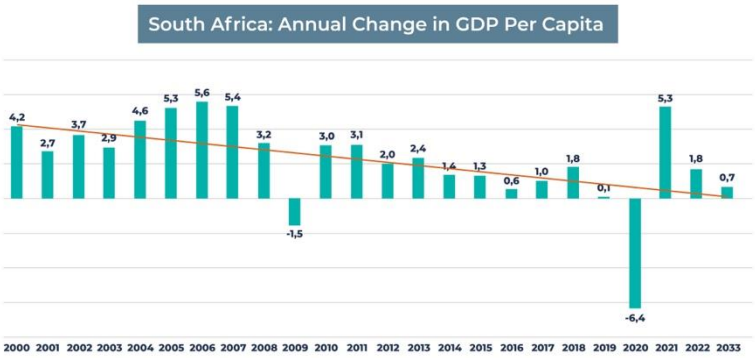

Figure 2: Annual change in GDP per capita, South Africa 2000-2023

Tragically, albeit unsurprisingly, such a reversal in economic performance has coincided with several other undesirable socio-economic outcomes such as increasing overall unemployment, a dramatic increase in youth unemployment and declining investment into the economy.

The significant gains in overall employment which characterised the 2000s had lost its momentum entirely by 2010 and had already begun to swing in the other direction when the devasting lockdown-era spikes in unemployment had taken place.

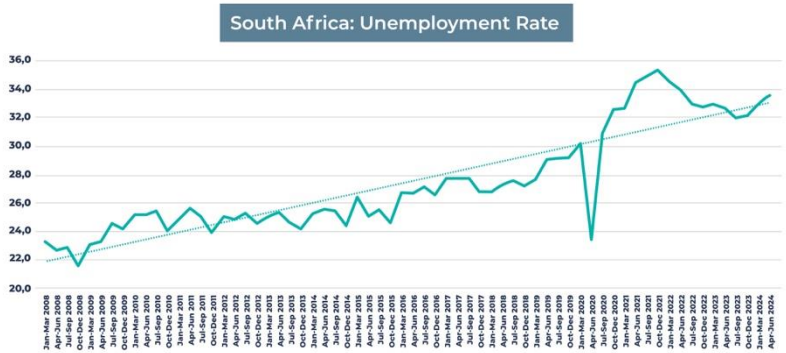

Figure 3: Unemployment rate, narrow definition South Africa 2008-2023

Worrying as the abovementioned may be, the figures for South Africa's youth look rather more dire. While some degree of unemployment amongst young people is to be expected and could suggest underlying dynamism and exploration as younger individuals seek better opportunities early in their careers, the spike in the aftermath of the GFC and the subsequent rise point to structural lack of opportunities for the youth to enter into the labour force.

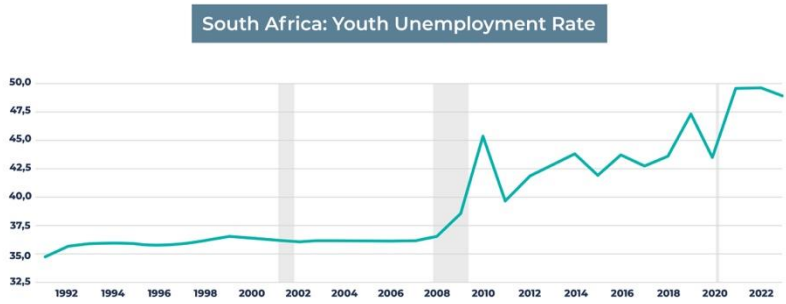

Figure 4: Youth unemployment for South Africa 1990-2023

A final metric which further illustrates the trend identified above relates to Gross Fixed Capital Formation in the economy. Here again, the data follow a similar pattern which flows from high growth in long term investment during the 2000s, towards a circumspect stance in the 2010s culminating in highly volatile and ever declining overall accumulation of capital goods.

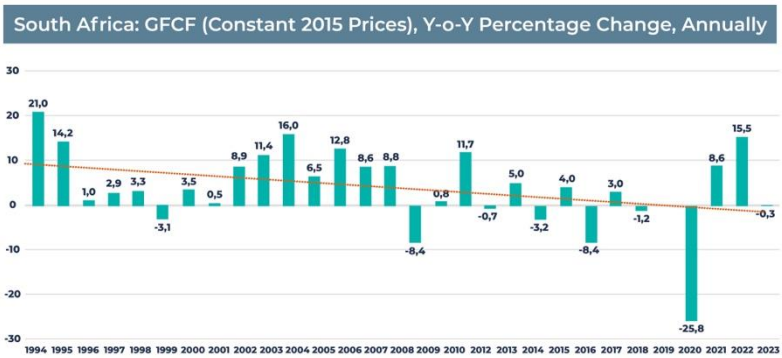

Figure 5: Gross fixed capital formation (GFCF) constant 2015 prices, Y-o-Y % change, South Africa 1994-2023

We have chosen for the purposes of this paper to focus on overall economic growth, unemployment rates and changes in fixed investment as measures of economic well-being. However, it should be stressed that regardless of the metric one chooses to analyse, South Africa's economic performance for the past three decades has been lacklustre. Yet, even more concerning is the fact that our performance on these metrics has not only been poor but has also worsened over time.

A fundamental shift in policy is non-negotiable. The rest of this paper will detail what such a shift must look like by identifying the ostensible causes undergirding the lacklustre performance of the South African economy in recent years. The first metric which concerns our analysis is that of overall economic freedom in the economy.

Stylised summary of trends in economic freedom for South Africa

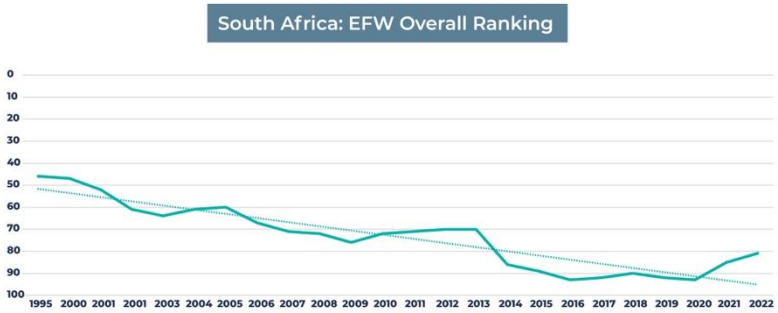

Figure 6: SA EFW rank 1995-2022

As indicated in the above chart South Africa has been in continual decline concerning economic freedom since the dawn of democracy. The most concerning development to note in the above graph is not so much the short-term fluctuations in South Africa's ranking relative to other countries but rather the long-term trend towards lesser freedom in the economy with an especially notable decline at roughly 2014. A final note before proceeding to further comparisons with other jurisdictions, is to highlight the relation between declining overall economic freedom and the decrease in economic performance identified in the previous section. It will be clear at the conclusion of the present section that such a strong positive correlation between freedom and growth exists not only within our country but is even more pronounced in comparisons between countries.

To further illustrate the extent to which South Africa has diverged from its peers regarding its trend toward greater intervention into the economy through regulation, taxation and state interference with economic activity, the following table details South Africa's decline relative to other Sub-Saharan African countries.

Rank	2000	2005	2010	2015	2022
1st	Mauritius	Mauritius	Mauritius	Mauritius	Mauritius
2nd	**South Africa**	**South Africa**	Uganda	Seychelles	Cabo Verde
3rd	Uganda	Kenya	**South Africa**	Cabo Verde	Seychelles
4th	Botswana	Botswana	Ghana	Gambia, The	Gambia, The
5th	Zambia	Uganda	Kenya	Uganda	Kenya
6th	Tanzania	Ghana	Zambia	Rwanda	Uganda
7th	Kenya	Zambia	Rwanda	Botswana	Botswana
8th	Namibia	Namibia	Gambia, The	Kenya	**South Africa**
9th	Mali	Tanzania	Botswana	**South Africa**	Rwanda
10th	Senegal	Côte d'Ivoire	Tanzania	Tanzania	Tanzania

Figure 7: Top 10 freest economies by overall EFW score in Sub-Saharan Africa, 2000-2022

Whereas South Africa was second only to Mauritius in terms of economic freedom in 2000 and 2005 the following periods have been characterised by a persistent drop in the rankings with South Africa still languishing at the bottom-end of the rankings in the latest report.

Because the EFW comprises a composite index of various factors, there is often a significant level of deviation within the underlying elements of the index where great gains could be made at one level

while other factors remain constant or deteriorate. Moreover, one should not limit an analysis of the outcomes to the rankings but should instead focus on the changes in the actual scores from which those rankings are derived. The following graph compares the changes in economic freedom summary scores for South Africa (ZAF), Romania (ROU) and the Dominican Republic (DOM):

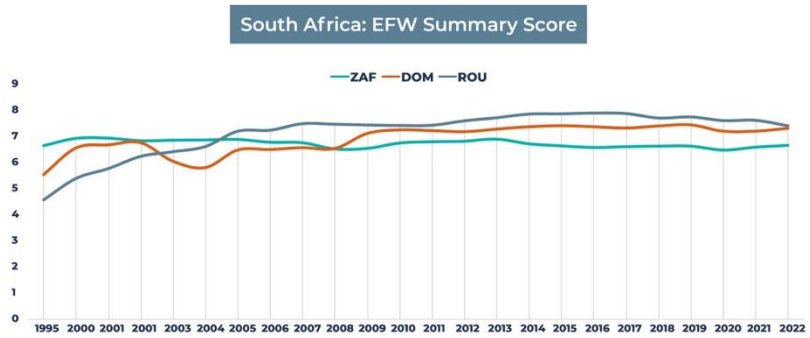

Figure 8: EFW summary scores: South Africa (ZAF), Romania (ROU), Dominican Republic (DOM), 1995 – 2022

The trends could hardly have been clearer. Whereas South Africa was the freest of the three jurisdictions under investigation in 1995, it is today the least free – resulting both from the adoption, over time, of freedom enhancing policies on the part of Romania and the Dominican Republic as well as a rejection thereof by domestic policymakers.

As alluded at the beginning of this section, the impact of such a trend goes far beyond mere figures in an index and is manifest in the tangible influence which such policies have on economic performance:

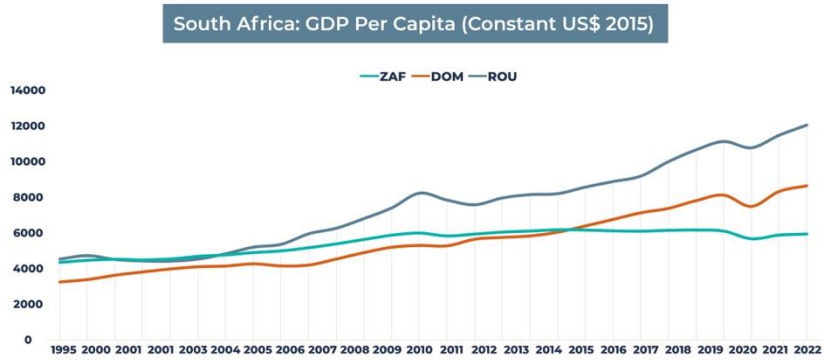

Figure 9: GDP per capita, constant US$ 2015 prices: South Africa (ZAF), Romania (ROU), Dominican Republic (DOM), 1995 – 2022

The results borne from greater economic freedom could scarcely have been clearer. South Africa having started in 1995 with a comparable level of economic wealth as that of Romania and being significantly richer than the Dominican Republic at that time, has since been surpassed by both. Likewise, Romania which saw a greater change in the degree of freedom has also seen far greater economic growth than the Dominican Republic.[5]

The above is but one of a multitude of examples which could be marshalled to illustrate the impact of what we have termed the "freedom dividend." This notion, namely that economic freedom generates societal wealth which accrues to all its members, represents the foundation of the Liberty First policy agenda.

[5] Although not illustrated here, an even starker contrast could be drawn between the Dominican Republic and its immediate neighbour, Haiti. Once again, cementing the enormous value of economic freedom as a driver of prosperity.

The freedom dividend

One of the most notable revelations from the EFW is what might be termed the "freedom dividend" that exists for the poorest 10% of a society's population.

Comparing the economic freedom scores of countries with the amount of income earned by the poorest 10% of the populations in those countries, it is shown that the poorest demographic of the population in the first quartile of economic freedom (the most "free market" states) earns $14,204 (R250,000) on average per annum, compared to a mere $1,736 (R30,500) in the fourth quartile of economic freedom (the least free market states).[6] The difference is stark.

The poorest of the poor, therefore, earn some eight times more when they find themselves in the midst of free market policies. A higher degree of state interference in the economy is, therefore, not only unquestionably worse for overall economic performance but also quantifiably worse for the poor. Each of the following papers will indicate how placing *Liberty First* when crafting policy generates wealth, prosperity and fulfilment within societies.

Legal system and property rights rank

[6] *Economic Freedom of the World: 2023 Annual Report* 19.

Federalisation

The federal character of the South African Constitution should be given legislative and fiscal expression.

South Africa is formally a federal state, whereby the central government and subcentral governments (provinces and municipalities) all have original constitutional authority that do not depend on legislative or executive discretion. Despite this, the state has been governed as though it were unitary, and this is especially pronounced in the fiscal relations between the various spheres of government.

Comprehensive federalisation, including the adoption of devolution legislation, fiscal decentralisation legislation, federalisation legislation, and section 235 legislation, would go a significant way to resolving the immense concentration risk that exists in South Africa.

Whereas many state functions are constitutionally framed as general competences – meaning those spheres of government may take whatever legal action is necessary to achieve the stated objectives – especially for the central and municipal spheres, the Constitution also vests a limited number of important functions explicitly in the hands of the central government. Despite this, the central government is typically not the best primary repository for responsibilities of this nature.[7]

[7] Under the doctrine of necessity, municipalities and provinces conceivably can unilaterally take over central government functions where the vital interests of their residents are at risk, but this should be a last resort. See "Ask Forgiveness, Not Permission" above.

Parliament should adopt either a single Devolution Act, or a cohesive set of devolution Acts, in terms of which various legislative and executive functions are assigned from the central government to the other spheres.

Such legislation would be necessary wherever the Constitution provides that "national legislation" is necessary for some or another purpose. These are non-exhaustive examples of constitutional functions that Parliament could, in terms of section 44(1)(a)(iii) of the Constitution, assign downwards:

- Section 9(4): Prevention and prohibition of unfair discrimination.
- Section 23(5): Regulation of collective bargaining.
- Section 155(2): Recognition and regulation of different kinds of municipalities.
- Section 179(7): Various aspects relating to criminal prosecutions, including the qualifications of prosecutors.
- Section 182: Additional functions and powers of the Public Protector's office.
- Section 188(4): Additional functions and powers of the Auditor-General's office.
- Sections 195, 196, and 197: Regulation of the public administration and public service.
- Section 199(3) and (4): Establishment of institutions of safety and security.
- Section 205(2): Powers and functions of the South African Police Service.
- Section 206(7): Establishment of municipal police services.
- Section 217(3): Frameworks for preferential procurement.
- Any item listed in Schedules 4 and 5 of the Constitution.

Furthermore, for all intents and purposes, only the central government is presently empowered to collect revenue. Municipalities and provinces do have some scope, however this is negligible, particularly in the case of provinces. The central government's monopolisation of state revenue therefore undermines the formally federal features of the Constitution.

Parliament should adopt legislation that not merely assigns more money to the other spheres of government, but in fact grants to those spheres an overriding entitlement to the greater proportion of revenue generated within their jurisdictions.

This would encourage provinces and municipalities to compete with one another for revenue-rich businesses and individuals to relocate to their areas. Such competition both incentivises good governance by rewarding better performing jurisdictions and punishes a lack of service delivery by freeing up the capital assets of inhabitants. Neither of the aforementioned outcomes are possible within the current, overly centralised structure where funds are all but guaranteed regardless of performance.

Such legislation should go some way to decentralising the decision-making authority over revenue generation (the South African Revenue Service) and revenue allocation (National Treasury) as well.

A revenue board and treasury board could be instituted that consists of the representatives of the provincial and municipal spheres – drawn from state, community, and commercial structures – with representatives' voting weight being proportionate to the revenue that the Revenue Service generates within those representatives' jurisdictions. Representatives themselves should, ideally, be chosen on a rational, fair, and transparent process, and include most significant taxpayers in each jurisdiction. These boards would provide

oversight and ensure provincial and local concerns are ventilated and addressed in revenue generation and allocation.

Perhaps most crucially, thirty years of centralist rule under a formally federal constitution has entrenched various preconceptions about "how things work," not merely in the elected branches of government, but also in the courts.

Parliament should adopt legislation that explicitly rejects these preconceptions and entrenches principles about how, in fact, governance under a federal constitution ought to be approached.

Such legislation must include a "subsidiarity" process according to which it is determined at which sphere of government a given issue would best be addressed.

Some of the principles this Act should include are:

- Unless clear malice can be proven on their part, the permission of a provincial or municipal authority is necessary before the central government may revoke a power that it has devolved. The principle, long recognised in English constitutional law, that *freedom once conferred cannot be revoked* has not received the respect it is due.
- The central government and provincial governments may not intervene, in terms of sections 44(2), 100, and 139 of the Constitution, in the affairs of other jurisdictions for *partisan* reasons. Nor may political parties or other formations conduct themselves in a way that induces and nominally gives rise to a "legitimate" intervention by these spheres of government. "Disruption" is part of the political process, but this may not be done in a way that abuses the constitutional design.

- Municipalities that claim to be willing and able to render any other service ordinarily rendered by a "higher" sphere of government, must be allowed to render such services. This would be subject to oversight from the other spheres to ensure the constitutional rights of all who live in the municipality are respected.

Finally, South Africa is a multicultural mecca wherein not merely a dominant political elite, but also its nominal opposition, seeks to impose once-size-fits-all political contrivances upon all the various cultural communities.

Parliament should adopt legislation in terms of section 235 of the Constitution and grant substantive powers of self-determination to any self-defined linguistic and/or cultural community in South Africa.

This legislation should, in generous terms, empower any cultural community that lives relatively contiguously anywhere in South Africa to incorporate a juristic person that may provide a defined list of services – chiefly related to education (primary, secondary, and tertiary), welfare, healthcare, and safety – ordinarily provided by the municipal, provincial, or central governments. This juristic person also, automatically, becomes an ambassador for that cultural community (or that part of a cultural community) with the other spheres of government and even, where appropriate, with the international community.

This legislation can take inspiration from the constitutions of the Belgian language communities, and closer to home, the various special ratings areas bylaws that exist throughout South Africa, which allow territorially-based communities to provide complementary municipal services to legal subjects. The only difference would be that, where a section 235 community exists, it would be the municipal,

provincial, and central governments that provide complementary services, and the community takes primarily responsibility for service provision. These communities should also be empowered to provide complementary and secondary services to members of the community who live outside of the defined territorial area.

To avoid further rent-seeking in an already overtaxed society, this legislation should put it beyond any doubt that the section 235 community would be responsible for its own funding, although generous provision should be made for tax and rate relief for the juristic person itself and the community members who choose to rely on the services of the juristic person rather than other spheres of government.

Rule of Law

The unpredictable, random, and incoherent character of law- and policy-making should be brought to a quick and binding end.

Adhering to the standards of the rule of law is a constitutional imperative for which there is much supportive rhetoric but very little in the way of compliance. This is because these standards are high and difficult to square with the politically unlimited agendas of most political parties. The resulting policy environment is one of intense uncertainty and a lack of confidence in institutions to protect established legal interests.

A culture of incompetence has taken firm hold in South Africa's civil service, and this extends as much to legislative drafters as it does to the implementers of laws. Nonetheless, the judiciary has been largely deferential when it fears it might step into a "policy" or "executive" matter.

Parliament should adopt legislation – or amend existing legislation, such as the Interpretation Act – that empowers

and directs the courts to uphold the standards of the rule of law when they come across breaches in legislation and regulations.

Among the provisions of this amendment would include an instruction to courts to interpret any limitation on constitutional rights – even those justified in terms of section 36 of the Constitution – strictly and narrowly, and certainly never to find any "implicit" limitation in a policy, regulation, or legislation. All limitations must be explicit, and must be accompanied by a comprehensive section 36 justification.

It should also include a provision that directs the courts to invalidate any vague or ambiguous provisions, and any assignment of powers to a minister, regulator, or other body, that is not strictly circumscribed. No assignment of general competence (such as, "the minister may make any regulation to achieve the objectives of this Act") should be recognised as valid.

It has, furthermore, been a matter of Cabinet policy since 2015 that new legislation or regulations must be accompanied by impact assessments before the process of their adoption could be completed.[8] This policy has not been consistently adhered to, and where impact assessments are in fact published, they are almost without exception of a very low quality.

Parliament should adopt legislation that makes the conducting and publishing of impact assessments

[8]. "Socio-Economic Impact Assessment System (SEIAS): Guidelines." Department of Planning, Monitoring and Evaluation. (2015).

mandatory, and includes the various criteria and standards according to which these assessments would be measured.

A key feature must be that impact assessments must be independent of the policy proposal, meaning the drafter of the assessment must not favour or disfavour the proposal. They must be fact-based evaluations, not marketing exercises.

Assessments must also include full accounting for how the policy proposal would be funded, factoring in the context of the budget, South Africa's public debt, and the Laffer curve in taxation policy. It must be provided that no draft legislation may be submitted to any parliamentary committee without a certified impact assessment.

This does not, however, solve the fundamental problem that there are some policies – in the form of regulations – that ought not exist in the first place, or ought be much more concise.

Democratic theory holds that the rules that bind legal subjects must be adopted by freely elected representatives. This principle has been unduly stretched to allow democratic representatives to appoint third parties – regulators – who may now also adopt binding rules. These rules come in all manner of forms, from "directives" to "notices" and even euphemistically so-called "guidelines," but ultimately all amount to regulations. The result is that there are reams upon reams of regulatory measures applicable within law but that most people do not know exist.

Parliament should adopt legislation that limits the number of regulations a specified body may adopt, and limit the scope and length of such regulations.

This legislation should centrally define which public bodies may adopt regulations, and end the practice of every new piece of legislation creating new bodies that may do so. Some industries fall within the jurisdiction of statutory professional councils, regulatory authorities, compliance councils, standards authorities, and all manner of additional institutions, all of which may design and implement regulations. This practice should end, and ensure a limited number of entities may regulate, leaving the remaining bodies exclusively in a position to issue *strictly non-binding* guidelines.

Those bodies that may adopt regulations must be limited to a specified number of regulations that may not exceed a specified length in number of words and pages. Nor, at the same time, should these bodies be allowed to amend or vary the regulations too often. A strict limit on amendments must be imposed, alongside a requirement for exhaustive notice to potentially affected stakeholders.

The legislation should also curtail the scope of what qualifies as a "regulation." Regulations may not be used as an *alternative* to legislation, which often happens today. More appropriately, regulations must be concerned exclusively with technical and formal compliance with the substance and content of the legislation, without introducing any new substance or content themselves.

Finally, and perhaps most practically, immediate steps can be taken to increase access to South Africa's courts.

With the significant backlogs that exist today at the various divisions of the High Court, many litigants have to wait many years before receiving a court date. This disincentivises many from engaging in necessary litigation, and forces others to utilise more expensive private arbitration options when they have already paid taxes into the justice system.

Parliament should adopt legislation that raises the threshold at which court applications must be made to the High Court from R400,000 to a higher amount, which would allow litigants to make more use of the magistrates' courts.

Furthermore, Parliament should raise the maximum monetary jurisdiction of the Small Claims Court amount from R20,000 to at least R100,000.

Private Property

The section 25 right to private property in the Constitution should be prioritised as an imperative, rather than an optional inconvenience.

Although there is much agreement that the poverty caused in South Africa by Apartheid was due to its denial of private property rights to most South Africans, efforts by the post-Apartheid government to further undermine property rights are significant. For the first few years after 1994 when the interim and current constitutions entrenched the right to property, South Africa experienced notable economic growth and a gradual reduction in poverty.

This began to turn when the African National Congress became increasingly radicalised after 2008.

Beginning in earnest in December 2017, the South African government sought to not only introduce its long-mooted Expropriation Bill, but also "amend" the Constitution to water down the right to property to virtual insignificance.[9] Added to this was intense political rhetoric in favour of confiscating fixed property

[9] See Van Staden "Property Rights and the Basic Structure of the Constitution: The Case of the Draft Constitution Eighteenth Amendment Bill." (2020). *Pretoria Student Law Review*.

(primarily agricultural property) from its owners without any payment of compensation.

Parliament should shelve the Expropriation Bill, or, if it becomes an Act, immediately repeal it. Parliament should thereafter adopt a resolution indicating the body's commitment to the integrity of section 25 of the Constitution.

The commitment to the protection of property rights should be restored, to signal unequivocally to domestic and foreign investors that the South African policy environment is not a risk – but an opportunity – and that they will experience growth, not confiscation.

Expropriation law in South Africa must have no conception of compensationless confiscation. The opposite is the case: where property is expropriated, owners must receive not merely market-related compensation, but *well above* market-related compensation as is the norm globally. When sales are done in the marketplace, they are done voluntarily, meaning there exists a desire by the owner to part with their property. Expropriation involves no such desire, meaning the inconvenience – indeed, the harm – that owners experience during the process must, *in addition to* the value of the property itself, be compensated, in the form of *solatium*.

In a closely related context, over four decades South African academics and media personalities have crafted a narrative unsupported by data that there is a "hunger for land" among the population.

In reality, very few South Africans care about what proportion of land is owned by what proportion of a given racial group. This is an academic concern with neat formulae and ratios exclusively, not a

popular concern. Nonetheless, this preoccupation has informed increasingly radical and economically deleterious state policies.

Parliament should adopt legislation that rejects the paradigm of redistribution and places renewed emphasis on the principle of restitution.

Redistribution is a purely political phenomenon that has made a relatively novel appearance in law to which the Constitution contains no hint. Restitution, on the other hand, is an age-old, inherent feature of law that the Constitution requires as a matter of justice. In fact, restitution is intrinsically linked to the notion of property rights when established rights to property can be shown to have been unjustly infringed upon.

Whereas restitution is about returning (defined) property to that (defined) person or persons from whom it had been taken involuntarily by another (defined) person or persons, redistribution is about taking property (virtually at random) from owners who have not been proven to be guilty of anything, and handing it to a person or people (again, randomly chosen) regardless of whether it was taken from that person or those people involuntarily. Redistribution is, therefore, at best an unconstitutional attempt at legislative tit-for-tat where past injustices are met with a force of opposing current injustices.

Furthermore, with the introduction of the Land Court Act, government correctly recognised that specialised courts could be useful to address specialised problems – in this case, land reform. Government, however, took it too far by attempting to divorce this new court from established principles of evidence and due process.

Parliament should amend the Land Court Act to make it clear that this court nothing more than a specialised division of the High Court. All the rules of evidence and procedure applicable in the High Court must be applicable in the Land Court. There should be no relaxation of legal standards in land matters.

More practically, in the late 1990s and early 2000s, Parliament adopted the National Water Act and Mineral and Petroleum Resources Development Act which respectively nationalised all water, mineral, and petroleum resources and vested them in the ownership of the state under the euphemisms of "trusteeship" and "custodianship."

South Africa, a dry country, cannot afford to play fast and loose with a resource as precious as water, which can only be sufficiently protected and developed within the confines of market-based incentives and private property rights.

That mining in South Africa has progressively become a less lucrative industry that no longer contributes nearly as much as it could to economic growth and development since the adoption of the custodianship principle, is no surprise.

The National Water Act and the Mineral and Petroleum Resources Development Act represent significant inroads into the sanctity of private property, and Parliament should adopt legislation repealing both laws.

The common law *ad coelum* principle – *whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell* – should apply, giving

primacy to landowners. Landowners may then freely contract and lease or sell their mineral, water, and petroleum rights if they so desire.

Civil Liberty

Freedom under law should be respected, especially when it is exercised in ways some subjectively deem to be offensive or hurtful.

Freedom that is not protected by law is fleeting. When the law is itself weaponised against the very thing it exists to protect, the legitimacy of the state is drawn into question.

With tens of thousands of "crimes" on the statute books, scattered across the national, provincial, and local spheres of government, and spread over hundreds of legislative Acts and many more executive regulations, legal certainty is threatened. While South Africa is not an exceptional case in the world in this respect, it has become difficult for ordinary legal subjects to know, precisely, what is a criminal offence and what is not.

Most people have a good idea about the *mala in se* crimes[10] that one intuitively know to be criminal, but given the wide variety of domains the state today regulates, there are thousands upon thousands of pages of peculiar offences that could land one in prison, make one liable for a fine, or burden one with a criminal record.

These pages are scattered all throughout the hundreds of statutory and regulatory books of the central, provincial, and municipal governments. The result is that many peaceful, well-intentioned South Africans contravene potentially dozens of criminal law rules every single day without knowing it.

[10] A crime is a *malum in se* when it amounts to conduct that the reasonable person – indeed most people around the world – would regard as criminal by its very nature, without having to have been declared criminal by some positive government action. The other category of crime is a *malum prohibitum*, which is conduct that is "criminal" only and exclusively because the government has deemed it as such.

Parliament should adopt a Criminal Code Act that enumerates every single criminal offence recognised by South African law.

This does not amount to replacing South Africa's common criminal law with a codified criminal law on the civil law model, but rather simply ensures that there is a legal requirement for the state to publicise the existence of offences and allow legal subjects to easily determine whether any contemplated conduct is or is not criminal.[11]

In this respect, however, given South Africa's unique, extreme levels of violent crime, the over-criminalisation of peaceful individuals who engage in victimless conduct is even more significant than the moral problems of over-criminalisation elsewhere in the world. Violent crime is an existential threat to any economic growth and prosperity.

Parliament should also adopt comprehensive decriminalisation legislation that ensures police, prosecutorial, and penal institutions do not have their attention distracted by politically contrived offences other than violent crimes and crimes with clear victims who suffered tangible harm.

The common law categories of *malum in se* and *malum prohibitum* are instructive in this regard.[12]

[11] See in this respect the FMF's proposal for a Criminal Code. https://section12.org.za/the-solutions/.
[12] See in this respect the FMF's Criminalisation Index. https://section12.org.za/criminalisation-index/.

Among those laws that ought to be removed from the statute book to more appropriately respect civil liberty, is the Prevention and Combating of Hate Crimes and Hate Speech Act.

This Act was initially conceived as legislation to address hate crimes – that is, tangible criminal harm committed against someone due to some or other inborn characteristic – but was thereafter contrived into a criminalised prohibition on hurtful speech.[13] This happened within the context of South African law already prohibiting hurtful speech through such measures as the Equality Act and the modified common law doctrine of *crimen iniuria*.

The Hate Speech Act should not be allowed to become entrenched law in South Africa. The Act should either be repealed in its entirety, or its provisions relating to hurtful speech must be excised, leaving only those concerned with hate crimes.

The Promotion of Equality and Prohibition of Unfair Discrimination Act, in turn, was meant primarily to give effect to section 9 of the Constitution, in particular its prohibition on unfair discrimination. The addition of a hurtful speech provision in this Act has complicated the discourse. Any and all regulation of expression must be seen through the prism of section 16(2) of the Constitution, but because these provisions appear in the Equality Act, their wide breadth has been justified on the basis of standards set out in section 9, which undermines the constitutional design.

[13] While the legislation does utilise the term "hate speech," it does not fully satisfy the constitutional definition of hate speech and therefore address itself to a lesser category of offensive expression: hurtful speech.

The Equality Act's hurtful speech provisions should either be amended to reflect, precisely, the language utilised in section 16(2)(c) of the Constitution, or failing that, removed entirely.

Section 16(2)(c) provides that government may prohibit or regulate speech that amounts to "advocacy of hatred based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

Alongside the repeal of the Hate Speech Act and the amendment of the Equality Act should be a reform to the doctrine of *crimen iniuria*.

This doctrine has been inappropriately wielded to prosecute hurtful speech. But it is in fact unclear whether there is any room left *per se* in South African law for *crimen iniuria*, in light of the constitutional protection for expression.

The need for this comprehensive decriminalisation is evident in light of the sheer scale of the problem of violent crime. In the last quarter of 2023, crime statistics showed that there were about 86 reported murders every day in South Africa on average, and on average five reported rapes *per hour*.

If we are to be conservative and take only half of these – 43 murders per day and 60 rapes per day – and we assume again that half of these are committed by *separate* people, meaning 21.5 unique murders and 30 unique rapes per day, that still amounts to at least 645 unique murders and 900 unique rapes committed every month. If we assume our criminal justice system prosecutes these violent criminals speedily, there would need to be at least 1,545 new beds available in

South African prisons every month to accommodate only those guilty of murder and rape. Thousands of additional prosecutors, and dozens of massive new prisons, would be necessary for this.

To say that this is unlikely, or even impossible, is an understatement.

Parliament must, therefore, take action to decentralise policing, allowing the South African Police Service to focus on becoming an elite institution that supports the other spheres of government and communities in their fights against the particular criminal contexts they exist in. The number of prosecutors must be increased, as must support mechanisms be developed for more private prosecutions. South Africa's prison capacity must be swiftly and dramatically expanded.

And while the principles of due process are sacrosanct, some have interpreted this to mean that only *the state* may therefore engage in the apprehension of criminals. The aforementioned criminal reality of South Africa manifests how unviable this arrangement is, given the sheer scale of the problem.

Parliament should adopt legislation empowering communities and commercial enterprises to comprehensively protect themselves and their property.

Not only should private security officers have power of arrest, but private prosecution should also be expanded and developed. Communities and commerce must also play a role in penal institutions and parole boards that goes beyond merely making representations.

Finally, but crucially related to observance of the rule of law, is the phenomenon whereby South Africa's criminal justice institutions have been lax to take remedial steps against politically powerful or influential individuals who brazenly encourage violent conduct among their followers. Where private individuals make similar threats, the law is allowed to take its course. This does not merely threaten equality before the law, but often translates into tangible harms done against life, liberty, and property, without recourse.

Some politicians and officials who *themselves* engage in violence (rather than merely inciting it) and who are then convicted for that offence, are also often paroled very early into their sentences, and swiftly redeployed into organs of state. Their victims are then forced to witness how the principle against double jeopardy is perverted by the justice system to protect those with political leverage.

Recognising the context of South Africa's particularly violent society, Parliament should adopt legislation that elevates the common law prohibition on criminal threats and incitement to commit violence to that of statutory law.[14]

Given the coercive authority that political actors are clothed with in society, they should have less, as opposed to more, freedom to engage in the rhetoric of violence, and the consequence of them engaging in such rhetoric should be greater than when ordinary civilians engage in similar rhetoric.

No person must be free to issue a sincere threat of violence against anyone else. There must, of course, be judiciousness in applying this prohibition, especially in determining whether the threat is in fact

[14] A form of this provision already exists in the Riotous Assembles Act, but is unduly narrow.

sincere. But where politically powerful people in fact engage in violence, they must be treated as any other violent criminal and have the full might of the law brought to bear upon them.

Conclusion

The legal system and property rights of a society have been identified by the 2024 Nobel Prize recipient in economics, Daron Acemoglu, as some of the most important catalysts for prosperity. While South Africa's ranking compared to other states in the EFW index in this respect is not horrible (with the absolute score leaving much to be desired), there are many reforms that could be introduced that would help improve South Africa's rankings even more.[15]

Combined with other reforms identified by the Free Market Foundation in its Liberty First series, this *would* improve socio-economic outcomes for the country as a whole, but in particular for the poor. The freedom dividend, which means the poorest 10% of populations in free market economies earn some R250,000 per annum and the poorest 10% in interventionist economies earn only some R30,500 per annum, is something worth working towards.

In South Africa, government is constitutionally committed to each of the proposed reforms in this report: federalisation, the rule of law, private property, and civil liberty. The constitutional infrastructure to pursue these reforms therefore already exists. No delay is necessary.

[15] South Africa *ranks* 59th out of 165 countries in terms of Legal System and Property Rights, lower being better. South Africa however *scores* only 5.78, higher being better.

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