

“SANITIZING” CORPORATE POLITICAL EXPENDITURE IN SOUTH AFRICAN CORPORATE GOVERNANCE

Aubrey Sibanda
LLB LLM
Lecturer, School of Undergraduate Studies
Faculty of Law, North West University
Mafikeng Campus

SUMMARY

Companies have become catalysts of socio-economic development due to various activities or initiatives they undertake in their countries of incorporation. Among the broad range of corporate activities, political expenditure has emerged as a new trend through which companies advance socio-economic development. Whilst there have been mixed reactions to companies availing financial resources to support political objectives, this article submits that, for South Africa, corporate political expenditure is an effective way for the country's business entities to participate in nation-building, provided the practice is adequately regulated. With reference to developments in other jurisdictions, the article proposes a model to provide a starting point for the regulation of corporate political expenditure under South African company law.

1 INTRODUCTION

Despite South Africa having attained a celebrated democracy, the private funding of its political parties remains an ambivalent¹ subject. Public funding² of political parties is authorized by the Constitution of South Africa³ (the South African Constitution) and statutorily executed through the Public Funding of Represented Political Parties Act (the PFRPPA).⁴ Nevertheless,

¹ Generally speaking, both the Electoral Act 73 of 1998 and the Public Funding of Represented Political Parties Act of 1997 as primary legal instruments governing the conduct of elections and the function of political parties in South Africa are not explicit about the private funding of political parties. Nevertheless, the Electoral Commission of South Africa notes that both State and private funding of political parties are permitted in South Africa. See <http://www.elections.org.za/content/Parties/Party-funding/> (2015-12-08).

² “Public funding” in the context of this discussion refers to the provision of financial support to various political parties from the national fiscus.

³ 1996. In terms of s 234 of the South African Constitution, the public funding of political parties is aimed at enhancing multiparty democracy in the country.

⁴ 103 of 1997 as amended by the Constitutional Matters Amendment Act 15 of 2005. S 2(1) of the legislation establishes the Represented Political Parties Fund (the RPPF) which provides financial support to parties represented in Parliament and in the provincial

one can presume that not all political parties in South Africa may be solely relying on public funding.⁵ For example in 2013, there were allegations that the Democratic Alliance (DA) had received a donation from Sahara Computers, a company owned by the controversial Gupta family in South Africa.⁶ The then leader of the DA, Helen Zille, refuted the alleged links to the Guptas, but acknowledged the receipt of a private financial donation by the party. The DA declined to disclose the identity of the private donor, arguing that such disclosure was in violation of its ethical policy.

Similarly, the African National Congress (ANC) was once embroiled in a scandal in which it was accused of receiving an irregular donation of eleven million rand from South Africa's State oil company, PetroSA SOC Ltd, ahead of the 2004 general elections. In another development, the leader of the United Democratic Movement, Bantu Holomisa filed a complaint for the Public Protector to investigate allegations that the Public Investment Corporation⁷ (PIC) bankrolled the 104th anniversary celebrations of the ANC held in 2016.⁸ Butler submits that South Africa is at ethical crossroads in respect of the funding of political parties and political finance in its wide sense. According to the author, the country can no longer ignore the evidence of mounting party-funding scandals.⁹

An interpretation of the referred events and South Africa's past political history corroborates the view that the fold of financial donors dominating the country's political space includes corporate entities. Quintessentially, South African beverages firm, SABMiller Ltd, announced towards the run-up of the 2014 general elections that it was donating an amount of nine million rand to the then biggest six political parties¹⁰ in South Africa in proportion to their

legislatures. S 2(2)(b) of the legislation permits the RPPF to be funded by "contributions or donations inside or outside" South Africa. For further discussion, see Booysen and Masterson "South Africa" in Kadima and Booysen (eds) *Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy* (2009) 414-415. S 1(d), read with s 236 of the South African Constitution creates a constitutional basis for the public funding of political parties in South Africa.

⁵ The Open Society Foundation of South Africa similarly observes that public funding accounts only for a small fraction of the finances of political parties, with the rest coming from undisclosed private sources. See Open Society Foundation of South Africa "Money and Politics in South Africa: the Challenge of Public Funding" 2011 *Policy Brief 2*.

⁶ See Mnguni "Is Helen Zille a Liar" 31 January 2013 *Timeslive* <http://www.timeslive.co.za/ilive/2013/01/31/is-helen-zille-a-liar-ilive> (accessed 2015-09-04). Private funding of political parties was brought in the spotlight in *Institute for Democracy in South Africa v African National Congress* 2005 (5) SA 39 (C), in which the then major political parties in South Africa successfully challenged an application to reveal their private funders. The DA and the IFP raised objections that they would lose future financial guarantees from their private donors if their identity was revealed.

⁷ The PIC, an investment-management company, wholly owned by the South African Government. The company manages investments on behalf of public-sector entities.

⁸ See "ANC Denies Receiving R42 Million Funding from PIC" 21 January 2016 *Sowetan* <http://www.timeslive.co.za/thetimes/2016/01/21/ANC-denies-receiving-R42-million-funding-from-PIC> (accessed 2016-01-21).

⁹ Butler *Paying for Politics: Party Funding and Political Change in South Africa and the Global South* (2010) 234.

¹⁰ That is, the ANC, the DA, the Congress of the People (COPE), the Inkatha Freedom Party (IFP), the United Democratic Movement (UDM), and the Freedom Front Plus (FFP).

parliamentary representation.¹¹ The company justified the contribution as part of its “on-going commitment to encourage the development of South Africa’s democratic political system”.¹² Despite SABMiller Ltd having evidently endorsed what can be viewed as an idiosyncratic form of corporate social responsibility,¹³ corporate political spending¹⁴ itself remains a circumvented topic in South African corporate governance,¹⁵ particularly in its regulatory milieu.¹⁶ Having been inspired by the foregoing observation, this article identifies a dire need for clarity on how South African firms ought to approach corporate political spending from a corporate governance perspective.

There is strong interaction of entrepreneurial activity and national politics¹⁷ which renders corporate political spending due for debate among South African corporate governance scholars. On a general note, Bond argues that corporate executives, particularly directors, are free to defend political interests which may sometimes surpass those of companies employing them or the community at large.¹⁸ Apart from the abovesaid, corporate governance practices are influenced by among other factors, the political

¹¹ See “SAB Boosts Political Donations” 15 March 2013 *Moneyweb* <http://www.moneyweb.co.za/archive/sabmiller-announces-south-african-political-donati/> (accessed 2015-09-04). SABMiller Limited has in the past made contributions of five million rand in the run up to the 1999, 2004 and 2009 elections in South Africa. See discussion in par 4 below for other companies that have provided monetary contributions to political development in South Africa.

¹² See 15 March 2013 *Moneyweb* <http://www.moneyweb.co.za/archive/sabmiller-announces-south-african-political-donati/> (accessed 2015-09-04) quoting the late former Executive Chairman of SABMiller Limited, Graham Mackay.

¹³ Corporate social responsibility also known as corporate citizenship refers to the self-regulated compliance of companies with social obligations emanating from their different business environments. Corporate social responsibility underscores responsibility for the social impact of corporate actions. The concept encompasses actions such as the protection of the environment by companies and them promoting positive relations with their various stakeholders such as employees, consumers, communities and others. It has been argued that corporate social responsibility comprises of three basic principles namely; sustainability, accountability and transparency. Crowther and Martinez *Social Responsibility World* (2004) 104. See Madрахimova “Evolution of the Concept and Definition of Corporate Social Responsibility” 2013 8(2) *Global Conference on Business and Finance Proceedings* 113–118 for a historical account of corporate social responsibility. For a discussion on corporate social responsibility in South Africa, see paragraph 4 below in the article.

¹⁴ See paragraph 2 below in the article for the definition of corporate political spending. The term is used interchangeably with “corporate political expenditure” in the context of the discussion.

¹⁵ Corporate governance refers to processes, mechanisms and methodologies through which companies are directed or governed. See *Report of the Committee on the Financial Aspects of Corporate Governance* (1992) par 2.5, commonly known as the Cadbury Report.

¹⁶ That is, substantive legal instruments governing business activity, particularly the Companies Act 71 of 2008 (hereinafter “the Companies Act 2008”) and codes of corporate governance mainly the King Reports on Corporate Governance in South Africa (hereinafter “the King Reports”). The latest code on corporate governance in South Africa, hereinafter referred to as “King III Report” was adopted in 2009.

¹⁷ See Harris and Fleisher *Handbook of Public Affairs* (2005) 79. The authors observe that, “politics and business intertwine to form two of the most significant threads in the larger socio-political environmental tapestry that will increasingly define the business environment facing corporate public affairs practitioners in the twenty first century”.

¹⁸ Bond “Elite Social Relations and Corporate Political Donations in Britain” 2007 55 *Political Studies* 59 59.

environments in which companies operate.¹⁹ The International Corporate Governance Network (the ICGN) observes that interactions between companies, governments, politicians and political parties occur in markets all over the world.²⁰ Evidently, board compositions of some companies in South Africa also include political figures.²¹

Additionally, there are existing precedential developments in international corporate governance which provide a viable basis for South Africa to consider “sanitizing”²² political spending as a corporate governance normalcy if correctly executed and policed. Finally, it is undebatable that corporate disclosure has emerged as a key tenet of contemporary corporate governance.²³ It follows that policy clarity on the treatment of corporate political spending may enhance corporate disclosure and financial reporting in South Africa, as companies may not attempt to conceal politically-motivated financial donations in fear of possible reputational damage.

Although political spending has been debated in various jurisdictions, notably the United States of America, the United Kingdom and Australia,²⁴ there is arguably worrying dearth or a *lacuna* of academic dialogue on the topic in South Africa. In a bid to import the debate on corporate political spending to South Africa, this article proposes a theoretical legal road-map for the adjudication of the concept under the country’s corporate governance regulatory framework. Unregulated private funding of political parties in South Africa has been bemoaned as capable of institutionalizing corruption.²⁵ Conversely, it is submitted that, if conducted in the right way and for the right reasons, corporate political activity in the form of funding

¹⁹ For general reading, see Roe *The Political Determinants of Corporate Governance: Political Context, Corporate Impact* (2003) 11–26; Fan, Wong and Zhang “Politically Connected CEOs, Corporate Governance, and Post-IPO Performance of China’s Newly Partially Privatized Firms” 2007 84 *Journal of Financial Economics* 330–357; Shin and Gourevitch *Political Power and Corporate Control: The New Global Politics of Corporate Governance* (2005) 3, the authors state that “corporate governance structures are fundamentally the result of political decisions”.

²⁰ See ICGN *Statement and Guidance on Political Lobbying and Directions* 6.

²¹ Eg, the South African deputy president, Cyril Ramaphosa resigned from various board appointments as he assumed his new political role as the deputy president of the country.

²² The use of this terminology is informed by controversy surrounding the topic. It has been generally noted that, “much popular sentiment looks askance at large companies using their vast wealth both to determine who gets elected and then to influence elected officials ...” See Welsh and Young “Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies” 2011 3 www.irrcinstitute.org/.../Political_Spending_Report_Nov_10_2011.pdf (accessed 2015-09-27).

²³ See King III Report Chapter 2.

²⁴ See generally, Goodridge and Jantz “Fiduciary Responsibility in Corporate Spending: Governance, Transparency and Accountability” 2014 4–14 http://northstarasset.com/wp-content/uploads/2014/03/March2014_NorthStar-Position-Paper-on-Corporate-Political-Spending.pdf (accessed 2015-09-27); Healy *Corporate Political Behaviour: Why Corporation Do What They Do in Politics* (2014); Torres-Spelliscy “Corporate Political Spending and Shareholders’ Rights: Why the U.S. Should Adopt the British Approach” in Jalilvand and Malliaris *Risk Management and Corporate Governance* (2011) 391–437; King “Corporate Political Spending and the First Amendment” 1962 23(4) *University of Pittsburgh LR* 847; Lambert “Corporate Political Spending and Campaign Finance” 1965 40(6) *New York University LR* 1033; Dubs “Corporate Donations by Companies: A Corporate Law Perspective” 2005 1 *Cross-sections* 17.

²⁵ Open Society Foundation of South Africa “Money and Politics in South Africa: the Challenge of Public Funding” 2011 *Policy Brief* 1.

can be positive.²⁶ Bearing in mind the current absence of the desired regulatory policy on private political funding, efforts to police political funding through reliance on corporate governance arrangements or mechanisms to some extent address the identified regulatory void. In any event, corporate entities are arguably the main sources of private political funding.²⁷ Some scholars assume that the flow of corporate money into the political process through obscured channels is unavoidable.²⁸ Based on the said postulation, to some extent, this contribution provides direction on how South Africa can manage a seemingly embedded problem blighting global corporate governance.

The fundamental objectives of the discussion are propounded as follows; the concept of “corporate political spending” is defined as a starting point. Thereafter, the nature of corporate political spending prior to the attainment of political independence in South Africa and the reformation of the country’s corporate governance is assessed. The following section of the article scrutinizes the manifestation of corporate political spending in a post-independence era in South Africa which is characterized by companies assuming important socio-political responsibilities apart from their economic relevance. The regulation of corporate political spending in international jurisdictions is then considered. Finally, an internationally-inspired legal road-map for the governance of corporate political spending in South Africa is proposed. This is followed by the conclusion.

2 WHAT IS CORPORATE POLITICAL SPENDING?

Corporate political spending has not been directly defined in academic literature.²⁹ Nevertheless, a viable definition of the term can be artificially constructed through reliance on academic sources defining other terms closely related to corporate political spending. For example; “corporate political donations” have been defined as “providing corporate monetary resources, services, or other gifts-in-kind, directly or indirectly, to a political party, candidate, trade association, charity or other third party”.³⁰ “Political spending” has been conceptualized as “spending that is intended to influence the outcome of any candidate’s election or the outcome of a matter on the ballot, such as a referendum, initiative, constitutional amendment, or ballot measure”.³¹ The commonality between “corporate political donations” and “political spending” as provided by the cited definitions is the availing of mainly financial support for the furtherance of the political objectives of candidate or party. For the purpose of this discussion, a similar approach will

²⁶ ICGN *Statement and Guidance on Political Lobbying and Directions* 6.

²⁷ See generally Hillman, Keim and Schuler “Corporate Political Activity: A Review and Research Agenda” 2004 30(6) *Journal of Management* 837 838.

²⁸ Torres-Spelliscy in Jalilvand and Malliaris *Risk Management and Corporate Governance* 391.

²⁹ For related commentary, see The Forum for Sustainable and Responsible Investment *Confronting Corporate Money in Politics: A Guide for Individual and Institutional Investors* 3.

³⁰ ICGN *Statement and Guidance on Political Lobbying and Directions* 8.

³¹ Torres-Spelliscy in Jalilvand and Malliaris *Risk Management and Corporate Governance* 393–394.

be adopted. The only addition to be made is that a corporate entity has to be the one providing the stated financial support.

Corporate financial spending should not be confused with corporate political lobbying which is characterized by companies devoting financial or other forms of resources to advocate for the adoption of legislative instruments or policies favourable to the company, its shareholders, sector, grouping of business or business at large.³² Corporate political spending and corporate lobbying are considered as falling within the domain of “corporate political activity” which refers any business effort to influence the formulation of public policies. Corporate political activity encapsulates a wide range of activities such as political advertising, various forms of public communication, stakeholder management, litigation, and the sponsoring of political parties.³³

3 CORPORATE POLITICAL SPENDING UNDER THE APARTHEID ERA IN SOUTH AFRICA

The major players of the corporate fraternity in South Africa during apartheid included multinational entities and family-controlled mining companies.³⁴ Companies, particularly mining conglomerates in the South African economy, pursued a concentrated model of corporate governance characterized by the use of pyramidal ownership structures³⁵ and non-voting shareholding.³⁶ Through the aforementioned arrangements, such companies were able to raise capital on the stock market, with the owners still retaining prime control of the entities. Mining conglomerates were able to exploit their pyramidal ownership structures to expand their influence on the stock market and the economy.³⁷ One of the methods of doing so was through sponsored listings of new companies, financially supported by parent companies and institutional investors, especially insurance companies. The system of sponsored listings enabled mining houses and their controlling

³² ICGN *Statement and Guidance on Political Lobbying and Directions* 7. See also Torres-Spelliscy in Jalilvand and Malliaris *Risk Management and Corporate Governance* Routledge 393 distinguishing lobbying from corporate political spending.

³³ Anastasiadis “Understanding Corporate Lobbying on its Own Terms” 2006 5 www.nottingham.ac.uk/business/ICCSR/research.php?action=download&id=38 (accessed 2015-09-28).

³⁴ For general discussion on the subject, see Chabane, Goldstein and Roberts “The Changing Face and Strategies of Big Business in South Africa: More than a Decade of Political Democracy” 2006 15(3) *ICC* 549–577.

³⁵ A “pyramidal ownership structure” is defined as an entity “whose ownership structure displays a top-down chain of control. In such a structure, the ultimate owners are located at the apex and what follows below are successive layers of firms”. See Arrifin “Pyramidal Ownership Structure and Agency Problem: Theory and Evidence” 2009 *Integration and Dissemination* 9.

³⁶ Non-voting shareholding provides shareholders with little influence or no vote on corporate decisions such as the election of the board of directors, mergers or acquisitions. This kind of share ownership is utilized by individuals who wish to invest only in the firm’s profitability without necessarily exercising any voting rights to steer corporate governance in the company.

³⁷ Malherbe and Segal “Corporate Governance in South Africa” 2001 3 http://www.tips.org.za/files/Corporate_Governance_in_South_Africa.pdf (accessed 2016-02-07).

families to raise equity financing without risking the dilution of corporate control.³⁸ With corporate power concentrated only in the hands of few elite individuals a culture of sound corporate governance based on transparency and corporate disclosure hardly existed.³⁹

It is onerous to ascertain the extent of business involvement in the sustenance of apartheid, particularly by direct financial support of the then-governing National Party.⁴⁰ Most cases still exist as mere allegations. For example, the Office of the Public Protector is still investigating claims that billions of rands could have been clandestinely spent by two leading South African companies for the purchase of weapons in Europe during the apartheid era.⁴¹ In a related respect, attempts by Khulumani Support Group, a South African civil-rights group, to pursue international litigation against American multinational companies it accused of propping the apartheid regime, collapsed after the lawsuit was dismissed in the United States of America in 2013.

Despite the practical difficulties of proving the role of business entities in furthering the apartheid policy, the final report of the Truth and Reconciliation Commission (the TRC), published in 1998, provides some illumination on how corporate political spending manifested in the apartheid era. The TRC which was instituted by the former president Nelson Mandela epitomised a court-like restorative body to facilitate national healing after the end of apartheid. As part of its mandate, the commission engaged the business fraternity in a bid to establish its “culpability, collaboration and involvement”⁴² in propping the apartheid regime. Major Craig Williamson, a former police security spy, submitted in his evidence to the commission that apartheid police operations were financed by bankers who “provided covert credit cards for covert operations”.⁴³ According to the TRC, the direct provision of products and services to the National Party could be classified as “second-order involvement” of business in the sustenance of the apartheid.⁴⁴

Two points can be deduced from Williamson’s evidence which relate to the theme of this article. Firstly, it is possible that there was indeed some corporate spending by some South African business entities to support the political objectives of apartheid. Secondly, corporate political spending towards the sustenance of apartheid was conducted in a covert manner and in violation of transparency as a key feature of corporate governance. Nevertheless, in spite of the harm precipitated by some corporate entities during apartheid, a ground-breaking achievement of the commission’s work

³⁸ Habbard “Corporate Governance in South Africa” 6 http://www.tuac.org/en/public/e-docs/00/00/08/60/telecharger.phtml?cle_doc_attach=2775. (accessed 2016-02-07).

³⁹ Padayachee “Corporate Governance in South Africa: from Old Boys Club to Ubuntu” 2013 81(2) *Transformation: Critical Perspectives on Southern Africa* 260.

⁴⁰ For related observations, see Du Bois and Du Bois-Pedain *Justice and Reconciliation in Post-Apartheid South Africa* (2008) 179.

⁴¹ See http://www.pprotect.org/media_gallery/2011/06072011_sp.asp (accessed 2015-09-08).

⁴² See *Truth and Reconciliation Commission Report Vol 4* 1998 19; <https://www.youtube.com/watch?v=CgH8QhCatq0> (accessed 2016-02-07).

⁴³ See *Truth and Reconciliation Commission Report Vol 4* 1998 24, citing evidence provided by Williamson in a memorandum submitted to the Commission at the Armed Forces hearing in Cape Town on 9 October 1997.

⁴⁴ *Truth and Reconciliation Commission Report Vol 4* 1998 25.

was its ability to conceive or solicit a collective view from the corporate community that businesses could contribute towards national development in a more concrete manner.⁴⁵ The development portended a shift in corporate social responsibility which reverberates in contemporary South African corporate governance.

4 CORPORATE POLITICAL SPENDING IN THE POST-APARTHEID BUSINESS ENVIRONMENT IN SOUTH AFRICA

The post-apartheid business environment in South Africa has been characterized by corporate governance emerging as a key component in economic development. After the end of apartheid, South Africa institutionalized corporate governance through its campaign for the self-regulation of corporate conduct.⁴⁶ The King Committee on Corporate Governance has been instrumental in producing voluntary codes of corporate governance. The committee's latest code, the King III Report, was published in 2009. Complementarily, company law has also been fundamentally reformed. One of the aims of the Companies Act 2008 is to entrench sound practices of corporate governance.⁴⁷ An important thrust of corporate reform in South Africa has been the adoption of an inclusive approach to corporate governance. Inclusive corporate governance embraces the idea that apart from satisfying the interests of their shareholders, companies must correspondingly fulfil various stakeholder⁴⁸ demands. Inclusive corporate governance further requires that the purpose of the company be defined, and the values by which the company carries out its daily life, be identified and communicated to its various stakeholders.⁴⁹

Corporate social responsibility⁵⁰ has been subsumed a vehicle for inclusive corporate governance. The concept has further been compounded by the adoption of an array of legislative instruments directly and indirectly conferring stakeholder-oriented obligations on companies.⁵¹ While substantive law provides a legal framework for the exercise of basic corporate social responsibility, South African companies have been able to pursue other forms of corporate social responsibility which are not legislated

⁴⁵ See *Truth and Reconciliation Commission Report Vol 4 54*.

⁴⁶ Self-regulation hinges on the voluntary observance codes of corporate practices by companies instead of them being compelled to do so by the use of legislation or substantive law.

⁴⁷ S 7(b)(iii) of the Companies Act 2008.

⁴⁸ See fn 10 above for the definition of stakeholders.

⁴⁹ Mongalo "The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa" 2003 *The South African LJ* 173 191.

⁵⁰ See fn 10 above for the definition of corporate social responsibility.

⁵¹ To mention a few, see the Broad-Based Black Economic Empowerment Act 53 of 2003 (as amended); the National Environmental Management Act 107 of 1998 (as amended), the Skills Development Act 97 of 1998 (as amended), the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000, the Labour Relations Act 66 of 1995 (as amended), the Basic Conditions of Employment Act 75 of 1997, the Consumer Protection Act 68 of 2008 (as amended).

per se.⁵² Owing to the influence of self-regulatory instruments, particularly the King Reports, companies arguably continue to “shop” for what they regard to be influential projects through which they can demonstrate their commitment to corporate social responsibility. Despite the vivid entrenchment and different manifestations of corporate social responsibility, corporate political spending has been shunned as an expression of social responsibility by business entities in South Africa.⁵³ This occurs despite the Johannesburg Stock Exchange Limited having adopted a Social Responsibility Index⁵⁴ for listed companies, requiring them to report on their adjudication of corporate political spending as an element of stakeholder governance.⁵⁵

Companies such as BHP Billiton Limited⁵⁶ and Mr Price Group Limited⁵⁷ have cited their political neutrality as a reason for them not to incur any politically-motivated expenditure. Other companies have, however, defied the odds. For example, MTN Group Limited, Standard Bank Group Limited, AngloGold Ashanti Limited and SABMiller Limited, have sanctioned political expenditures in the form of donations during past election cycles in South Africa. Absa Group Limited discontinued its political donations only in 2013, without giving a specific explanation for the decision. Having surveyed the nature of corporate political spending in the post-apartheid environment in South Africa, it is expedient to study its regulation in the United Kingdom and the United States of America. Both countries provide valuable lessons which South Africa can draw on charting the way to regulate corporate political spending in the country’s corporate governance.

5 INTERNATIONAL JURISPRUDENTIAL APPROACHES TO THE REGULATION OF CORPORATE POLITICAL SPENDING

Jurisprudential developments in both the United States of America and the United Kingdom show an interaction between corporate political spending and corporate governance. Although the countries have responded to the regulation of corporate political spending in different ways, there is a commonality between legal developments in both jurisdictions which shall receive attention later in the discussion.

⁵² Owing to the broad nature of corporate social responsibility, it is difficult to entirely legislate the concept in South Africa, and statutorily instruct companies on how to approach each of the various forms of corporate social responsibility.

⁵³ The Open Society Foundation of South Africa reveals that in its survey of the 40 top companies listed on the Johannesburg Stock Exchange Limited by market capitalization in 2011, most preferred not to provide financial support for political activities. See Society Foundation of South Africa “Money and Politics in South Africa: the Challenge of Public Funding” 2011 *Policy Brief* 7.

⁵⁴ A social responsibility index is a benchmark through which the commitment of companies to social responsibility obligations is assessed. The index underscores the promotion of environmental, social and economic sustainability by companies.

⁵⁵ See the *Johannesburg Stock Exchange Social Responsibility Index* (2014) 12.

⁵⁶ See [http://www.wikininvest.com/stock/BHP_Billiton_\(BHP\)/Political_Donations](http://www.wikininvest.com/stock/BHP_Billiton_(BHP)/Political_Donations) (accessed 2015-09-30).

⁵⁷ See *Mr Price Group Limited Code of Conduct* (2014) 7.

5 1 The United States of America

Corporate political spending is notoriously controversial in the American legal history, with early legislation prohibiting the practice, dating back to 1907.⁵⁸ American scholar, Donald King, notes that the early prohibition of corporate political spending in American politics was informed by concerns that such contributions amounted to the “bribery” of legislators. It was also feared that corporate political spending would result in companies exercising undue influence over voters themselves. Corporate political spending was viewed as contrary to the interests of shareholders. The secrecy surrounding such contributions was another cause for concern.⁵⁹ The prohibition of corporate political spending was further cemented by the Federal Corrupt Practices Act (the FCPA) in 1910, whose aim was to address the aforesaid concerns. Having undergone substantial amendment particularly in 1925, the FCPA was replaced by the Federal Election Campaign Act⁶⁰ (the FECA) which focused on increasing the disclosure of financial contributions to federal election campaigns. In essence, legislation prohibiting corporate political donations protected the integrity of the American democratic process as well as the interests of shareholders.⁶¹

A key feature of the FECA is its authorization of the corporate political spending through the use of political action committees. Political action committees or “separate segregated funds”⁶² can be defined as organizations which pool financial contributions from their members, and donate such funds towards campaigning for or against particular electoral candidates, electoral initiatives or legislative reforms.⁶³ While the FECA permitted companies to be paying members, or set up their own political action committees, the legislation prohibited corporate entities from using their treasury funds to make direct contributions or expenditures relating to federal elections. The importance of political action committees in American politics was enhanced by the adoption of the Bipartisan Campaign Reform Act⁶⁴ (the BCRA) in 2002 which, among other reforms, increased the amounts which individuals, including business entities, can contribute to political action committees.

The requirement that companies could make politically-motivated financial contributions became a subject of intense debate in the United States of America. A turning point was witnessed in 2010 in the decision *Citizens*

⁵⁸ See the Tillman Act of 1907.

⁵⁹ King “Corporate Political Spending and the First Amendment” 1962 23(4) *University of Pittsburgh LR* 847 850–851.

⁶⁰ FECA, Pub.L. 92–225, 86 Stat. 3, enacted February 7, 1972, 2 U.S.C. § 431 *et seq.*

⁶¹ Torres-Spelliscy in Jalilvand and Malliaris *Risk Management and Corporate Governance* 392.

⁶² The term is derived from the fact that the money contributed to the political action committee is kept separate from the company’s treasury.

⁶³ Although political action committees were institutionalized by the Federal Election Campaign Act of 1972, their history dates back to around 1944, when a labour union, the Congress of Industrial Relations, mobilized for some financial resources for the re-election of President Franklin Roosevelt.

⁶⁴ Of 2002.

United v FEC,⁶⁵ which significantly ingrained the ability of companies to participate in corporate activities. The case involved a non-profit company, Citizens United, which had released a documentary critical of Hillary Clinton’s presidential candidacy. The company intended to sponsor the viewing of the documentary available in movie theatres. With the BCRA prohibiting corporate spending on “electioneering communications”,⁶⁶ the company sought a court injunction, preventing the Federal Election Commission from enforcing the said provisions of the BCRA.

Citizen United argued that the prohibition stifled freedom of expression as protected by the First Amendment,⁶⁷ that is, the Bill of Rights in the Constitution of the United States of America. The court ruled in favour of Citizens United, overturning previous decisions namely, *Austin v Michigan Chamber of Commerce*⁶⁸ and *McConnell v Federal Election Commission*⁶⁹ which both had outlawed corporate spending on “electioneering communications”. A significant aspect of the *Citizen* judgment is that, although it retained the probation of companies from making direct financial contributions to federal candidates, it allowed companies to pay for political advertisements calling for the election or defeat of certain political candidates. Most importantly, such payments could be made from the company’s treasury. The decision enhanced what can be referred to as “corporate political speech”⁷⁰ as constitutional guarantee protectable in terms of American constitutional law.⁷¹ The *Citizen* judgment moreover pioneered the recognition of “super political action committees” which transcend political action committees institutionalized by the FECA. “Super political action committees” can raise and spend unlimited financial resources to finance a political candidate, even if it means sourcing the required financial resources from the company’s treasury. Lastly, the *Citizen* decision upheld the authority of the Congress of the United States of America and individual states to pass laws compelling companies to disclose all financial spending on political advertisement.

⁶⁵ 130 S.Ct.876 (2010), hereinafter “the *Citizen* judgment”.

⁶⁶ According to the Federal Election Commission, “electioneering communications” are any broadcasts by television, radio, cable or satellite made by people or groups who do not file regular reports with the commission. Such broadcasts should refer to a federal candidate, target voters and appear within thirty days of a primary or sixty days of a general election. See http://www.fec.gov/finance/disclosure/ec_table.shtml (2016-02-07).

⁶⁷ The relevant provisions of the First Amendment relating to freedom of expression state that, “Congress shall make no law abridging the freedom of speech ...”

⁶⁸ 494 U.S 652 (1990).

⁶⁹ 540 U.S 93 (2003).

⁷⁰ Corporate political speech had, however, been a pre-existing concept in American jurisprudence. See generally, Ribstein “Corporate Political Speech” 1992 43 *Wash & Lee LR* 109; Bebchuk and Jackson “Corporate Political Speech: Who Decides” 2010 124(1) *Harvard LR* 83; Sitkoff “Corporate Political Speech, Political Extortion and the Competition for Corporate Charters” 2002 69(3) *The University of Chicago LR* 1103, Fox “Corporate Political Speech: The Effect of First National Bank of Boston v Bellotti Upon Statutory Limitations on Corporate Referendum Spending” 1978–1979 *Kentucky LJ* 75.

⁷¹ In essence, the judgment upheld that companies be treated as people in relation to the expression of political speech, Menendez “Summary of the Protection Act of 2015” <http://www.menendez.senate.gov/download/shareholder-protection-act-of-2015> (accessed 2016-01-19); *First National Bank v Bellotti* (1978) 435 US 765 778–780.

The overall approach adopted in the *Citizen* judgment created numerous corporate governance conundrums. Importantly, it was feared that the decision would result in directors of companies usurping the ability of shareholders, who are presumably “the owners of the company”⁷² to decide on how their resources which are invested in the company ought to be utilized.⁷³ Torres-Spelliscy interprets the foregoing predicament as an encroachment on the shareholder’s right to a fair return on their investment.⁷⁴ Furthermore, the author argues that corporate political spending emasculated shareholders of the right to remain silent in respect of political speech, as fund managers could use the company’s funds to support political objectives that can even be incompatible to the wishes of shareholders.⁷⁵

Since the *Citizen* court ruling, there have been parallel campaigns particularly by shareholder-activist groups in the United States of America to ensure that shareholders play a critical decision-making role in the adjudication of corporate political spending. Organizations, such as the Center for Political Accountability and the Common Cause, have been the trailblazers of such campaign work which encompasses calls for the disclosure of corporate political expenditure. A striking development in American corporate governance born out of shareholder activism is the proposal for the adoption of the Shareholder Protection Act⁷⁶ by the country’s Congress. The proposed legislation set to amend the Securities Exchange Act⁷⁷ requires companies to receive majority authorization from their shareholders before making any political expenditure. Any failure by directors to observe the majority shareholder-approval threshold required by the legislation is considered to be a breach of their fiduciary duties which attracts legal liability.⁷⁸ As of now, the proposed legislation is being debated by the American Congress. If adopted, the Shareholder Protection Act will give shareholders leverage in determining how companies in the United States of America spend on political activities.

5.2 The United Kingdom

In the United Kingdom, early initiatives to prevent the influence of processes through political donations date back to 1925. The Honours (Prevention of Abuses) Act 1925 was enacted as a legislative attempt to curb what could be considered to be as the “purchase of honour” by contributing to the Government party fiscus.⁷⁹ Despite the existence of the Honours (Prevention

⁷² See Valesco “Shareholder Ownership and Primacy” 2010 3 *University of Illinois LR* 897 897; Grantham “The Doctrinal Basis of the Rights of Company Shareholders” 1998 57(3) *The Cambridge LJ* 554 554–555.

⁷³ See Menendez “Summary of the Protection Act of 2015” <http://www.menendez.senate.gov/download/shareholder-protection-act-of-2015> (accessed 2016-01-19).

⁷⁴ Torres-Spelliscy in Jalilvand and Malliaris *Risk Management and Corporate Governance* 397.

⁷⁵ *Ibid.*

⁷⁶ Of 2015.

⁷⁷ 15 U.S.C. 78a *et seq.*

⁷⁸ S 14C(d)(1) and (2) of the Shareholder Protection Act of 2015.

⁷⁹ Walker “The Political Parties, Elections and Referendums Bill – Donations” 9 <http://www.parliament.uk/commons/lib/research/rp2000/rp00-002.pdf> (accessed 2016-02-07).

of Abuses) Act, party funding did not attract serious attention in the United Kingdom as a subject of concern, neither were companies put under the spotlight as key sources of political sponsorship until the later years. Notwithstanding the foregoing, there have always been legal instruments in the United Kingdom authorizing and regulating political funding by juristic institutions, particularly trade unions.⁸⁰ The early treatment of corporate political donations in the United Kingdom as a corporate governance concept can be traced to the both the UK Companies Act 1967 and the UK Companies 1985, which merely required the directors’ disclosure in the annual financial report of political donations exceeding a certain limit.⁸¹ By the 1990s, there were notable attempts to regulate corporate donations, with most legislative proposals favouring the American approach, where companies could establish separate political funds.⁸²

A notable shift on the adjudication of political donations from a corporate governance perspective in the United Kingdom occurred with the country adopting the Political Parties, Elections and Referendums Act 2000 (the PPERA). Instead of only emphasizing the disclosure of corporate political donations, the legislation endorsed what can be termed a “notice and consent”⁸³ approach. In essence, the legislation required that before political donations are made, companies are supposed to give notice to their shareholders, and solicit for majority shareholder approval in relation to the donation.⁸⁴ Company law in the United Kingdom has since been amended to subsume similar provisions.⁸⁵ In the absence of majority shareholder approval, a company cannot proceed to make the proposed political donation; otherwise its directors will be liable for personal action by shareholders.⁸⁶ The PPERA provides a corporate disclosure regime on corporate political donation which extends to companies. In terms of the Act, if a company makes a political donation amounting to two thousand pounds, such expenditure must be disclosed in the directors’ financial report, as well as the name of recipient thereof.⁸⁷

⁸⁰ See generally, the Trade Union Act 1913, the Trade Disputes and Trade Union Act 1927, the Trade Union Act 1984 and the Trade Union and Labour Relations (Consolidation) Act 1992.

⁸¹ In terms of the UK Companies Act 1967 it was an amount of fifty pounds, whereas in terms of the UK Companies Act 1985 it was an amount of two hundred pounds.

⁸² See the *Political Parties (Income and Expenditure Bill)* 98 1989–1990 and the *Companies (Political Funds) Bill* 60 1997–1998. Both bills were privately sponsored and never got the political approval to be adopted as law.

⁸³ For use of this phrase, see Torres-Spelliscy in Jalilvand and Malliaris *Risk Management and Corporate Governance* 413.

⁸⁴ See s 139–140 of the PPERA.

⁸⁵ See s 369–374 of the UK Companies Act 2006. In terms of s 378 of the legislation, majority shareholder approval is required for any political donations amounting to five thousand pounds.

⁸⁶ S 369–371 of the UK Companies Act 2006.

⁸⁷ S 140 of the PPERA.

6 A THEORETICAL LEGAL ROAD-MAP FOR THE GOVERNANCE OF CORPORATE POLITICAL SPENDING IN SOUTH AFRICA

The discussion above has articulated the legal position in relation to the governance of corporate political donations in both the United States of America and the United Kingdom. It is now expedient to streamline the discussion and locate it in a South African context. As pointed out earlier in the introduction of the article, the objective of this discussion is to map out a corporate governance framework for the adjudication of corporate political donations by South African firms, with reference to international jurisprudential developments. In addressing the theme of the contribution, reference will be made to some novel concepts of South African company law, namely the social and ethics committee and the business-judgment rule. Both concepts which were introduced by the Companies Act 2008 interplay with the subject of corporate political donations. It would be incongruous for the discussion to omit these important concepts.

The United States of America, the United Kingdom and South Africa are driven by different political persuasions and experiences. This could explain why the countries have not responded to the *impasse* of corporate political expenditure in an exact manner and at simultaneous eras despite their sharing a common regulatory approach. For the United States of America, the country's strongly capitalist background places corporate political sponsorship at the centre of the swing of political power between Democrat and Republican politicians.⁸⁸ The same argument can be presented as the possible reason why attempts to regulate corporate political expenditure date back to as early as 1907. Contrarily, in the United Kingdom, the dominance of labour-oriented politics in the country's political history may serve as an explanation why only political funding by trade unions, and not companies *per se* were in the spotlight since earlier times. As already submitted, corporate political spending began to receive attention in the United Kingdom in the 1990s.

For South Africa, the country's political history advocates for a unique and different regulatory approach to the treatment of corporate political expenditure. As a point of departure, it is common knowledge that the political legacy of apartheid which is characterized by past racial polarization, calls for collective action towards nation building in the current political dispensation. Corporate entities can be important agents for the promotion of democratic values and nation-building in general.⁸⁹ This perhaps explains why post-apartheid corporate political spending by some South African companies is already clothed in the values of corporate social responsibility. Such an approach is fair in light of South Africa's political history. South Africa has been a progressive nation as far as the development of its corporate governance is concerned. The country's zeal in maintaining high standards of corporate governance renders it due to

⁸⁸ See generally Nownes *Interest Groups in American Politics: Pressure and Power* (2013) 139–167.

⁸⁹ See generally the *Truth and Reconciliation Commission Report Vol 4 54*.

adequately address the adjudication of corporate political donations by its firms.

Shareholder activism is still a passive concept in South Africa.⁹⁰ Debatably, the possibility of the emergence of separate and fully-fledged shareholder-protection legislation in South Africa, driven by shareholder activists as in the United States of America, is remote. Instead, the influence of the United Kingdom on the development of South African legislation particularly company law⁹¹ presents the United Kingdom model as an attractive alternative for South Africa. In that regard, the convenient starting point will be for South Africa to encapsulate precise rules relating to the adjudication of corporate political donations in its company law. The requirements provided by the UK Companies Act 2006, demanding shareholder approval of corporate political donations and supported by a strong corporate disclosure regime, are therefore accepted as appropriate for South Africa.

Although corporate governance is primarily directed by legislation, useful recommendations drawn from codes of conduct,⁹² encouraging the self-regulation of business conduct cannot be overlooked. Such codes often supplement legislative provisions in relation to the regulation of corporate governance. While South Africa’s latest code of corporate governance, the King III Report, does not address the governance of corporate political donations. There are certain principles it emphasizes that are of utmost importance. Principles, such as board integrity,⁹³ transparency and accountability,⁹⁴ if observed, are able to facilitate the development of a commendable approach in dealing with corporate political donations. Internationally speaking, the ICGN has produced an informative code of conduct to guide companies in making corporate political donations. The code underscores principles such as legitimacy, accountability, transparency

⁹⁰ Langa Attorneys “The Absence of Shareholders Activism in South Africa” <http://langaattorneys.co.za/Articles/images/The%20Absence%20Of%20Shareholder%20Activism%20In%20South%20Africa.pdf> (accessed 2016-01-22). For a contrary view, see, Broyles “The Impact of Shareholder Activism on Corporate Involvement in South Africa During the Reagan Era” 1998 28(1) *International Review of Modern Sociology* 1. The author argues that shareholder activism successfully disgorge apartheid in South Africa.

⁹¹ Company legislation in South Africa is traditionally influenced by English company law. The Cape Joint-Stock Companies Liability Act of 1861 which was the first company legislation in South Africa was modelled after the English Joint Stock Companies Act of 1844 and the Limited Liability Act of 1855. In 1926, South Africa passed the Companies Act 46 of 1926, which followed after the English Companies (Consolidation) Act of 1908. Reforms in South African company law between 1939 and 1952 were inspired by similar developments in English company law. South Africa attempted to deviate from English company law through its adoption of the Companies Act 61 of 1973 which substantially restructured South African company law. The Companies Act 1973 was repealed by the Companies Act 2008. The Companies Act 2008 was inspired by company-law reforms in the United Kingdom, which culminated in the UK Companies Act 2006.

⁹² Codes of conduct aimed at regulating business conduct are often referred to as “soft-law” instruments.

⁹³ See King III Report Chapter 2 Principle 2.1. The code provides that the company be perceived as a responsible citizen, as its board discharges its mandate guided by values of effective leadership, integrity and responsibility.

⁹⁴ Transparency and accountability are identified as guiding principles for the disclosure of a company’s socio-economic activities. See King III Report Chapter 6 Principle 6.1.

and responsibility.⁹⁵ Similarly, in 1985 the Constitutional Reform Centre in the United Kingdom published a code on the governance of corporate political donations. The code provides four principles, set to guide the advancement of corporate political donations, namely: the best interests of the company and its shareholders, shareholder consent, “proportionality” in political giving, and open giving.⁹⁶

6 1 The Social and Ethics Committee

The Social and Ethics Committee is a subcommittee of the board introduced in terms of section 72(4) of the Companies Act 2008. Regulation 43 of the Companies Regulations requires all public- and state-owned companies, unless exempted, to appoint a social and ethics committee. Among other responsibilities, the Social and Ethics Committee monitors the company’s performance in relation to various activities that pertain to corporate citizenship.⁹⁷ Such activities encompass values aligned to the socio-political development and nation-building, such as the promotion of equality, the prevention of unfair discrimination and the reduction of corruption.⁹⁸ The mandate assigned to the Social and Ethics Committee in terms of South African company law qualifies it as a key body to monitor the adjudication of corporate political donations. In principle, the committee should overall ensure that corruption, mainly in the form of covert corporate political donations, is eliminated. Covert donations can be deterred by companies availing funding for political activities through legitimate channels such as the RPPF, established in terms of the PFRPPA.⁹⁹

6 2 The Business-Judgment Rule

The business-judgment rule did not exist in South African company law until its adoption from American jurisprudence when the Companies Act 2008 was promulgated. The business-judgment rule provides legal immunity to directors for any decisions they make, having fulfilled the requirements stipulated by section 76(4) of the Companies Act 2008. In terms of section 76(4) of the legislation, a director is presumed to have exercised his powers in the best interests of the company: if the director has taken reasonably diligent steps to become informed about the matter; if the director had no materially financial interest in the subject matter, nor had a reasonable basis to know that any related person had a personally financial interest in the matter; if the director made the decision having the support of a committee or the board; and if the director had a reasonable basis to believe that the

⁹⁵ *ICGN Statement and Guidance on Political Lobbying and Directions* 10.

⁹⁶ Constitutional Reform Centre *Company Donations to Political Parties: A Suggested Code of Practice* 20.

⁹⁷ Corporate citizenship is often referred to as corporate social responsibility. The exact definition of “corporate citizenship” or “corporate social responsibility” is a subject of intense scholarly debate. Mohan notes that corporate citizenship is “typified by business initiatives such as responsible care towards society and environment in the conduct of business functions ...” See Mohan “Corporate Citizenship Perspectives from India” 2001 2 *JCC* 107 108.

⁹⁸ See Regulation 43(ii)(aa).

⁹⁹ See s 2(1) of the legislation.

decision in question were in the best interests of the company.¹⁰⁰ In essence, the business-judgment rule affords latitude to directors which enable them to make business decisions as long as they can justify them as being to the best interests of the company. The absence of shareholder participation in relation to corporate political spending in South Africa results in the board of directors remaining in sole control of the process. Directors may justify any political expenditure in terms of the business-judgment rule, regardless of the company's shareholders objecting to such.¹⁰¹ The implications of the business-judgment rule therefore present another compelling basis for South African company law to afford shareholders an opportunity to actively participate in any decisions relating to corporate political expenditure. According to Walker, the involvement of shareholders in the governance of political expenditure would ensure that such transactions are approved by the company as a “whole”.¹⁰²

7 CONCLUSION

This article has established that there is no legislation developed yet to regulate the private funding of political parties in South Africa. Although South African political parties are primarily funded from State coffers in terms of the provisions of the PFRPPA, it is ascertainable that some political parties may be obtaining funding from private sources. Corporate entities are debatably among leading institutions availing private funding to political parties in South Africa. The adjudication of corporate political expenditure also remains unaddressed in South African corporate governance, particularly in regulatory instruments, namely company law and the King Reports. The default outcome has therefore been companies formulating their own policies on corporate political spending. Few companies in South Africa have chosen to avail political funding as a form of corporate social responsibility.

Support for the entrenchment of democracy in South Africa requires collective action which encompasses the input of the corporate sector. In that regard, companies have to consider corporate political spending as a means through which they can contribute to nation-building. For political expenditure to be easily accepted as a corporate governance normalcy in South Africa, the country needs to consider ways in which such expenditure should be regulated in a corporate governance context. The approach adopted by the United Kingdom, where company law was amended to require that shareholder resolutions be sought in politically-related expenditure, presents a feasible option for South Africa. In handling political expenditure, there is a need for South African companies not to digress from other key principles emphasized by voluntary codes of practices aimed at institutionalizing sound practices of corporate governance.

¹⁰⁰ For a discussion on the business-judgment rule in the Companies Act 2008, see Cassim *et al Contemporary Company Law* 2ed (2013) 513–515.

¹⁰¹ Torres-Spelliscy in Jalilvand and Malliaris *Risk Management and Corporate Governance* 403, citing Allen and Kraakman *Commentaries and Cases on the Law of Business Organisation* (2003) 252.

¹⁰² Walker 31 <http://www.parliament.uk/commons/lib/research/rp2000/rp00-002.pdf> (accessed 2016-02-07) commenting on the PPERA before it had not been adopted yet as law.

The Social and Ethics Committee as a subcommittee of the board introduced to monitor the company's activities relating to corporate citizenship, has a pertinent role to play in the governance of political expenditure. The focus of the committee should be to ensure that political expenditure is not provided by the company in manner that flouts foundational principles of corporate governance, mainly corporate transparency. Lastly, the business-judgment rule which is, although a new concept in South African law, enables directors to exercise their fiduciary duties without fear of legal reprisals. Notwithstanding the above, amendments to South African company law to empower shareholders to participate in the adjudication of corporate political expenditure, would create an essential symmetry of corporate power between directors and shareholders as important decision-making bodies of any company.¹⁰³ Such a balance of power will promote a healthy and collective¹⁰⁴ approach to the regulation of corporate political expenditure within South African companies. Moreover, it will insulate a vast of shareholder rights and entitlements from infringement.¹⁰⁵

¹⁰³ For a discussion of the board of directors and shareholders as decision-making bodies of a company, see Davies *Principles of Modern Company Law* (2008) 411–412; Mongalo *Corporate Law and Corporate Governance* (2003) 245; Bottomley *The Constitutional Corporation: Rethinking Corporate Governance* (2013) 20.

¹⁰⁴ See general sentiments by Walker 31 <http://www.parliament.uk/commons/lib/research/rp2000/rp00-002.pdf> (accessed 2016-02-07) commenting on the PPERA.

¹⁰⁵ See Torres-Spelliscy in Jalilvand and Malliaris *Risk Management and Corporate Governance* 397.