

Corporate Political Speech: How Nigeria Threw Away the Baby with the Bath Water: Any Lesson from Citizens United?

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Abstract

This paper examines the concept of Corporate Political Speech in a Democracy. Corporation being a legal person is clothed with distinct attributes necessary for its existence as a person and for the realization of its goals and objectives. The paper reasons that Corporation must speak out in politics to influence ideas and enrich debates in the political marketplace. As a person, the Corporation is entitled to rights to free speech. Unfortunately in Nigeria, the message is blatant and uncompromising - a business corporation has no business in politics. It must follow political debates and policies sheepishly and slavishly without a voice. The paper finds that the blanket-ban on Corporate Political Donations in Nigeria has bred a black market for corporate speech. It juxtaposes the Nigerian position with the US jurisdiction with a view to finding a suitable model for Nigeria's nascent democracy.

Keywords: Corporation, Political Speech, Democracy, Nigeria, USA

1. Introduction

In Nigeria, the message is blatant! A corporation has no voice in the political market place. Its voice is not to be heard and the Freedom of Speech guaranteed by the Constitution to every citizen of Nigeria² is not to be extended to corporation because it is an artificial creature of the law.

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²See Sections 39(1) and 40(1) of the Constitution of the Federal Republic of Nigeria, 1999 (CFRN).

According to the Nigerian Company and Allied Matters Act Cap C20 LFN 2004 (CAMA), a company shall not have or exercise power either directly or indirectly to make a donation or gift of any of its property or funds to a political party or political associations, or for any political purpose; and if any company, in breach of this subsection makes any donation or gift of its property to a political party or political association, of or any political purpose, the officers in default and any member who voted for the breach shall be jointly and severally liable to refund to the company the sum or value of the donation or gift and in addition, the company and every such officer or member shall be guilty of an offence and liable to a fine equal to the amount or value of the donation or gift.³ The corporation like a zombie, is condemned albeit constitutionally and statutorily to follow government policies and political debates slavishly and sheepishly without protestation. While it is true that Democracy is an all inclusive form of government, corporations in Nigeria is sidelined in the electoral exercise of their power of choice through corporate speech notwithstanding the fact that it bears brunt of bad government or excessive tax regime capable of crippling the corporation. Government through its programmes and activities restrict and interfere with the corporation sometimes economically detrimental to the interest of the corporation. But as statutorily provided, the corporation cannot complain because it has no such right to voice its opinion in politics necessary in shaping the composition of those who constitute and form the government of the day it considers friendlier to its course and business interest. The corporation in its own ways has made tremendous sacrifice for the enthronement of democracies in many parts of the world including Nigeria through strikes among others.

The battle therefore for the enthronement of democracy was fought and won by all including Corporate Nigerians who many a time had to lock up for business in protest for continued dictatorship of the Military. Strikes and loss of productions were common sacrifices these companies made to enthrone democratic government in Nigeria.⁴

³See Section 221(1) of Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria, 2004 and the Electoral Act 2010.

⁴For example, the Nigerian Labour Congress (NLC) and the umbrella body of bank and insurance workers, the National Union of Banks, Insurance and other Financial Institutions Employees (NUBIFIE) as well as the Nigeria Union of Petroleum and Natural Gas Workers (NUPENG) and Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN); literally shut down the Nigerian economy in protest of the revalidation of the 1993 Presidential Election believed to have been won by Chief Moshood Abiola of the Social Democratic Party.

With the dawn of democratic governance in Nigeria in 1999, it becomes necessary that all hands should be on deck, including Corporate Nigerians, to enthrone good governance through cross fertilization of ideas, speeches and policies in the political market place. Corporate voices must be lent to political discuss and support accorded government that is favorable, people-oriented, and can provide the most conducive and tax-regulated environment for Corporations to thrive. The question is: Should Corporations remain political zombies sheepishly and slavishly bearing the burden of harsh policies and programs of government without a voice of dissent at period of politics and politicking for change of government? Nigeria will do anything to succeed as a democracy including granting unimpeded access to information and free speech needed to resist any policy that might prepare fertile grounds for the military to seize power – Corporate voice should not be so blatantly shut. Never again!

In other democracies of the world, the concept of the corporate personhood of corporations have been given a broad interpretations and meaning as to accord them the status of citizens or persons capable of enjoying the constitutional right to freedom of expression and speech necessary to add values and ideas needed in the political arena and market place of ideas.

In this wise, event watchers and history makers have always been consistent in their questions: What is the business of Corporations in politics? Should a Corporation have a voice in politics? What amount of control of Corporate Political Donations is desirable in a Democracy? In Nigeria, is the current regime of blanket ban on Corporate Political Speech desirable? Should the Board of Directors of Corporations be empowered to place ceilings and approval limits on donations to political parties or party activities? The answers to these questions depend largely on the legislations of the country involved. These laws include the Constitution, corporation laws as well as electoral laws which contain provisions on Corporate Political Activism.⁵

The Constitution as a grundnorm in a democracy contains provisions which govern the participation of corporations in politics.

⁵In Nigeria, these laws include, the 1999 Constitution of the Federal Republic of Nigeria (hereinafter 'the Constitution'), the Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria, 2004 and the Electoral Act 2010, just to mention but a few.

In Nigeria, the message is blatant and uncompromising, or so it seems: a business corporation has no business in the political marketplace.⁶ In the eyes of the lawmakers and drafters of the Constitution, a Corporation's voice adds no value to the debate on issues and ideas that are usually traded in the political arena.⁷

Despite this ban and allied limitations placed on political finance in Nigeria, the propriety or otherwise of the continued ban regime especially for a country like Nigeria coming out of the dark tunnel of military dictatorship need re-examination. The need for cross fertilization of ideas and robust debate needed to shape and reshape government policies and direct the ship of state cannot be overemphasized. Full and adequate political participation from not only the citizens but also from corporate Nigerians would add value and enrich the political market place. Sadly enough, the ban has not yielded the intended result as it had only created a black market for business oligarchy who exploit the huge resources at their disposal to cornea favor from politicians and political parties through unregulated and unapproved corporate spending under false representations. The increasing waves of indiscriminate donations to political parties are noticeable or prevalent when the political parties are feverishly preparing for crucial elections. At elaborate political rallies and launching ceremonies across the country, moneybags pledge mouth-watering donations towards the success of political parties at elections.

It is a fact that individuals, corporate bodies, government agencies at various tiers, including state governments, make substantial donations to the political parties of their choice. It is not uncommon that candidates eyeing elective positions in the state Houses of Assembly and the National Assembly, as well as gubernatorial and presidential candidates are mandated to make donations to their respective political parties especially when preparing for elections. Such donations could be in form of money, vehicles, souvenirs, payment for media coverage and advertisements, as well as payment of staff and delegates' allowances and hotel bills, amongst others.

Individuals, corporate bodies and even local and state governments make donations towards the construction of political parties' national secretariat offices.

⁶See CAMA, Chapter 59, Section 38(2). See also the Constitution, Section 221(1).

⁷I.O. Bolodeoku, 'Corporate Speech in a Democracy: What can Nigeria Learn from Abroad?' *Cardozo Journal of International and Comparative Law*, (2005) Vol.13, No.1, p.61.

But from elections to elections, the issue of political donations has assumed worrisome dimension especially judging by the fact that it seems biggest donors tend to be guaranteed automatic nomination for juicy elective positions even if it would require getting such candidates' inordinate political ambitions realized through rigged elections, while other individuals and corporate organizations with deep pockets are assured of big contracts for as long as they continue making substantial political donations.

Although donations are made to political parties all over the world but the all-important issue of ethics is not compromised. However, this is one of those essential factors Nigeria's political parties lack and this tends to be contributing to the increasing rate of malpractices and corruption that have been bedeviling elections conducted in the country over the years.⁸ Politicians are placed in apparently compromising positions because of the need to solicit financial contributions for their campaign finance. If they then appear to be acting in the interests of those parties and corporations that funded them, this gives rise to talk of political corruption. Supporters may argue that this is coincidental. Cynics wonder why these corporations and businessmen fund politicians at all, if they get nothing for their money.

Under the current Nigerian situation, most political parties are merely zero-issue alliances of influential individuals and small groups who are able to control and, often enough, manipulate party structures, candidacies, and even the electoral process itself. Most parties are instruments in the hands of 'political entrepreneurs' who invest huge amounts of money and expect concurrent rewards on such investment. Besides fuelling corruption, this state of affairs is decidedly non-transparent and undemocratic. Furthermore, it impedes the emergence of a party system that focuses around issues and policies, rather than personalities only.⁹

Part II of the paper examines the legal framework for corporate political speech in Nigeria viz-a-viz the provisions of the Company and Allied Matters Act, the Electoral Act and the Nigerian Constitution.

⁸H. A. Orivri, 'Bill to Investigate Political Donations', *The Nigerian Compass*, (10 August, 2009), p.15.

⁹Centre for Law and Social Action, 'Political Finance And Democracy In Nigeria: Prospects and Strategies for Reform', (January, 2004). Available at www.clasa.kabissa.org. Accessed 15 August 2014.

The implication of the absolute-ban regime in Nigeria on the Freedom of Expression and Association guaranteed by the Constitution is also examined. Part III examines the concept of corporate political speech in selected foreign jurisdictions particularly the U.S.A. and reviews cases that illustrate the U.S. position on the subject. Particular attention is paid to the United States' Supreme Court decision in *Citizen United v. United States*.¹⁰ The paper looks at the merit of the U.S independent expenditures and contributions in the realization of freedom of expression with a view to considering the lessons learnt as a policy consideration for Nigeria. The paper is concluded in Part IV with a call for a regulated corporate political speech in Nigeria as opposed to the present absolute ban regime.

2. Legal Framework for Corporate Speech in a Democracy

The controversy concerning the nature of the corporation presents a challenge for constitutional law. If courts continue to embrace the historical view of the corporation as a legal 'person' endowed with personhood at the will of the state, then it seems to follow that government should have broad power to limit corporations' rights. But if, as many scholars now believe,¹¹ a corporation is a nexus of contracts, these contractual rights should be constitutionally protected to the same extent as other contract rights. Thus, the state must show why intervention in the corporate contract is constitutionally justified given the availability of self-protection through private contracting. Resolution of this controversy is important in determining the constitutionality of restrictions on corporate political speech.¹²

Why then do corporations spend money on politics? Most firms, like most individuals, behave rationally and strategically in their spending decisions on campaigns and lobbying, devoting resources in ways that, they have reason to expect, will benefit the corporations themselves and their shareholders.

¹¹See Henry N. Butler & Larry E. Ribstein, 'Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians', 65 Washington Law Review, 1, 8-9 (1990); Harry N. Butler & Larry E. Ribstein, 'The Contract Clause and the Corporation', 55 Brook Law Review, 767, 774-75 (1989).

¹²The principal decisions considering the rights of corporate speakers are *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S. Ct. 1391 (1990); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197 (1982); and *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978). Of course many First Amendment cases involve corporate speakers and therefore inferentially recognize that corporations have First Amendment rights. This Article focuses on cases that explicitly consider the differences between the rights of corporate and non-corporate speakers.

This is not surprising. The Supreme Court's decision in *CitizensUnited v.FEC*¹³ remains deeply unpopular amid fears that corporate money will swamp the political system. Political spending enables corporations to get greater access to government officials and potentially a greater say in designing legislation and regulation. Companies make political contributions and spend on political advertising because it's good for business - their business. Campaign contributions help unions, too.

The *Citizens United* decision opened up the potential for corporations and unions to give unlimited amounts of money in support of politicians and their campaigns for office. However, at the same time, the Court has continued to restrict the ways in which unions can draw upon their own funds for such purposes. Just this past spring in *Knox v. Service Employees International Union Local 1000*, the Court held that the union had violated the First Amendment rights of objecting nonmembers when it required them to pay a special assessment for political funds.¹⁴ The case presented an unusual situation: The union seemed to have overstepped existing legal requirements for allowing nonmembers to opt out of political spending, and it had already promised to return the funds. Nevertheless, the majority opinion took the occasion to go beyond the question at hand and impose new, more onerous requirements.

It must be stressed at this juncture that Democracy - a system of government in which the citizens of a state participate in decision making either by voting directly or by electing representatives to make decisions,¹⁵ involves electing representatives into government through the ballot box; hence it has been described as the best form of government because it enables both the majority and the minority to have their say in governance and their rights and interests protected. Elections and democracy are therefore inextricably linked.

¹³Supra.

¹⁴ Catherine L. Fisk & Erwin Chemerinsky, Political Speech and Association Rights after *Knox v. Seiu, Local 1000*. Available at <http://cornelllawreview.org/files/2013/07/FISKCHEMERINSKY-98CLR1023.pdf>. Accessed 14 August 2014.

¹⁵Definition of Democracy obtained from the web. See 'Democracy', Available at www.nyise.org/homsy/ushistory/glossary.htm. Accessed 14 August, 2014.

A credible, free and fair election gives legitimacy to democracy and ensures a stable polity.¹⁶ In the words of Bolodeoku,¹⁷ Democracy is about the empowerment of the people, which is typically conceptualized in terms of participation. Empowerment is crucial in a democracy because it recognizes that the governed have interest and yearnings that the instrumentality of the organized government should not only be responsive to, but also protect as much as practicable.¹⁸

The need to enhance political participation through communication of ideas such as organizing into association of people of common interests and ensuring that voices are loud enough in the marketplace for political ideas cannot be overemphasized.¹⁹ Political Participation is not a free for all in terms of monetary aspect of it. Politics involve money for campaign, organizing political rallies, pamphlets, posters etc as such for a voice to be heard it must be matched with strong and united cohesion. This voice in politics for interpretational emphasis, form the right to freedom of expression and association all geared toward getting the votes.

The Constitution provides the legal framework for every Nigerian to be politically active. The Constitution provides that every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.²⁰ Section 40 of the Constitution provides that every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests.

¹⁶ M. M. Ogbeidi, 'A Culture of Failed Elections: Revisiting Democratic Elections in Nigeria, 1959-2003', (2010). Available at www.doaj.org/doaj?func=abstract&id=525882. Accessed 10 August 2014.

¹⁷O.I. Bolodeoku, above n 6 p.68.

¹⁸For the link between democracy and human development, see United Nations Development Programme, (UNDP), Human Development Report 2002: Deepening Democracy in a Fragmented World 3 ("Enjoying political freedom and participating in the decisions that shape one's life are fundamental human rights: they are part of human development in their own right").

¹⁹Honourable Justice Chukwudifu Oputa, 'Democracy: What is it all about?' in *Democracy and the Law* 53, 79 (quoting the contributions of Pericles in laying the foundation for the united and harmonious Athens: 'The greatest impediment to action is, in our opinion, not discussion, but the want of that knowledge which is gained by discussion preparatory to action. For we have a peculiar power of thinking before we act and of acting too, whereas other men are courage from ignorance but hesitate upon reflection'.) See also the *Handyside Case*, 7 December, 1976, series A No. 24; EHRR 737.

²⁰ See the Constitution, Section 39(1) and Section 40(1).

Corporations can often be far wealthier than individual citizens, and thus capable of buying far more power of any and every kind to prevail in any contest with a human adversary. Also, corporations can outlive a normal human lifetime, and so have a temporal advantage over actual humans: corporations can use delay till a human contender's money is spent, or life expended. Of course, the best insurance for corporations is to use the wealth invested in them, and their possibly superhuman lifetimes, to acquire dominating political influence so as to shape the government and the laws to their particular economic advantage.

Corporations combine superhuman attributes for potential wealth accumulation and longevity, with the subhuman attribute of lacking an immediately responsible actor to be held accountable for the consequences of corporate actions. This combination is an affront to the very concept we actual human "persons" have of our individual selves, and it should not be equated with human reality in the laws devised to regulate human society.

Corporation laws in Nigeria enjoin registered companies in Nigeria to expend their resources to further their authorized business and objectives. The CAMA grants to every company the power of a natural person of full capacity.²¹ More importantly, the CAMA empowers companies limited by guarantee to pursue a cause the members considered pertinent to their belief and conviction. In this wise it safe to suggest that companies limited by guarantee can be politically active if the purpose of forming the company in the first place was to promote the political ideology or aspiration of the group.²²

However, section 38(2) of CAMA provides as follows:

A company shall not have or exercise power either directly or indirectly to make a donation or gift of any of its property or funds to a political party or political associations, or for any political purpose; and if any company, in breach of this subsection makes any donation or gift of its property to a political party or political association, of or any political purpose, the officers in default and any member who voted for the breach shall be jointly and severally liable to refund to the company the sum or value of the donation or gift and in addition, the company and every such officer or member shall be guilty of an offence and liable to a fine equal to the amount or value of the donation or gift.

²¹ See CAMA, Section 38(1), *supra* n 4.

²² See CAMA, Section 26.

The interpretation and intention of the above provisions is to make it unlawful for a company to dabble into the political arena at least to the level of requiring it to spend its fund or make a gift of its property for political reason.

On a more embracing or enabling sanctity to the CAMA provision above, section 221(1) of the 1999 Constitution of Nigeria forbids corporate or business association from contributing to political parties or towards political activities. To the Constitution, the message is blatant and unambiguous. No association other than a political party, shall canvass for vote for any candidate at any election or contribute to the fund of any political party or to the election expenses of any candidate or election.

The Constitution targets association and prohibits them from both canvassing for votes for the election of a particular candidate and contributing to the funds of either a political party or the election expenses of any candidate. The operative words are 'canvassing for votes' and 'contributing to'.

Again successive electoral laws in Nigeria²³ contain provisions regulating or limiting the amount of money or other assets which an individual or corporate body can contribute to a political party.²⁴ This section seems to imply that corporate money or other assets to political parties are not needed to enrich political market place. Not only do these sections contradict the express provisions of section 38(2) of CAMA, it is also inconsistent with section 221 of the 1999 Constitution and to that extent, void and of no effect.²⁵ The inescapable conclusion is that the Electoral Commission does not have the power to permit corporations to engage in activities already prohibited by the Constitution.²⁶ As submitted by Bolodeoku,²⁷ it is unfortunate that those responsible for putting together the 1999 Constitution did not leave to the National Assembly the task of regulating the political activity of associations and corporations. The broad freedoms of expression and association guaranteed under the Constitution could have been used as a yardstick for determining the extent to which guaranteed rights may be permitted or limited in a free democratic society.

²³ These electoral laws include the Electoral Act 2002, the Electoral Act 2006 and the Electoral Act 2010.

²⁴ See Section 83 of the Electoral Act 2002 for example.

²⁵ See the Constitution, Section 1(3).

²⁶ See the Constitution, Section 4. See also *Attorney General of Lagos State v. Attorney General of the Federation & Ors.*, 35 W.R.N. 1(2003) (holding that the National Assembly cannot enact any law in contravention of the Constitution).

²⁷O.I. Bolodeoku, Above n 6.

It is unfortunate that political donations have become a money-spinning business in Nigeria to the extent that some people are already nursing fears that some of the big donations may be coming from drug barons and those associated with blood oath-taking who are determined to go to any extent to achieve their selfish and diabolical objectives. If this is true, it is time for decisive action to be taken to stem this ugly trend that is capable of further threatening not only our controversial electoral process which requires urgent reform, but also our nascent democracy.

As warned by the Independent Corrupt Practices and Other Related Offences Commission (ICPC), the Commission will sponsor a bill to the National Assembly which will empower the Commission to access lodgments of questionable amount of money in banks and donations in any guise to political parties. The ICPC's initiative is a welcome development which when it becomes operational, will reduce drastically the nauseating problems currently associated with the frivolous and mysterious donations to political parties in the country by businessmen, corporations and moneybags. *The Nigerian Compass*²⁸ believes that this measure will also bring about a level playing field to enable politicians and political parties irrespective of their financial muscles, to successfully execute their programmes. Although this bill is necessary but it must be elastic enough to effectively monitor the peculiar nature of political donations and also help considerably in sanitizing the country's crisis-ridden electoral process and the polity.²⁹ Individuals, corporate bodies and even local and state governments make donations towards the construction of political parties' national secretariat offices. Corporate donors or organizations with deep pockets are assured of big contracts for as long as they continue making substantial political donations.

²⁸ H. A. Orivri, above n 7 p.15.

²⁹ Before the April 2003 elections, there were public outcries over the manner in which politicians and corporate entities donated to politicians and political parties. For example, former President Obasanjo and his erstwhile deputy, Alhaji Abubakar Atiku, realized over N5.5 billion in their fund-raising campaign. Governor of Delta State, Chief James Ibori, raised N2 billion. Governor Bola Ahmed Tinubu of Lagos State raised N1.3 billion. The Nigerian public described these fund-raising as regressive events. With these donations, political parties and corporate entities violated the Company and Allied Matters Act of 1990 and Section 225 of the 1999 Constitution which prohibit companies from contributing fund to political parties and receiving funds from outside Nigeria. See 47 Campaign for the Defence of Human Rights (CDHR), Annual Report on the Human Rights Situation in Nigeria 2000 (Lagos, 2001) pp.105–106.

In a publicly held corporation with centralized management, corporate speech, like other corporate conduct, originates from the managers rather than the shareholders. If the managers speak as agents of the shareholders or others in the corporation, the relevant protected interest belongs to the shareholders the managers represent. If managers speak on their own behalf, their own speech interest should be constitutionally protected. This is clearest when managers' speech is supported by their compensation paid directly in money or indirectly by the corporation's authorization of the authorizing managers' use of corporate funds for personal speech.

Why is Nigeria finding it difficult to regulate the influence of money in politics as other civilized democracies do? To provide answer to this question, the paper examines corporate political speech in some other democracies of the world particularly the USA and Australia.

3. Corporate Political Speech: A Look at Other Jurisdictions

The concept of Corporate Political Speech has been interpreted and applied with differentials from country to country and from jurisdiction to jurisdiction. While Nigerian politicians and parties relies heavily on government money and the support of super rich individuals, businessmen and corporate managers to win elections, which ultimately make them, become surrogates to these categories of people; it is a different ball game in places like the United States. For instance, during the 2008 election, records³⁰ have it that President Barack Obama set fund-raising records and mobilized millions of individual donors. In the course of the campaign, more than 500 people raised at least \$76.5 million for him, according to research by the Center for Responsive Politics. In all, Obama's political team raised more than \$745 million during the 2008 election cycle.³¹

For instance, *Citizens United v. Federal Election Commission*³² held that restrictions on independent political expenditures by corporations, associations and unions were unconstitutional under the First Amendment. Corporate mega-contributions are now considered a lawful expression of freedom of speech. Corporations now enjoy First Amendment rights that were once reserved for people.

³⁰ Available at www.campaign.finance.institute.com.org. Accessed 30 July 2014.

³¹ *ibid* n 29.

³² *supra*

However, in a 5-4 *McCutcheon v. Federal Election Commission*³³ ruling, the Court struck down limits on overall campaign contributions that wealthy supporters may make. Individuals will now be able to dish out contributions of up to \$3.6 million to candidates, parties and political action committees. They will be able to write one cheque to maximize their leverage and direct all of it, through legal channels, to a favored candidate.

Before³⁴ the rampaging decision of the US Supreme Court in *Citizens United v. Federal Election Commission No. 08-205*, the ban on corporate donations was re-enacted in section 313 of the Federal Corrupt Practices Act of 1925 (FCPA). The Federal Elections Campaign Act of 1971 (FECA) as amended in 1974 by Bipartisan Campaign Reform Act (BCRA) restated the ban on corporations from using treasury funds for political activities. The FECA however permitted corporations and labor unions to establish Political Action Committees (PACs), with corporate or union funds and to solicit their members to contribute to the PACs.³⁵ A PAC collects money from individual contributors, such as union members, and then distributes it to a particular candidate. The U.S. Supreme Court addressed the constitutionality of limiting corporate donations in the *Federal Election Commission v. Massachusetts Citizens for Life MCFL*³⁶ and *Mc Connell v. Federal Electoral Commission*.³⁷ In these cases the court upheld the banning of corporations from using resources to fund political speech.

Thus, it was in 2007, that the US position experienced a major doctrinal shift in the Supreme Court decision in *Citizens United v. Federal Election Commission, No. 08-205*. The 5-to-4 decision was a vindication, the majority said, of the First Amendment's most basic free speech principle, that the government has no business regulating political speech.

³³ 554 U. S. 724-739.

³⁴The movement to stop corporations from polluting the electoral process received a boost from the recommendation of the Armstrong Committee that investigated life insurance companies in the New York the committee had recommended that "contributions by insurance corporations for political purposes should be strictly forbidden. Neither executives officers nor directors should be allowed to use the money paid for purposes of insurance in support of political candidates or platforms." See also Report of the Joint Committee of the Senate and Assembly of the State of New York Appointed to investigate the Affairs of the Life Insurance Companies, at 397 (1906). The recommendations of the Armstrong Committee were influenced by the desire to stop corporate executives from diverting corporate funds against the wishes of shareholders and to prevent political quid pro quo.

³⁵ See BCRA, Section 203, which amended Section 316(b)(2) of FECA.

³⁶ 479 U.S. 238 (1986).

³⁷ 540 U.S. 93.

The dissenters said that allowing corporate money to flood the political marketplace would corrupt democracy. Specialists in campaign finance law said they expected the decision to reshape the way elections were conducted. Though the decision does not directly address them, its logic also applies to the labor unions that are often at political odds with big business.

President Obama called it a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.³⁸

The majority judgment brushed aside warnings about what might follow from their ruling in favor of a formal but fervent embrace of a broad interpretation of free speech rights. '*If the First Amendment has any force*', Justice Anthony M. Kennedy wrote for the majority, which included the four members of the court's conservative wing, '*it prohibits Congress from jailing citizens, or associations of citizens, for simply engaging in political speech.*'³⁹

Thus, today, in a rare show of judicial activism, the US Supreme Court in *Citizens United v. Federal Election Commission, No. 08-205*, overruled two precedents: *Austin v. Michigan Chamber of Commerce*, a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates, and *McConnell v. Federal Election Commission*, a 2003 decision that upheld the part of the *Bipartisan Campaign Reform Act of 2002* that restricted campaign spending by corporations and unions. They said that the BCRA violated the First Amendment, which declares that Congress shall make no law infringing the freedom of speech. They agreed that their decision was contrary to the *Austin* and *McConnell* precedents; they therefore overruled those decisions as well as repealing a century of American history and tradition.

The law, as narrowed by the 2007 Supreme Court decision applied to communications '*susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate...*' Eight of the justices did agree that Congress can require corporations to disclose their spending and to run disclaimers with their advertisements, at least in the absence of proof of threats or reprisals. Disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.

³⁸A. Liptak, 'Justices, 5-4, Reject Corporate Spending Limit,' *The New York Times* (22 January, 2013).

³⁹ A. Liptak, *ibid* n 37.

According to Justice Kennedy:

When government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.⁴⁰

In *Citizens United*, the Supreme Court majority relied heavily on the benefits of transparency. It wrote that:

Disclosure permits citizens...to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.⁴¹

However, research⁴² demonstrates that it is not all such donations from a corporation that can be readily traced back to its original source as corporation will rarely sponsor i.e. political advertisement directly that says '*Vote for Senator Smith...Paid for by ExxonMobil.*' More often, it will contribute to a body with an innocuous name such as "*Americans for Energy Solutions*" which will sponsor the advertisement. Or, to make its sponsorship of the advertisement completely invisible to voters, it can contribute to a 501(c) 4⁴³ non-profit corporation which by virtue of the law, need not disclose its donors and can have a generic name such as '*Americans for a Better Future*' which can spend this money directly or in turn contribute to '*Americans for Energy Solutions*' corporation. Voters viewing the advertisement will have no way of knowing the profit motive behind the communication.

⁴⁰ A. Liptak, *ibid* n 37.

⁴¹ *Citizens United* at 919.

⁴² See B. Bowie, A. Lioz, e.t.c. 'Auctioning Democracy: The Rise of Super PACs and the 2012 Elections.' Available at www.demos.org/publication/auctioning. Accessed 10 August 2014.

⁴³ Non-profit corporations established under Section 501(c)(4) of the Internal Revenue Code are not required by the Internal Revenue Service (IRS) to disclose their donors. On its website, the IRS states that to qualify as a tax-exempt organization, these entities must "be operated exclusively to promote social welfare;" that "the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office;" and that "a Section 501(c)(4) social welfare organization may engage in some political activities, so long as that is not its primary activity." But, the IRS has never clearly defined what it means for political activity to be an organization's "primary activity" and many 501(c)(4)s take the position that they are permitted to spend up to 49% of their budgets on political activity. This can include contributing to Super PACs. Details available at

<http://www.irs.gov/charities/nonprofits/article/0,,id=96178,00.html>. Accessed 19 August 2014.

Lunching a scathing attack on corporate political spending and the effect of the Supreme Court decision in *Citizens United*, Blair Bowie, Adam Lioz, e.t.c.⁴⁴ argued that Super PACs provide a vehicle for the very wealthy to exert unfair influence over elections. They stressed that corporate political spending violates the spirit of the “one-person, one-vote” principle and a basic premise of political equality that the size of one’s wallet should not determine the strength of one’s voice in a democracy. As a way out of the current Super PAC menace, they recommended that the people must act together through Congress and the state legislatures to amend the Constitution to make perfectly clear that the First Amendment was not and never intended as a tool for use by wealthy donors and large corporations to dominate the political process.

Arguing passionately in his rejection of *Citizen United*, Justice James C. Nelson of the Montana Supreme Court in *Western Tradition Partnership, Inc. v. Attorney General of Montana*.⁴⁵ held:

While, as a member of this Court, I am bound to follow *Citizens United*, I do not have to agree with the Supreme Court’s decision. And, to be absolutely clear, I do not agree with it. For starters, the notion that corporations are disadvantaged in the political realm is unbelievable. Indeed, it has astounded most Americans. The truth is that corporations wield inordinate power in Congress and in state legislatures. It is hard to tell where government ends and corporate America begins; the transition is seamless and overlapping. In my view, *Citizens United* has turned the First Amendment’s “open marketplace” of ideas into an auction house for Friedmanian corporatists. Freedom of speech is now synonymous with freedom to spend. Speech equals money; money equals democracy. This decidedly was not the view of the constitutional founders, who favoured the pre-eminence of individual interests over those of big business.

Continuing, Justice James C. Nelson criticised the Supreme Court ascription of the notion of fundamental and natural rights to corporation under the doctrine of corporate personhood. In his dissenting judgment, he stated inter alia: Lastly, I am compelled to say something about corporate ‘personhood.’ While I recognize that this doctrine is firmly entrenched in the law, I find the entire concept offensive.

⁴⁴ B. Bowie, A. Lioz, e.t.c., *ibid* n 41.

⁴⁵ DA 11–0081 (Mont. Sup. Ct. 2011), *ration* 125, p. 80; see also FN 19.

Corporations are artificial creatures of law. As such, they should enjoy only those powers—not constitutional rights, but legislatively-conferred powers—that are concomitant with their legitimate function, that being limited-liability investment vehicles for business. Corporations are not persons. Human beings are persons, and it is an affront to the inviolable dignity of our species that courts have created a legal fiction which forces people—human beings—to share fundamental, natural rights with soulless creations of government. Worse still, while corporations and human beings share many of the same rights under the law, they clearly are not bound equally to the same codes of good conduct, decency, and morality, and they are not held equally accountable for their sins. Indeed, it is truly ironic that the death penalty and hell are reserved only to natural persons.⁴⁶

While not unmindful of the opposing views expressed against *Citizen United*, this paper argues that corporation being part of human endeavours through which life itself and by extension, natural persons, survives, I do not see any reason while human rights to speech and expression should not be extended to a corporation. What is in the right of corporation to strike in protest of bad government and governmental policies when such corporation is not permitted to participate in political decision that could enthrone favourable government? Is it to say government exist only for natural persons that exist in the polity while the artificial persons component of it is to exist at the mercy of those who controls government machineries and swallow the spittle of government down its throat without a fight? Strike actions and other forms of labour agitations fall under the category of human rights to speech and expression.

This paper would hasten to add that disclosure and transparency should be the ultimate factor for corporate political speech. In the otherwise controversial arena of campaign finance, there has been a near-consensus across the political and ideological spectrum—regarding the benefits of robust disclosure of the sources and amounts of campaign funds, the Supreme Court in *Citizens United* extolled these benefits in the very decision that laid the groundwork for Super PACs.⁴⁷

⁴⁶ *Ibid* n 42. ration 132, P.79.

⁴⁷ *Citizens United* at 619. *Citizens United* did not create Super PACs on its own, but its logic paved the road.

Because Super PACs have provided an avenue for secret money not traceable to its original source and by implication not subject to disclosure, to influence elections, and have been used as tools to translate economic success into political gain, sometimes in secret; this paper recommends that the electoral commission tightens its rules by making stronger regulations prohibiting coordinated fundraising organisations and candidates. The Commission should issue stronger regulations that establish legitimate separation between candidates and Super PACs.

Again, the corporation should be required to include basic information about the tax and political committee status of their institutional donors in disclosure filings. This simple adjustment would make it far easier for concerned citizens to 'follow the money.'

Furthermore, the Commission must protect the interests of shareholders whose funds may currently be used for political expenditures without their knowledge or approval. The law should be amended to require corporations to obtain the approval of their shareholders before making any electoral expenditure; and require any corporation to publicly disclose any contributions to organization or trade association that either makes an independent expenditure or contributes to politics.

Democracy is a system for people of equal worth and dignity to make decisions about collective self-government. Elections are the most concrete locus of popular decision-making in a representative democracy. Contrary to the Supreme Court's Citizens United ruling, corporations should only be permitted to spend treasury funds to influence these elections if such expenditure or budget is approved by the shareholders of the company and full disclosure, made.

Looking at the positions of corporate political speech in the US jurisdictions, this paper still maintains that corporation should not be shut out of its voice in contributing to debates necessary to enrich the market for ideas. The US position particularly against the background of the ratio in Citizens United case, disclosure and transparency in corporate dealings as it affects political speech should form the fulcrum upon which corporation makes donations of its assets or gift for political activities. The Corporation seen from the view point that it is part of the microcosm forming the society and by extension, part of the livewire for its survival, it is rudely absurd to deny it a voice in the political market place of the country where it resides and does business.

The life of man from nature is brutish, nasty and short until law was introducing into it to guide the affairs of man with its relation to one another and the society at large – society, inclusive of not only the natural persons or component but artificial persons like the corporation on whose fulcrum the economy sits. To deny the Corporation voice is to shut out one segment of the society from the rest and in the opinion of this paper, is self-destructive and as corporate goals and agenda are better enhance in a regulated free speech.

4. Suggestions and Recommendations for Reform

The role of money in politics especially for those seeking political office has become the norm. Perhaps, the Nigerian electorate has become apathetic that whether run by the military or civilians, they have little hope for enjoying the dividends of the national cake. While not much could be done when the military class in power flagrantly siphoned wealth (though their coup speeches had expressed the desire to turn around the downward trend of the nation's economy), some electorate expect or demand for compensations in cash or kind as the only opportunity to nibble at the crumbs from what is left of the 'national cake'.

The use of money in campaigns to secure votes is an open secret in Nigeria. Thus when an aspirant makes his/her intentions known, the first question that is normally asked by well-wishers is, 'how much do you have?' Advocates of shareholder protection schemes claim that such a regulatory system ensures that the magnitude of corporate speech reflects voluntary support for the ideas expressed. This conclusion is correct, but irrelevant. Because corporate speech is a collective good, voluntary contributions for its provision will far understate the actual preferences of shareholders for such speech. Far from assuring that speech will reflect the actual desires of shareholders; such a system creates substantial free rider problems and thus imposes a substantial burden on high value speech. Supporters of such schemes claim that they prevent wasteful speech and protect shareholders from a scheme of 'bundling' that results in compelled subsidization of a point of view.

This Article has argued that such schemes cannot survive constitutional scrutiny. The rationale for shareholder protection schemes may suffer from a basic flaw - a mischaracterization of the corporate relationship.

Retained earnings are only shareholder property-and corporate speech theft - if one adopts that so-called Berle and Means view of the corporate relationship. If, however, one adopts the contractual theory, such earnings are the property of no one, and the use of such earnings by management for speech presents no problem of 'compelled subsidization.' Instead, the corporate contract, which shareholders enter willingly, allows management to deploy such earnings in ways beneficial to the firm, including political speech. The choice between these competing theories of the corporation determines the strength of the state interest supporting the significant burden on speech that shareholder protection schemes involve. Such a choice is not to be made *a priori*. Instead, it must be based upon an empirical assessment of the agency costs created by the specialization of function that characterizes the corporate form.

More specifically, one wants to know how much corporate speech is profit maximizing. It may be true that formal mechanisms have little disciplining effect upon management decisions, including those concerning speech.

However, many other informal mechanisms ensure that managers will internalize the effects upon firm profitability of such decisions. Fortunately, one need not take sides in the empirical debate over agency costs in order to evaluate the strength of the state interests asserted. Instead, one need only determine whether a non-trivial amount of corporate speech is indeed profit-maximizing. The data seem to indicate that, in fact, a substantial amount of corporate speech is profit-maximizing.

Further, the scholarly case in favor of limiting corporate speech to protect the electoral process is itself premised upon a belief that corporations engage in too much profit-maximizing speech. If the data and these scholars are correct as an empirical matter, shareholder protection schemes cannot survive first amendment scrutiny.

Of course, even when speech is profit-maximizing, some shareholders might object to the corporate message on ideological grounds. This possibility has led some to suggest that states should restrict such speech to ensure that such shareholders are not coerced into supporting speech they oppose. However, as shown earlier, no corporation possesses the economic power sufficient to coerce shareholders into supporting speech they would otherwise oppose. Further, 'unbundling' the purchase of stock from an agreement to support political speech creates substantial costs, including the costs associated with free riding.

Thus, the pervasiveness of bundling suggests either that, the costs of unbundling outweigh the benefits associated with it, or shareholders are unwilling to pay a positive price to obtain such unbundling. Neither explanation justifies the suppression of a substantial quantity of high-value, profit-maximizing speech.

Stakeholders in the Nigeria project are of the view that the country's electoral system has to be decisive on the issue of funding if governance is to have a positive effect on the people. Until this is done, government and political office holders will still patronize their financiers to the detriment of the nation. If the past is any guide, then those who financed President Jonathan's campaign will emerge the big players in the Nigerian economy following his victory. They certainly have an edge over other businessmen and politically dormant corporations.

From the discussion so far, the conclusion drawn is that the so-called ban on corporate political speech in Nigeria is at best in theory as businessmen and chief executive officers of big corporations in Nigeria continue to make political donations to political parties under various disguise thus creating a black market for corporate political activism in Nigeria.

This paper advised that Nigeria should learn from other jurisdictions which permit corporations to make independent expenditures or even political contributions with prior approval of shareholders and full disclosure of such donation. In the general elections held in 2003 and 2007, it was obvious that many registered companies made political donations to the ruling party, although none would admit as this was done under different disguise. As rightly argued by Bolodeoku,⁴⁸ by prohibiting registered businesses in Nigeria from making political contributions, the legislature unwittingly created a black market for such donations and induced the affected companies to lie about them.

Public policy decisions can have a profound effect on a corporation - from the board room to the bottom line. Legislative proposals, laws, government regulations, taxes, trade agreements or sanctions, and a host of other policy measures can affect how corporations operate at home and abroad, and may have a significant impact on their business performance.

⁴⁸ O.I. Bolodeoku, Above n. 6.

Those policies, in turn, affect the company's shareholders, employees and customers as well as nearby communities and other stakeholders. As a result many corporations consider participation in the political process, and the opportunity to help shape public policy, a necessary part of their responsibility to shareholders: to strengthen and grow their business. The absolute ban regime in Nigeria is to say the least, an overreaction as corporate voices in policy decisions and governance oil the mutuality between governance and the economy on the one hand, and promotes industrial peace on the other hand because government intentions and agenda are put before the front burner for healthy political debate and consideration by both natural persons and corporate Nigerians.

The industry and countries in which a company operates can greatly affect whether it chooses to actively engage in the political process and, if so, in what capacity. But one thing is clear: a growing number of corporations, many for the first time, now see engaging with policymakers at all levels of government as an increasingly important part of their business responsibility and strategy. To say the opposite is to distort the very definition and essence of democracy – government of the people, for the people and by the people. To exclude corporation from political participation particularly in the face of endemic corrupt electoral system such as ours amounts to selling the polity to party oligarchy whose philosophy of an idea society is primitive accumulation of wealth. In an age where several Nigerian businesses are relocating to neighbouring countries because of very hash and corrupt business environment as well as dearth of infrastructure, it will be a welcomed relief to lift the ban on corporate political activism to enable corporations has a say in the election of policy and decision makers.

A key benefit for corporations that engage in political spending and other political activities is their ability to actively support candidates and to help elect policymakers whose positions are consistent with their business values and strategies. Corporations also can educate policymakers about their issues through lobbying, and participate in issue advocacy and voter education.

Therefore, active political involvement is a laudable goal for corporations. Success in the public policy and political arenas can help to create an environment that contributes to success in the business world the risk of the political involvement notwithstanding.

Because corporate political activities are closely scrutinized by public-interest groups and the media, with the threat that direct or indirect political spending can put its reputation at risk and could adversely affect its business if the company takes a controversial position or supports a candidate who holds positions that are inconsistent with its corporate values or the views of a significant number of its workers, shareholders or customers; corporations making political speeches are very careful in their decision, thus enriching the market for ideas.

Consider the example of a corporation that joins a politically active trade association. On one hand, trade associations can offer a corporation greater opportunities to bring about consensus on policy issues important to its business or industry, and may diffuse attention generated by controversial issues the company supports. On the other hand, through its trade association memberships, the company may appear to support a position that is contrary to its corporate strategies or business practices. In those instances, the corporation should decide whether it needs to take appropriate steps to make sure policymakers understand its true position on key issues related to its business.

Therefore, Nigeria can employ different strategies to control the flow of corporate money into politics, creating a legal framework within which companies and registered businesses can be held in politics. An effective formula for control of corporate political donation will require the existence of a comprehensive system of political finance based on the following pillars; full disclosure, doctrine of agency, elimination of patronage politics and control over costs of elections, control of donations and, effective implementation and enforcement.

a. Full Disclosure.

The US Supreme Court in the *Buckley v. Valeo* case 424 US 1 (1976) argued that Disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek office. It allows the voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is more likely to be responsive and thus facilitate predictions of future performance in office.

Disclosure requires systematic and detailed reporting, auditing, public access to records and publicity. The term 'disclosure' suggests that voters receive information on the various financial activities of politicians through the public exposure of large contributions and expenditures. Disclosure of the donor's identity and the amount of the corporate donation is meant to control the flow of corporate money into campaign coffers. Regulations concerning the disclosure of corporate contributions are a common feature for advanced democracies of the world and Nigeria as an emerging democracy in Africa cannot but have a legislative rethink in this direction. A regime of public disclosure will not only appraise the public as to who contributes what, but as to how the executive's contracts and policies are implemented, and who benefits therefrom. With information available to the public, civil society, and independent media, the general public can monitor probable cases of political quid pro quo, subject them to review and criticism, and further educate the public on their implications.⁴⁹ This process is bound to allay the fear that the political process may be corrupt.

b. Doctrine of Agency

Furthermore, to improve financial management of political parties and candidates, the law should assign responsibility within each political party for obedience to political finance regulations. New regulations should encourage political parties to comply with requirements for professional and accurate book-keeping. It is recommended that each party should appoint one specific official who will have responsibility for ensuring that the party obeys political finance laws. This practice is adopted in Britain, Canada, France, and now in Poland, with this official being called the 'agent'. The system based on the 'doctrine of agency' foresees that all campaign expenditure must be authorized by the 'agent' and the 'agent' must check incoming donations to ensure that they are in conformity with the rules. By so doing, shareholders and promoters of corporations would have adequate information as to the amount the corporation spent at any given time as political donations.

c. Eliminating Patronage Politics and Controlling Costs of Elections

The regulation of political expenditure generally involves restrictions concerning direct vote buying or limitations on the expenditures of political parties or individual candidates.

⁴⁹ O.I. Bolodeoku, Above n 6 p.123.

Some of the most important legislation should be designed to prohibit all different forms of vote-buying, direct and indirect and associated methods of electoral bribery as this is the root of political finance-related corruption in Nigeria.

d. Control of Donations

Most democracies restrict the use of at least some sources of private donations, either by banning them (e.g. anonymous donations) or by setting contribution limits. Anonymous donations should be prohibited, having in mind the transparency of political finance. In so doing corporation would no longer hide under the tag of anonymous donor to make a gift of corporate assets and money.

e. Effective Implementation and Enforcement

Regardless of complex regulations, analyses show a worrying gap between legal requirements and the political practice of funding politics. One implication of the ineffectiveness of control mechanisms within the political finance system has been the growing level of political corruption. The major weakness that undermines the working of effective political finance systems is the lack of fully independent enforcement mechanisms. Any enforcement agency's autonomy must result from many factors, including its membership, terms of appointment, funding and administrative jurisdiction.

In view of the espoused shortfalls and negative effect a blanket ban on corporate political speech has on the polity, it is recommended that Nigeria should amend the extant laws to permit corporate free speech subject to full disclosure. The Nigerian Supreme Court should be buoyed by the recent US Supreme Court decision in *Citizens United v. Federal Election Commission*, No. 08-205 and permit corporate political activism to enrich the market of ideas. Corporations should be able to influence change in government whenever the democratic change of baton comes calling by voting in or out government in accordance to the economic interest of the corporation dictate of the economy. A government with excessive tax regime on corporation is likely to be voted out of power through donations to opposition political parties or candidates, thus widening the political space for ideas.

This paper recommends the removal of Section 221 from the Constitution, as it is undemocratic. A law that bans any association from canvassing for votes for any candidate at any election, or bans contributing to the funds of any political party, or to the election expenses of any candidate at an election, is indefensible, particularly in the face of the freedoms of expression and association. Rather than a sweeping prohibition as provided under Section 221 of the Constitution, limits may be set as to what associations may do with respect to each activity within the overall goals set by the Constitution.

In as much as Nigeria remain with her 'cash and carry' politics, so shall the rich ideas and dissenting voices of corporate Nigerians continue to elude her as a Nation. The Nigeria Judiciary must wake up to its interpretative role by been more assertive in its decisions as demonstrated by the recent U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*, No. 08-205. The world is moving, and very fast too, we must move with it. The paper opined that there is need for legislative rethinking on the absolute-ban regime in Nigeria by providing a streamlined and statutorily guided procedures and limit for corporate political speech. Setting a limit to the amount corporation could vote to sponsor a candidate or political parties that would mostly likely promote their corporate interest subject to approval by members in general meeting, in the view of the paper, is the best antidote to enriching the democratic space and the market for ideas. The present total ban regime has done little to curbing political spending by corporations in Nigerian but rather has created a black market for corporate political donations. The law as it is today in Nigeria is more observed in breach than in compliance. The earlier Nigeria realizes the business of corporation in politics, the better for our democracy and quality of governmental policies and programme with rich corporation constantly on the toes of leaders to see that they do not derail from their electoral manifestoes and get butted out in office with the strong voices of not only the Nigerian people but also, corporate Nigerians.