

## **REFORMING CAMPAIGN FINANCE LAWS IN GHANA: A 'POLITICAL PARTY BANK' PROPOSAL**

Rowland Atta-Kesson<sup>1</sup>

### **ABSTRACT**

All over the world, the issue of financing democratic institutions is a huge concern. In developing countries in Africa, several commentaries and suggestions have inundated the subject. Central to these suggestions is the idea of state funding of political parties. Given that there are many political parties in Ghana, any notion of State financing of political parties does not appeal to many. But as democracy has come to stay in Ghana, the phenomenon of elections and financing would continue to nag for attention. Two issues to this are; whether it is necessary to deregulate the use of money in elections because of democratic free speech or whether to regulate given democratic and equal political participation. The paper uses a qualitative, doctrinal, and comparative legal methodology to make a case for 'political party banks' as an option in political party financing.

**Keywords:** Political party, Campaign finance law, Political party funding, Banking law, Bank bargain

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<sup>1</sup> L.L.B., B.L., (Ghana), L.L.M., S.J.D. (Indiana), Lecturer, UPSA Law School, Accra.

## **Introduction**

In 2018 in Ghana, the main opposition political party held elections to elect its presidential candidate for the general elections in 2020. Of interest here is how some supporters or public members formed long queues to donate funds towards the GHC420,000 (about \$77,000) filing fees for former President Mahama to contest the National Democratic Congress (NDC) presidential election candidacy for the December 2020 elections.<sup>2</sup> Turning one's gaze away from politics to the economy, one also saw the Bank of Ghana revoke the licences of some local banks for failing to meet minimum capital requirements and other governance problems.<sup>3</sup> Next to this, was the political agitations that followed this regulatory measure. As perceived members of the main opposition political party were significant shareholders of some of the affected banks, some viewed the regulatory action as politically motivated.<sup>4</sup> Others thought otherwise.<sup>5</sup> These two stories in 2018, though unrelated, invite a discussion on campaign finance law in Ghana.

Without a doubt, democracy and campaign financing would continue to nag for attention in Ghana.<sup>6</sup> As political parties also continue to race for funds for their political activities,

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<sup>2</sup> See Naa Ayeley Aryee, 'GHC420K Fee: NDC Supporters Queue to Donate "Widow's Mite" to Mahama (Photos) | YEN.COM.GH' (2018) <<https://yen.com.gh/119611-gh420k-fee-ndc-supporters-queue-donate-widows-mite-mahama-photos.html>> accessed 20 October 2020; See Adom FM Ghana, '420k Filing Fees: 96 MPs Mobilise over GHC600,000.00 to Support Mahama - Adomonline.Com' (2018) <<https://www.adomonline.com/420k-filing-fees-96-mps-mobilise-over-ghc600000-00-to-support-mahama/>> accessed 20 October 2020; See Peace FM Ghana, 'GHC420,000 Fee-219 Mahama Supporters Pledge GHS1,000 Each (LIST) | Peacefmonline.Com' (2018) <<http://peacefmonline.com/pages/politics/politics/201812/369296.php>> accessed 20 October 2020; See also Peace FM Ghana, 'Mahama Cash Donation Starts In K'si | Politics | Peacefmonline.Com' (2018) <<https://www.peacefmonline.com/pages/politics/politics/201812/369515.php>> accessed 20 October 2020.

<sup>3</sup> See Bank of Ghana, 'Government Establishes New Indigenous Bank; Bank of Ghana Revokes Licenses of Five Banks and Appoints Receiver in Respect of Their Assets and Liabilities' (*Bank of Ghana*, 2018) 1 <[https://www.bog.gov.gh/privatecontent/Public\\_Notices/PRESS\\_RELEASE-Grand\\_Final\\_August\\_2018.pdf](https://www.bog.gov.gh/privatecontent/Public_Notices/PRESS_RELEASE-Grand_Final_August_2018.pdf)> accessed 25 November 2018.

<sup>4</sup> See Ghana Politics Online, 'UniBank Takeover "Politically Motivated" – Prof. Gatsi - GhanaPoliticsOnline' (2018) <<https://ghanapoliticsonline.com/unibank-takeover-politically-motivated-prof-gatsi/>> accessed 20 October 2020.

<sup>5</sup> See Starr Fm Ghana, 'Parliament to Probe Collapse of 7 Local Banks - Starrfmonline.Com' (2018) <<https://starrfm.com.gh/2018/08/parliament-to-probe-collapse-of-7-local-banks/>> accessed 20 October 2020; See Joy FM Ghana, 'We're Not Behind Any Plot To Collapse Banks – Danquah Institute - MyJoyOnline.Com' (2020) <<https://www.myjoyonline.com/news/politics/were-not-behind-any-plot-to-collapse-banks-danquah-institute/>> accessed 20 October 2020.

<sup>6</sup> See generally Baffour Agyeman Prempeh Boakye, 'Electoral Politics in Ghana's 4th Republic (1992-2016) and Its Implications on Future Elections' (*SSRN Electronic Journal*, 25 June 2018) <<https://www.ssrn.com/abstract=3202431%0Ahttps://www.dropbox.com/s/8mkd8s6tqxyaa7y/Boakye%282018%29%29%20Electoral%20Politics%20in%20Ghana's%204th%20Republic%201992-2016%29%20and%20its%20Implications%20on%20Future%20Elections.pdf?dl=0>> accessed 22 October 2020.

there is an ongoing debate about choosing between the two extremes of total State funding and zero State funding of political parties. In the discussion, some expect the state to be a neutral intermediary that should provide a level playing field for competing political parties through both positive and negative regulation.<sup>7</sup> The literature is also replete with suggestions about member-monthly dues, special levies,<sup>8</sup> and business donations<sup>9</sup> as sources of political party financing. But there are still concerns about how to measure political party funding.<sup>10</sup> Therefore, several discussions focus on the issue of regulations<sup>11</sup> and whether it is necessary to include other elements like corporate entities.<sup>12</sup> It seems, however, that the literature is yet to consider the political party itself as an economic actor. This paper, therefore, proposes the concept of a 'political party bank' by creatively tinkering with game theory<sup>13</sup> and marketised politics.<sup>14</sup> The idea is to allow political parties to compete vibrantly in selling their political products to the electorates.<sup>15</sup> But since the free market also challenges two liberal democratic values<sup>16</sup>

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<sup>7</sup> See Jonathan Mendilow, 'Introduction: The Party Funding Paradox And Attempts At Solutions' in Jonathan Mendilow and Eric Phelippeau (eds), *Handbook Of Political Party Funding* (Edward Elgar Publishing Ltd 2018) ss 4–6 The negative regulation includes banning certain donation sources of funds and capping contributions. Positive regulation includes the provision of both cash and in-kind subsidies like making public services available to all parties.

<sup>8</sup> See Ransford Edward, 'Public Funding Of Political Parties In Ghana: An Outmoded Conception?' (2015) 38 *UCLA Ufahamu: A Journal of African Studies* 3.

<sup>9</sup> See Rachel Sigman, 'Which Jobs for Which Boys? Party Financing, Patronage and State Capacity in African Democracies' (2015) <<https://surface.syr.edu/etd>> accessed 21 October 2020.

<sup>10</sup> Mendilow (n 7) 6–7.

<sup>11</sup> See Susan E Scarrow, 'Political Finance Regulation And Equality: Comparing Strategies And Impact' in Jonathan Mendilow and Eric Phelippeau (eds), *Handbook Of Political Party Funding* (Edward Elgar Publishing Ltd 2018); See also Susan E Scarrow, 'Political Finance In Comparative Perspective' (2007) 10 *Annual Review of Political Science* 193.

<sup>12</sup> See Nubia Evertsson, 'Corporate Contributions To Electoral Campaigns-The Current State of Affairs' in Jonathan Mendilow and Eric Phelippeau (eds), *Handbook Of Political Party Funding* (Edward Elgar Publishing Ltd 2018).

<sup>13</sup> See generally John Kirace, *Law, Economics, And Game Theory* (Lexington Books 2018); See also Gary S Becker, *The Economic Approach To Human Behavior* (University of Chicago Press 1976); See Richard A Posner, *Economic Analysis Of Law* (9th edn, Wolters Kluwer 2014).

<sup>14</sup> See William L Parish and Ethan Michelson, 'Politics and Markets: Dual Transformations'' (1996) 101 *American Journal of Sociology* 1042.

<sup>15</sup> See Colin Crouch, 'Marketization' in Matthew Flinders and others (eds), *The Oxford Handbook Of British Politics* (Oxford University Press 2010) 879.

<sup>16</sup> Whereas liberty is key for political communication, equality is also key for measuring the integrity of any democracy. But the realizations of these ideals are resource intensive, and since wealth is unevenly distributed, those who control many resources in a free-market setting are likely to distort any balance between these two.

of liberty<sup>17</sup> and equality,<sup>18</sup> we must get the courts to scrutinise such competitions through law reforms.<sup>19</sup>

The paper adds banking as an instrument of regulation<sup>20</sup> to the debate and thus calls for a change in the law and institutions of campaign financing in Ghana by proposing a legislative design that combines electoral and banking laws to regulate political parties as essential public service providers and as economic actors. I have organised the paper into eight parts beginning with this introduction. Part two is on the legal issues and methodology. Part three follows up with a discussion of comparative perspectives on campaign finance law. The fourth part takes up the concept of 'political party bank'. Part five looks at the ideal legislative framework for the 'political party bank'. Next is part six, which shows that Ghana's existing campaign finance law does not meet the needs of the 'political party bank'. The paper, therefore, makes a case for extending banking laws to the electoral process. Part seven then examines this possibility in terms of current banking laws in Ghana. Finally, part eight concludes with suggestions for the 'political party bank' policy supply.

### **Legal Issues and Methodology**

From the above, the first issue is the 'political party bank' and whether this is necessary for the Ghanaian context? Related to this broad issue are the following sub-issues. How different is the 'political party bank' from other banks? Whether political parties do and can operate as banks? Whether campaign finance law in Ghana needs reforms? What are the legal and institutional challenges of campaign financing in Ghana? How do we

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<sup>17</sup> See generally John Stuart Mill, 'On Liberty' in Mark Philp and Frederick Rosen (eds), *John Stuart Mill On Liberty, Utilitarianism And Other Essays (Oxford World's Classics)* (Oxford University Press 2015); For legal conception, see Glanville Williams, 'The Concept of Legal Liberty' (1956) 56 *Columbia Law Review* 1129.

<sup>18</sup> See The Global Commission on Elections Democracy and Security, 'Deepening Democracy: A Strategy For Improving The Integrity Of Elections Worldwide (The Report Of The Global Commission On Elections Democracy And Security)' (2012) 5–6 <[https://storage.googleapis.com/kofiannanfoundation.org/2016/01/deepening\\_democracy\\_0.pdf](https://storage.googleapis.com/kofiannanfoundation.org/2016/01/deepening_democracy_0.pdf)> accessed 22 October 2020.

<sup>19</sup> See Samuel Issacharoff and Richard H Pildes, 'Politics As Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643, 690–699 Where the authors argue to the effect that to realize one of the key ideals of democracy, it is important that there is competitive partisan environment. But it is also important to note that just like any market, there are bound to be anti-competitive tendencies, and this must be checked. They observed that corporate law now focuses on background competitive structures within which managers operate rather than fiduciary duties; hence the term 'market-for-corporate-control'. The authors sought to extend corporate law scholarship to public law.

<sup>20</sup> See generally Baldwin, Cave and Lodge (n 80); See Baldwin, Cave and Lodge (Eds) (n 80); See Niamh Moloney, Eilís Ferran and Jennifer Payne (Eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press 2015); And see Breyer (n 80).

regulate banks in Ghana? To what extent can we extend banking regulations to the 'political party bank'? And how do other jurisdictions regulate campaign financing? In addressing the issues above, the paper blends legal science and philosophy to identify and compare common elements of the law in Ghana and elsewhere as factual and normative.<sup>21</sup> It utilises a rational-legal argumentation<sup>22</sup> that translates the facts of the two stories above into a normative order or infers "ought" from "is"<sup>23</sup>. But as pointed out in legal theory,<sup>24</sup> the empirical is not always in line with the normative.<sup>25</sup> Therefore, the methodology herein takes the form of a qualitative,<sup>26</sup> doctrinal,<sup>27</sup> and comparative legal study that furnishes the reader with sufficient description to understand the basis of the argument herein. Meanwhile, most comparative law scholars distinguish between macro comparison and micro comparison in functionalist<sup>28</sup> comparative law

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<sup>21</sup> See MDA Freeman, *Lloyd's Introduction To Jurisprudence* (9th edn, Sweet & Maxwell 2014) 7.

<sup>22</sup> See generally Eveline T Feteris, *The Fundamentals Of Legal Argumentation: A Survey Of Theories On The Justification Of Judicial Decisions* (2d edn, Springer 2017); See also Christian Dahlman and Eveline T Feteris, 'Introduction' in Christian Dahlman and Eveline T Feteris (eds), *Legal Argumentation Theory: Cross-Disciplinary Perspectives* (2013); Further see Chaim Perelman and L Olbrechts-Tyteca, *The New Rhetoric: A Treatise On Argumentation* (University of Notre Dame Press 1969); See also Neil MacCormick, *Legal Reasoning And Legal Theory* (Oxford University Press 1978); And see John R Searle, *Speech Acts: An Essay In The Philosophy Of Language* (Cambridge University Press 1969).

<sup>23</sup> See Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 86; See also Richard A Posner, *Overcoming Law* (Harvard University Press 1995) 11–12.

<sup>24</sup> See for example David Hume, *A Treatise Of Human Nature* (1739) s 315.

<sup>25</sup> See generally Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press 2010) 15–18, 180–187, 188–208 where the author, among others, discusses the relationship between general practical argumentation and legal argumentation and argues that legal argumentation is a special case of general practical discourse because of the restraining limits within which it operates. The author makes the point that a theory of discourse can be empirical, analytical, and/or normative, and that there is a connection between these three. Analytical is the logical structure of argument, and it often goes together with normative, but empirical does not always go together with normative. Empirical is when describing the situation of discourse, and normative is when justifying the discourse. The justification process could be a blend of technical, empirical, definitive, and universal pragmatics approaches that are discernible in the rational discourse literature.

<sup>26</sup> See generally Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010). Also see Yin & Nelson's paper and how the gathered data qualitatively (2021).

<sup>27</sup> See generally Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2d edn, Routledge 2018).

<sup>28</sup> See generally Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook Of Comparative Law* (2d edn, Oxford University Press 2019) 346–368 where the author proposes an interpretative functionalism by reconstructing functionalism in terms of equivalence functionalism.

methodology.<sup>29</sup> And this distinction enables them to show that similar institutions in different countries may perform various functions, whilst different institutions may carry out similar tasks in different countries with different names. How then do other jurisdictions address the issue of campaign finance?

### **Comparative Law Perspectives**

All over the world, democratic countries are striving to balance free speech<sup>30</sup> and corruption-free<sup>31</sup> elections. The issue here is whether it is necessary to deregulate money in elections because of democratic free speech or whether to regulate it given democratic, equal political participation?<sup>32</sup> Therefore, in designing a campaign finance legal system, choosing the right mix from multiple funding sources for political parties is a paradox.<sup>33</sup> Here, there are two extremes of campaign finance legal systems. At one end is total public funding with limits, and at the other end is zero budget with free riding.<sup>34</sup> One can locate most campaign financing legal systems in between these extremes. How do different countries address such a situation?

There are diverse responses indeed. For example, in countries like Canada, there seems to be no consensus on State funding.<sup>35</sup> The Canadian Supreme Court has striven in two cases to balance libertarian and egalitarian approaches to campaign finance regulation

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<sup>29</sup> See Konrad Zweigert and Hein Kotz, *An Introduction To Comparative Law* (2d edn, Clarendon Press 1987) 4–5 where the authors explained that comparison may take one of two forms; macrocomparison and microcomparison. Macrocomparison looks at that style and spirit of the laws, and the thoughts process used in the legal system. In other words, it looks at the general institutional context of the legal system. Microcomparison deals with the specific problem or institution. But it is important to stress that the division between the two is very flexible. It is possible to engage in both types at the same time.

<sup>30</sup> See Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy and Public Affairs* 204.

<sup>31</sup> See Peter Arthur, 'Political Parties' Campaign Financing In Ghana's Fourth Republic: A Contribution to the Discourse' (2017) 52 *Journal of Asian and African Studies* 1124, 1132.

<sup>32</sup> See Kathleen Hunker, 'Elections Across The Pond: Comparing Campaign Finance Regimes In The United States and United Kingdom' (2013) 36 *Harvard Journal of Law & Public Policy* 1099 The challenge is that allowing free use of money as expression of free speech is to allow the few wealthy in society would have their say at the expense of equal participation in elections.

<sup>33</sup> See Mendilow (n 7) 2–3.

<sup>34</sup> See Graeme Orr, 'Full Public Funding: Cleaning Up Parties Or Parties Cleaning Up?' in Jonathan Mendilow and Eric Phelippeau (eds), *Handbook Of Political Party Funding* (Edward Elgar Publishing Ltd 2018).

<sup>35</sup> See Maxime Pelletier, 'Public Funding In Canada: Reform Without Consensus' in Jonathan Mendilow and Eric Phelippeau (eds), *Handbook Of Political Party Funding* (Edward Elgar Publishing Ltd 2018).

with minimal success.<sup>36</sup> With State funding,<sup>37</sup> the right to vote is a duty in Australia.<sup>38</sup> Also, there are several commentaries and suggestions about State funding of political parties in developing African countries.<sup>39</sup> For example, in South Africa, the Represented Political Parties Fund (RPPF)(EISA 2011a) regulates public funding of political parties. The law allocates subsidies using a 90:10 formula, whereby all the parties share 90 per cent of the total amount, and the parties with seats in Parliament share 10 per cent.<sup>40</sup> Below is a discussion of the experience in leading democracies like the US, Britain, and Germany.

In the US, federal case laws on campaign financing uphold the regulations of corporate political speech but not its suppression.<sup>41</sup> Companies are unavoidable in today's politics, and it is crucial to regulate their activities, including campaign financing. In a developing country like Ghana, there is the need to upscale the electoral laws in this respect. Therefore, Ghana can learn how to regulate corporate financing of elections regarding soft money and issue advocacy from the US. What is soft money? The understanding is that these are funds donated to political parties which the law has to regulate. Soft money thus encourages political parties to spend freely in achieving their objective of increasing votes.<sup>42</sup> In the US, this issue led to the passing of the Bipartisan Campaign Reform Act of 2002 (hence BCRA).<sup>43</sup> The law before this was the Federal Election Campaign Act of 1971 (hence FECA).<sup>44</sup> There is a long history of campaign finance law

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<sup>36</sup> See Yasmin Dawood, 'Democratic Rights' in Peter Oliver, Patrick Macklem and Nathalie Des Rosier (eds), *The Oxford Handbook Of The Canadian Constitution* (Oxford University Press 2017) 727–729.

<sup>37</sup> See Graeme Orr, Bryan Mercurio and George Williams, 'Australian Electoral Law: A Stocktake' (2003) 2 *Election Law Journal* 383.

<sup>38</sup> See Joo-Cheong Tham, 'Political Participation' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook Of The Australian Constitution* (Oxford University Press 2018) 983.

<sup>39</sup> See for example Victor Shale, 'Political Party Funding And Regulation In Lesotho And Mozambique' in Jonathan Mendilow and Eric Phelippeau (eds), *Handbook Of Political Party Funding* (Edward Elgar Publishing Ltd 2018).

<sup>40</sup> See Samuel Uwem Umoh, 'Party Funding In South Africa' in Jonathan Mendilow and Eric Phelippeau (eds), *Handbook Of Political Party Funding* (Edward Elgar Publishing Ltd 2018) 453.

<sup>41</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

<sup>42</sup> See Carol A Fichtelman, *Campaign Finance Law: A Legal Research Guide* (William S Hein & Co, Inc 2020) 22–23.

<sup>43</sup> Also known as the McCain-Feingold Act, 52 U.S.C. § 30101 et seq., Pub. L. 107-155, 116 Stat. 81. For a list of laws see Federal Election Commission, 'Federal Election Campaign Laws (February 2019)' (2019) <<https://www.fec.gov/resources/cms-content/documents/feca.pdf>> accessed 8 October 2020; See also Federal Election Commission, 'Federal Election Commission Campaign Guide-Congressional Candidates and Committees (June 2014)' (2014) <<https://www.fec.gov/resources/cms-content/documents/candgui.pdf>>; And for general discussion, see Fichtelman (n 41).

<sup>44</sup> 2 U.S.C. §§ 431 et seq., Pub. L. 92-225, 83 Stat. 3.

in the US predating the FECA.<sup>45</sup> The FECA was deficient in addressing concerns about soft money and issue advocacy, hence the introduction of the BCRA.<sup>46</sup> Now, as issues along this American legal history may be similar to what is panning out now in Ghana's budding democracy, Ghana can learn from them as this is the essence of comparative legal studies.<sup>47</sup>

The law on soft money is Section 30125 of the BCRA. Section 30125(a) regulates matters relating to national committees, and Section 30125(b) also holds those on state, district, and local committees. Section 30125(a)(1) states: "A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." As the BCRA seeks to curb corruption and ensure transparency,<sup>48</sup> it has detailed disclosure rules under Sections 30104 and 30105.<sup>49</sup> These include reporting requirements. Treasurers of political committees are required to file reports of receipts and disbursements. The law also spells out the reporting contents and software use. Other actors aside from political committees are also required to file statements when they make independent expenditures of more than \$250. Section 30109<sup>50</sup> and Section 30110<sup>51</sup> regulate enforcement by way of administrative adjudications and judicial

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<sup>45</sup> See Beth Rowen, 'Campaign-Finance Reform: History and Timeline' (*Infoplease*, 2017) <<https://www.infoplease.com/history/us/campaign-finance-reform-history-and-timeline>> accessed 8 October 2020; See also Jaime Fuller, 'From George Washington to Shaun McCutcheon: A Brief-Ish History of Campaign Finance Reform. - The Washington Post' (2014) <<https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon/>> accessed 8 October 2020; And see Foundation for Individual Rights in Education (FIRE), 'The History of Campaign Finance Archives - FIRE' (2020) <<https://www.thefire.org/first-amendment-library/special-collections/timeline/the-history-of-campaign-finance/>> accessed 8 October 2020; See also Fichtelman (n 41) 2.

<sup>46</sup> See R Sam Garret, 'Campaign Finance: Legislative Developments and Policy Issues in the 110 Th Congress' (2008) <<https://crsreports.congress.gov/product/pdf/RL/RL34324>> accessed 30 October 2020.

<sup>47</sup> See Geoffrey Samuel, *An Introduction To Comparative Law and Method* (Hart Publishing 2014) locs 1177, 1182-1240 of 4523 (Kindle); See also Geoffrey Samuel, 'Comparative Law and Its Methodology' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2d edn, Routledge 2018) 122; And see Matthias Siems, *Comparative Law* (2d edn, Cambridge University Press 2018) loc 723 of 29054 (Kindle).

<sup>48</sup> See generally L Paige Whitaker, 'Political Campaign Contributions and Congress: A Legal Primer' (2020) <<https://crsreports.congress.gov/product/pdf/R/R46521>> accessed 30 October 2020; See also R Sam Garret and L Paige Whitaker, 'Campaign Finance: Key Policy and Constitutional Issues' (2018) <<https://crsreports.congress.gov/product/pdf/IF/IF11034>> accessed 30 October 2020.

<sup>49</sup> 52 U.S.C.A §§ 30104-30105 (Westlaw through Pub. L. No. 116-179)

<sup>50</sup> 52 U.S.C.A § 30109 (Westlaw through Pub. L. No. 116-179)

<sup>51</sup> 52 U.S.C.A § 30110 (Westlaw through Pub. L. No. 116-179)



review. The BCRA caps contributions. It criminalises violations against the limits of contributions and imposes various sanctions, including fines and prison terms. It allows the use of conciliation agreement as a defence of lack of knowledge or intent in criminal trials. And it prescribes both permitted and prohibited uses of contributions and outrightly proscribes donations by foreign nationals.<sup>52</sup>

These provisions are examples of how tight the US regulate matters of campaign finance. Indeed, recent legislative activities in this area include a proposed bill in the US House of Representatives on 'Stop Super PAC-Candidate Coordination Act'<sup>53</sup> and another in the Senate on 'For the People Act of 2019'.<sup>54</sup> Although these bills are unlikely to get passed anytime soon, they show how tight legislation can regulate campaign financing. The Senate bill seeks "to expand Americans' access to the ballot box, reduce the influence of big money in politics, and strengthen ethics rules for public servants, and for other purposes." And the House bill seeks "to amend the Federal Election Campaign Act to clarify the treatment of coordinated expenditures as contributions made to candidates under such Act, and for other purposes." These two bills seek to achieve, when passed into law, underscore the point about securing effective electoral participation and integrity. In addition, several American constitutional case laws illustrate the challenges in balancing these values by addressing a broad range of issues from distinguishing between contributions and expenditures, addressing concerns about corporate free speeches and many problems, including those regulated under the BCRA.<sup>55</sup>

More cooperation and a less adversarial political system are what electoral reforms in the UK appears to be. But this requires reforming no less than three electoral systems operating in the UK at different levels from the House of Commons to local authorities and improving the low rate of voter turn-out at elections in the UK. Until then, the judiciary has to play a more significant role because the *status quo* of the first-past-the-post system continues to be adversarial and alienates voters.<sup>56</sup> The electoral system, which favours few political parties that are effectively under-representative, challenges

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<sup>52</sup> See generally 52 U.S.C.A §§ 30109(d), 30114, 30116, 30121 (Westlaw through Pub. L. No. 116-179)

<sup>53</sup> HR 4055, 116<sup>th</sup> Cong. (2019)(PAC refers to Political Action Committee)

<sup>54</sup> S. 949, 116<sup>th</sup> Cong. (2019)

<sup>55</sup> See generally John E Nowak and Ronald D Rotunda, *Constitutional Law (Hornbook Series)* (8th edn, West-Thomson Reuters 2010) 1487–1507; See also Ronald D Rotunda and John E Nowak, *Principles of Constitutional Law (Concise Hornbook Series)* (5th edn, West Academic Publishing 2016) 822–829.

<sup>56</sup> See Dawn Oliver, *Constitutional Reform In the UK* (Oxford University Press 2003) 131–147.

political participation in the UK. But it is also feared that diversifying the party system may lead to less control of large personal donations and corruption.<sup>57</sup> Allegations of 'sleeze', which bedevilled the Labour Government of Prime Minister Tony Blair and brought the issues of campaign financing to public attention, were, however, not effectively addressed in the Political Parties Elections and Referendum Act, 2000 (2000, c.41) (PPERA).<sup>58</sup> Thus, there are such enactments as the Political Parties and Elections Act, 2009 (2009, c.12) (PPEA), and the Electoral Registration and Administration Act, 2013 (2013 c.6) (ERA). And these laws seek, among others, to address the risk of corruption, equality, and citizen participation in funding political parties.<sup>59</sup> State funding of political parties continues to be a critical issue, even though there is some State funding or 'short money' for political parties' parliamentary activities.<sup>60</sup>

In Germany, the German Constitutional Court, reputed as citizens' court,<sup>61</sup> is best known for protecting democratic competition, as it guards against the tendency of incumbents to stifle political contests. In one instance, it struck down a strict signature requirement that applied only to candidates with no political parties in the legislature. Again, whilst holding for State funding of political parties, the German Court has handed down aggressive decisions in campaign financing. In this regard, it has laid down rules for public funding of political parties, including holding that donations to political parties are tax-free, given the tendency of the progressive tax system to favour wealthy donors. However, the German Court also struck down the government's distribution of political party funds based on parliamentary seat reasoning that that aspect of the law only exacerbated the inequalities among parties.<sup>62</sup> Germany, therefore, presents Ghana with

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<sup>57</sup> See KD Ewing, *The Cost Of Democracy: Party Funding In Modern British Politics* (Hart Publishing 2007) viii.

<sup>58</sup> See KD Ewing, 'The Funding of Political Parties in Britain Prospects for Reform' (1998) 7 Griffith Law Review 185, 188–205.

<sup>59</sup> See Vernon Bogdanor, 'The Constitution and the Party System in the Twentieth Century' (2004) 57 *Parliamentary Affairs* 717; See also Michael Pinto-Duschinsky, 'Party Funding In Britain' in Jonathan Mendilow and Eric Phelippeau (eds), *Handbook Of Political Party Funding* (Edward Elgar Publishing Ltd 2018).

<sup>60</sup> See Oliver (n 55) 152.

<sup>61</sup> See Anuscheh Farahat, 'The German Federal Constitutional Court' in Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks In European Public Law-Volume III: Constitutional Adjudication; Institutions* (Oxford University Press 2020) 299–318.

<sup>62</sup> See Richard H Pildes, 'Political Parties and Constitutionalism' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 256–257.

an example of State funding of political parties and the challenges in devising a scheme for equitable distribution.<sup>63</sup>

The established idea from this comparative law discussion shows that no two countries have the same institutions. But it is suggested that possible experimentation of the 'political party bank' as a game of bank bargain would project Ghana as a comparative leader, at least in Africa. Ghana can use the 'political party bank' concept to adapt the US BCRA, especially regulating soft money, capping contributions, corporate financing, and reporting requirements. Likewise, the UK's short money and South Africa's State funding formula can offer useful lessons for the 'political party bank'. The German democratic, competitive jurisprudence is equally instructive. Understandably, donations to the 'political party bank' can be tax exempted from this. Similarly, one cannot ignore the Canadian judicial attempts at balancing libertarian and egalitarian approaches in formulating the underlying principles of 'political party bank'. What then is the 'political party bank'?

### **The Concept of 'Political Party Bank'**

What is referred to herein as the 'political party bank' is a creative stretching of the work of Calomiris and Haber, who build on the works of Olson<sup>64</sup> and Stigler<sup>65</sup> with their 'Game of Bank Bargains', and argue that "when fundamental political institutions<sup>66</sup> change, the Game of Bank Bargains changes."<sup>67</sup> In their work, Calomiris and Haber identified and analysed three property rights<sup>68</sup> problems in banking concerning

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<sup>63</sup> See Manuela S Blumenberg, Karl-Heinz Nassmacher and Holger Onken, 'Germany: Current Issues Of An Aging Party Finance Regime' in Jonathan Mendilow and Eric Phelippeau (eds), *Handbook Of Political Party Funding* (Edward Elgar Publishing Ltd 2018).

<sup>64</sup> See Mancur Jr Olson, *The Logic of Collective Action: Public Groups and the Theory of Groups* (Harvard University Press 1965).

<sup>65</sup> See George J Stigler, 'The Theory of Economic Regulation' (1971) 2 *The Bell Journal of Economics and Management Science* 3.

<sup>66</sup> 'Institution' is understood herein to include laws, policies, and other rules that a recognized authority creates and enforces. See Eric Alston and others, *Institutional and Organizational Analysis : Concepts and Applications* (Cambridge University Press 2018) ss 13, 33.

<sup>67</sup> See Charles W Calomiris and Stephen H Haber, *Fragile By Design: The Political Origins Of Banking Crises And Scarce Credit* (Princeton University Press 2014) x, 13, 22.

<sup>68</sup> See Alston and others (n 65) 14, 26, 50, 55, 57, 61 where the authors explained the concept of 'property right' as describing the rights, privileges and other relationships associated with property. According to these authors, there are two forms of this concept, namely; de jure property rights, and de facto property rights. De jure property rights are created by law and are backed by state powers, whereas de facto are backed by social customs and etiquette. After a review of both legal and economic definitions of property rights, the authors proffer a very broad definition of de facto property rights to mean an individual's or organization's ability to make both present and future decisions about all forms of resources including human, physical and intellectual capital. And that there is an overlap

regulatory compliance, corporate governance, and depositor protection.<sup>69</sup> Calomiris and Haber thus argued that all three issues overlap because the might of the State, including the police for law enforcement, courts for adjudication, and the legislature for law-making, creates an imbalance in the triangular relationship involving the State or government, banks, and depositors.<sup>70</sup> Thus, supposing that at the request of others, the State enforces anti-fraud laws,<sup>71</sup> compels borrowers to pay up through the courts, and passes laws to regulate banking activities entirely, it can equally expropriate the banks without let or hindrance from the banks, bank handlers, shareholders, and depositors. As Olson argues, the minority shareholders or depositors, or bank insiders may not necessarily be united in their respective common interests.<sup>72</sup>

Two judicial decisions illustrate these bank bargain problems in Ghana. In the Ghanaian case of *NDK Financial Services Ltd, v. Ahaman Enterprises Ltd, and Others*,<sup>73</sup> a financial institution granted a loan facility by relying on a letter from a State agency as a guarantee. But subsequently, when the borrower defaulted, the State agency excused liability, and the financial institution had no other option than to sue to recover the loan from the defaulting borrower. Thus, aside from the high transaction cost<sup>74</sup> of legal action, it is evident that the financial institution could not challenge the coercive might of the State in this instance. Also, in the Ghanaian case of *Republic v. High Court Ex Parte Bank Of Ghana and Others*<sup>75</sup>, the Economic and Organised Crimes Office (EOCO) closed down a bank for operating without the requisite banking licence. Depositors sued

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between both de jure and de facto property rights in many respects, but de facto property rights can exist without the state's recognition and enforcement. Furthermore, although de facto property rights are not always well defined, it is costly for an individual or organization to possess, use, improve, exclude, destroy, sell, transform, donate, bequeath, lease, mortgage, consume, or develop them. In effect, there are transaction costs associated with the establishment and enforcement of de facto property rights; See also Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 *The American Economic Review* 347.

<sup>69</sup> The problem is that agreement between government and banks may compensate the shareholders and depositors for possible expropriation. But company law only limits the liability of shareholders towards the depositors without addressing the bit about expropriation.

<sup>70</sup> See Calomiris and Haber (n 66) ss 33–34.

<sup>71</sup> For as Stigler argued, regulation is designed to benefit industry as a rule although industry may also bear the burdens from regulation. See Stigler (n 64) 3.

<sup>72</sup> See Olson (n 63) critiquing, as unjustified, the widely held view that groups tend to further their common interests.

<sup>73</sup> [2014] DLSC 3007, at [https://www.dennislawgh.com/blank?id=\[2014\]DLSC3007&searchRadBtn=exact#](https://www.dennislawgh.com/blank?id=[2014]DLSC3007&searchRadBtn=exact#) (Accessed December, 3 2018)

<sup>74</sup> See RH Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386, 3; RH Coase, 'The Problem of Social Cost' (1960) 3 *The Journal of Law and Economics* 1, 19.

<sup>75</sup> [2013] DLSC2699 at [https://www.dennislawgh.com/blank?id=\[2013\]DLSC2699&searchRadBtn=](https://www.dennislawgh.com/blank?id=[2013]DLSC2699&searchRadBtn=) (accessed December, 3 2018)

the central bank to recover funds held for the troubled bank with many difficulties as the matter was unduly prolonged in court. The two agencies litigating against the depositing public and bank investors show how the State's coercive forces occasioned an imbalance in this triangular relationship between the State, bank owners, and the depositing public. Hence, a manifest display of the property rights problems of bank bargain.

Again, this bank bargain theory plays out in the banking crisis story described above. This story is about the ownership and operation of a bank in Ghana by some perceived members of political parties. Typically, even though a non-State-funded political party may qualify as a private entity, its political attribute blurs any public and private laws distinction. Therefore, the presence of political parties dilutes any private law concentration of the game of bank bargains given the political undertones. Indeed, one prominent view on the banking crisis suggested that we need to ban former governors of the central bank from owning and operating a bank.<sup>76</sup> But it is argued herein that instead of banning such former government appointees, political parties ought to be allowed to own and operate 'political party banks.'

The political party election story shows that desired details are missing in further assessing the relevance of the 'political party bank'. For example, how much the donations generated was not publicly disclosed. Into which bank account officials paid these sums of money was also not disclosed publicly. From hindsight, it is evident that political parties do own and operate bank accounts. But the usefulness of political parties owning and operating their bank accounts does not compare to political parties owning and operating 'political party banks' regarding public disclosure regulation. In the story, public members donated sums of money at a designated collection point, and it is most likely that the funds collected would have been paid into a bank account. But the problem with this arrangement is the lack of information about these donors. First, it was not clear whether all those donors were Ghanaians. Secondly, how much officials realised was not publicly known. Given that the former president eventually contested the said election and won the presidential candidacy, one can safely assume officials raised the

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<sup>76</sup> See Global Banking News, 'Asantehene Calls On Authorities To Ban Bank of Ghana Governors From Opening Banks' (*LexisNexis*, 2018) <<https://advance.lexis.com/document/?pdmfid=1516831&crd=11b5665f-c924-4f71-b100-ce16a2572013&pdDocFullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A5TDP-OR21-JD3Y-Y13K-00000-00&pdDocid=urn%3AcontentItem%3A5TDP-OR21-JD3Y-Y13K-00000-00&pdContentcom>> accessed 7 October 2018.

targeted amount of GHC420,000 (about \$77,000).<sup>77</sup> How other candidates in the said race also raised their funds was equally unknown to the public.

Therefore, the 'political party bank' would offer a regulatory regime different from what is currently in place. For example, instead of people queuing to make donations, they could have gone to the NDC 'political party bank' to make donations if there was one. Similarly, other candidates in the NDC presidential candidacy election could have also received donations through the 'political party bank'. And this would have fostered open and fair competition even at the political party level. Again, it is likely that regulators could have disclosed each candidate's generated revenue through legally compelled reports of the 'political party bank'. But as there was no formal public disclosure, one is only left to conjecture.

The story also justifies the 'political party bank' in other areas, particularly incumbency abuse. As this story is about the major political party in opposition, it appears the ruling political party, New Patriotic Party (NPP), did not need the public to queue to make donations for its presidential candidate, being the sitting president. But the ruling political party equally required funds to finance its political activities, and its funding sources and donors were equally not disclosed publicly. In this state of information asymmetries and secrecies, speculations about incumbency abuse may not be far from the truth. The preceding discussion brings up the issue of securing public disclosure under the existing law. Indeed, as mentioned below, Article 55(14) of the 1992 Constitution requires political parties to disclose their revenues and assets publicly. The disclosure requirement needs to be tightened with negative and positive regulations, as seen with the BCRA of the US. It is such tightened regulations that the 'political party bank' offers.

This 'political party bank' idea, however, raises several practical issues. For example, one might want to know what the 'political party bank' would do differently to minimise or eliminate election finance corruption. There are also concerns about protecting depositors' deposits with 'political party banks' owned by political parties. Other issues include how a 'political party bank' would solve the election financing problem. For example, what are the funding sources; whether funds held by a 'political party bank' automatically vests in a political party, or whether a political party should obtain loans

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<sup>77</sup> In the 2020 presidential elections, the NDC presidential candidate lost, and one of the development thereafter was a circulation, especially on social media, alleging that the NDC had written to Electoral Commission for a refund of moneys deposited.

from its 'political party bank' to finance its political activities? There are also issues of potential conflict of interest.

### **Model Legislation for the 'Political Party Bank'**

The above practical issues about the 'political party bank' translate into finding the suitable legal infrastructure for the 'political party bank'. And in doing so, the broad legal issue here is the ideal legislative framework for the 'political party bank' or how should the 'political party bank' be created and regulated? Subsumed in this broad legal issue is the issue of whether the existing banking legislation already covers the 'political party bank'? If yes, to what extent? If not, whether other existing legislative frameworks address this 'political party bank'? Whether it is necessary to amend the current law, whether it is essential to enact new legislation, or whether the 'political party bank' ought to be left to the innovations of the common law?

We can immediately discard the option of leaving the 'political party bank' to common law innovations because it does not appear attractive. The reason is that the laws in most common law countries, perhaps aside from the UK,<sup>78</sup> are now in statutes<sup>79</sup> and that legislation is the preferred regulatory tool for most governments.<sup>80</sup> Thus, with the common law option out of the way, the discussion considers the other issues. Now, whether the existing banking legislation already covers the 'political party bank' and the extent of such coverage invariably rope in an examination of banking laws and the 'political party bank' below. This examination establishes that even though the current state of the banking laws is very expansive, they do not serve the purposes of the 'political party bank.' Similarly, as discussed below, other legislative frameworks like the electoral laws do not meet the needs of the 'political party bank.'

Therefore, the 'political party bank' model legislation would require either an amendment of the existing banking and electoral laws or entirely new legislation for the 'political party bank'. As between these two options, I argue that Ghana should enact new

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<sup>78</sup> See for example Mark Elliott and Kirsty Hughes, 'The Nature and Role of Common Law Constitutional Rights' in Mark Elliot and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing 2020) (Kindle).

<sup>79</sup> See FA. Bennion, *Understanding Common Law Legislation; Drafting and Interpretation* (Oxford University Press 2001) 5.

<sup>80</sup> See Helen Xanthaki, *Drafting Legislation; Art and Technology of Rules for Regulation* (Hart Publishing 2014) loc. 582 of 10782 (Kindle); For a general discussion of regulation, see Stephen G Breyer, *Regulation and Its Reforms* (Harvard University Press 1982) locs. 558 & 2458 of 7352 (Kindle); See also Robert Baldwin, Martin Cave and Martin Lodge (Eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 5–9; And see Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation; Theory, Strategy, and Practice* (Oxford University Press 2012) 105–136.

legislation for the 'political party bank' given the following discussion. Indeed, the ideal *ex-ante* rules for the 'political party bank' ought to achieve at least two objectives: positive disclosures and competitive campaign financing. It should also structure and define the respective roles and shared discretions of the Bank of Ghana and the Electoral Commission. Thus, the ideal 'political party bank' legislation should dovetail electoral and banking laws as well as access to information laws under the Right to Information Act, 2019 (Act 989). The Right to Information Act or Act 989 has elaborate provisions on the processes and procedures for accessing information, but they appear to impose less positive disclosure obligations on State institutions. Therefore, the next discussion is about the existing campaign finance and banking laws in Ghana, beginning immediately below with whether existing campaign finance law meets the needs of the 'political party bank' and then whether political parties can operate as banks under existing banking legislation?

### **Reforming Campaign Finance Law in Ghana**

As an emerging democracy, Ghana has constitutionalised its democratic politics, unlike some democracies.<sup>81</sup> Article 55 (14) of the 1992 Constitution of Ghana explicitly states: "Political parties shall be required by law (a) to declare to the public their revenues and assets and the sources of those revenues and assets; and (b) to publish to the public annually their audited accounts." Article 55(15) prescribes that only a citizen of Ghana may contribute or donate to a political party registered in Ghana. Article 55(3) also states as follows: "Subject to the provisions of this article, a political party is free to participate in shaping the political will of the people, to disseminate information on political ideas, social and economic programmes of a national character, and sponsor candidates for elections to any public office other than to District Assemblies or lower local government units." Interestingly, even though Article 55(3) encourages political parties in Ghana to sponsor candidates for elections, it is mute on State funding of political parties. What comes a bit close to State funding is Article 55(11), which provides that "The State shall provide a fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the State-owned media."

Similarly, Article 163 mandates "all State-owned media to afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions." These Articles 55(11) and 163 were the subjects of dispute in the case of *New Patriotic Party v Ghana*

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<sup>81</sup> See generally Richard H Pildes, 'The Constitutionalization of Democratic Politics' (2004) 118 Harvard Law Review 29.



*Broadcasting Corporation*<sup>82</sup> which occurred almost at the start of the life of the 1992 Constitution. In this case, the state broadcaster declined to give the then prominent opposition political party airtime to critique the government's budget statement. Earlier, the state broadcaster had given the Minister of Finance enough time to defend the budget both on radio and television. In a suit for declaratory judgement on Articles 55 (11) and 163 of the Constitution, the Supreme Court held unanimously for the opposition party then. With the liberalisation of the media space today, members of political parties are allowed to operate media businesses. Thus, one could expect a different outcome if the events above were to recur today. The point here is that no one sector can do everything and that both private and public sectors are needed on-board. Therefore, I argue that granting equal access to State owned-media is a tacit constitutional vision of State funding of political parties. But extending such funding to other areas is, however, the challenge.

During his maiden State of the Nation address in 2009, the late President Atta-Mills announced a Public Financing of Political Parties Bill (PFPP) that included the creation of an Election Fund for political parties and guaranteed funding for the Electoral Commission. This announcement also highlighted the role of civil society, notably the Institute of Economic Affairs (IEA). Under the IEA's "Ghana Political Parties Programme", political parties with seats in Parliament appear to have agreed to the need for the PFPP.<sup>83</sup> Others who seem not to support the PFPP rely on a perceived anaemic economy of Ghana.<sup>84</sup> Academics, however, continue to push for the PFPP, and student dissertations<sup>85</sup> are also not left out in the debate. Given the contextual challenges in political party financing in Ghana,<sup>86</sup> one scholar described the PFPP as outmoded

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<sup>82</sup> [1993-94] 2 GLR 354. See also SY Bimbong-Buta, *The Role Of The Supreme Court In The Development Of Constitutional Law In Ghana* (Advanced Legal Publication (ALP) 2005) 404–408.

<sup>83</sup> See Parliament of Ghana, 'State of the Nation Address by His Excellency John Evans Atta Mills, President of the Republic of Ghana' (2009) <[http://ir.parliament.gh/bitstream/handle/123456789/578/STATE\\_OF\\_THE\\_NATION\\_ADDRESS\\_2009.pdf?sequence=1&isAllowed=y](http://ir.parliament.gh/bitstream/handle/123456789/578/STATE_OF_THE_NATION_ADDRESS_2009.pdf?sequence=1&isAllowed=y)> accessed 21 October 2020.

<sup>84</sup> See The Finder Online, 'Funding of Political Parties Will Burden State – IFS | The Finder Online' (2016) <<https://thefinderonline.com/politics/item/5790-funding-of-political-parties-will-burden-state-ifs>> accessed 21 October 2020.

<sup>85</sup> See Kingsley S Agomor, 'Financing Political Parties Under the Fourth Republic of Ghana' (2015) <<http://ugspace.ug.edu.gh/handle/123456789/23401>> accessed 21 October 2020; See also Festus Owiredo Amankwah, 'Public Views on State Funding of Political Parties in the Upper West Region Ghana' (2015) <[http://udspace.uds.edu.gh/bitstream/123456789/668/1/PUBLIC\\_VIEWS\\_ON\\_STATE\\_FUNDING\\_OF\\_POLITICAL\\_PARTIES\\_IN\\_THE\\_UPPER\\_WEST\\_REGION%2C\\_GHANA.pdf](http://udspace.uds.edu.gh/bitstream/123456789/668/1/PUBLIC_VIEWS_ON_STATE_FUNDING_OF_POLITICAL_PARTIES_IN_THE_UPPER_WEST_REGION%2C_GHANA.pdf)> accessed 21 October 2020.

<sup>86</sup> See Kingsley S Agomor, 'Does Context Matter in Financing Political Parties? The Ghanaian Experience' (2018) 3 *Journal of African Political Economy and Development* 85; See also Kingsley S Agomor, 'Contextual Variables and Financing of Political Parties in Ghana' (2015)

because the political commitment was lacking.<sup>87</sup> President Mills announced the PFPP Bill together with the Presidential Transition Bill. But today, the Presidential Transition Bill is law, whereas the PFPP is still far from reality because sustained civil society advocacy led to the passing of the Presidential (Transition) Act 2012 (Act 845). Indeed, civil society is shaping the current understanding of the demand for positive law in Ghana,<sup>88</sup> especially as they continue to agitate concerning other governance laws like the Right to Information Act, 2019 (Act 989).<sup>89</sup> Thus, we can utilise civil society to press for PFPP law.

The legislative framework for elections in Ghana is loudly silent on political party financing. Sections 23 to 25 of the Political Parties Act, 2000 (Act 574) are the relevant laws. Section 23(1), titled 'Contributions by citizens', provides to the effect that only a citizen may contribute cash or in-kind to the funds of a political party. Section 23(2) effectively defines a citizen as a firm, partnership, or enterprise owned by a citizen or a company registered under Ghanaian laws, with 75% of its capital owned by Ghanaians. Section 24 headed 'No contribution by non-citizens', then outrightly proscribes a non-citizen from making contributions or donations or loans, whether cash or in-kind, directly or indirectly, to funds held by or for the benefit of a political party or its agents.

Meanwhile, Section 25(4) exempts donations made to the Electoral Commission of Ghana from foreign governments or non-governmental organisations. Section 25(1)-(3) then prescribes penalties for Section 23 and 24 violations. These include forfeiture of funds to the State and deportation under the Immigration Act, 2000 (Act 573). These provisions clearly show that the issue of campaign financing is given a very casual treatment by legislation. It is evident that penalties are very lenient, and it appears the law does not cover Ghanaian collaborators of the crime. By way of judicial measures, a publication by the Judicial Service of Ghana on election adjudication is very instructive on this point. This publication shows that the subject of campaign financing is yet to receive any judicial pronouncement. And that there is more focus on the judicial process for adjudicating electoral disputes at the national level, i.e., disputes about presidential

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<[http://orgs.bloomu.edu/gasi/pdf\\_documents/2015\\_Proceedings\\_pdfs/Agomor2CONTEXTUAL\\_VARIABLES\\_AND\\_FINANCING\\_OF\\_POLITICAL\\_PARTIES\\_IN\\_GHANA.pdf](http://orgs.bloomu.edu/gasi/pdf_documents/2015_Proceedings_pdfs/Agomor2CONTEXTUAL_VARIABLES_AND_FINANCING_OF_POLITICAL_PARTIES_IN_GHANA.pdf)> accessed 21 October 2020.

<sup>87</sup> See Edward (n 8).

<sup>88</sup> See William Burnett Harvey, *Law And Social Change In Ghana* (Princeton University Press 1966) viii, 12, 344.

<sup>89</sup> See Peace FM Ghana, 'RTI Coalition Reiterates The Need For Effective Implementation Of RTI Law' (*Peacefmonline.com*), 2020 <<https://www.peacefmonline.com/pages/local/social/202005/410714.php>> accessed 27 September 2020.

and parliamentary elections.<sup>90</sup> Therefore, the current state of the law on political party or campaign financing points to the need to consider improving this law. One suggestion is to regulate political parties as political banks with detailed regulatory requirements similar to banking laws. The following section, therefore, takes up the discussion of this matter.

### **Extending Banking Laws to Political Party Bank in Ghana**

Several laws regulate banking in Ghana, but the primary legislation is the Banks and Specialized Deposit Taking Institutions Act, 2016 (Act 930). The Banks and Specialized Deposit-Taking Institutions Act, 2016 (Act 930) (hence, Act 930) applies to specified financial institutions. These are banks, specialised deposit-taking institutions (SDTIs), financial holding companies (FHCs), and their respective affiliates. By way of a brief overview, Act 930 has 160 provisions addressing several matters. These include such administrative law matters as the review of decisions of Bank of Ghana (sometimes referred to as BOG henceforth) on licensing,<sup>91</sup> on official administration, liquidation and receivership by arbitration,<sup>92</sup> review of decisions through arbitration,<sup>93</sup> unclaimed balances,<sup>94</sup> prohibition of floating charge,<sup>95</sup> confidentiality obligations of officials and employees of BOG,<sup>96</sup> secrecy of customer information,<sup>97</sup> agreement for exchange of information,<sup>98</sup> disclosure of information to banks, SDTIs or FHCs,<sup>99</sup> report on trend and progress,<sup>100</sup> protection from liability and indemnification,<sup>101</sup> collection of civil penalties,<sup>102</sup> prosecution of offences and penalties,<sup>103</sup> joinder of offences,<sup>104</sup> general

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<sup>90</sup> See Judicial Service of Ghana, *Manual On Election Adjudication* (2nd edn, Judicial Service of Ghana 2012).

<sup>91</sup> Section 140

<sup>92</sup> Section 141

<sup>93</sup> Section 142

<sup>94</sup> Section 143

<sup>95</sup> Section 144

<sup>96</sup> Section 145

<sup>97</sup> Section 146

<sup>98</sup> Section 147

<sup>99</sup> Section 148

<sup>100</sup> Section 149

<sup>101</sup> Section 150

<sup>102</sup> Section 151

<sup>103</sup> Section 152

<sup>104</sup> Section 153

penalty,<sup>105</sup> regulations,<sup>106</sup> interpretation,<sup>107</sup> repeal and savings,<sup>108</sup> validity of existing licence,<sup>109</sup> transitional provisions,<sup>110</sup> and moratorium for transition.<sup>111</sup> Official administration,<sup>112</sup> receivership and liquidation<sup>113</sup> are also addressed under Act 930. And here, the requirements of the Companies Act, 2019 (Act 992), the Corporate Insolvency and Restructuring Act, 2020, (Act 1015), or any other enactment on corporate insolvency or liquidation no longer applies to the winding up and liquidation of an insolvent bank or SDTI.<sup>114</sup>

The question of whether 'political party banks' are covered under Act 930 also implies the sub-issue of whether political parties can or should operate banking business generally, especially as 'political party banks'? Section 23(1) of Act 930 outrightly proscribes the use of the word 'bank' by anyone in Ghana without authorisation under Act 930, as seen in the case of *Ex Parte Bank of Ghana and Others* above. Thus, the law permits only a company holding a banking licence under Act 930 to hold itself out as a bank, use the word 'bank', or any of its derivatives in the description or title under which it is carrying on financial services business in Ghana. Concerning this, the law also permits an association of banks or an association of bank employees formed to promote mutual interests of its members to use the word 'bank'.<sup>115</sup> Similarly, an SDTI licensed as a rural or community bank may use "rural bank" or "community bank". A contravention of this rule is an offence and attracts an administrative penalty of 1500 penalty units.<sup>116</sup> Section 156 of Act 930 defines a bank as a body corporate that engages in the deposit-taking business and has a banking licence according to Act 930. Section 156 of Act 930 also describes an SDTI as a body corporate that participates in the deposit-taking business and has a licence to engage in the deposit-taking business according to Act 930. Furthermore, Section 156 of Act 930 again defines an FHC as a company that controls a bank or a specialised deposit-taking institution subject to registration requirements under Act 930. Last but not least, section 156 of Act 930 defines an

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<sup>105</sup> Section 154

<sup>106</sup> Section 155

<sup>107</sup> Section 156

<sup>108</sup> Section 157

<sup>109</sup> Section 158

<sup>110</sup> Section 159

<sup>111</sup> Section 160

<sup>112</sup> Sections 107-122

<sup>113</sup> Section 123-139

<sup>114</sup> Section 138

<sup>115</sup> Section 23(2) of Act 930.

<sup>116</sup> Section 23(7) of Act 930.

affiliate of a company as; (a) a body corporate of which the company is a subsidiary; (b) a subsidiary of the company, or (c) a body corporate that is under common control with the company.

The preceding clearly shows that the ambit of Act 930 is vast. It is tempting to argue that it is permissible for political parties to apply to the Bank of Ghana to operate a banking business. It is also enticing to say that nothing stops a political party from applying to the Bank of Ghana for a licence to operate a banking business under Act 930 even though no political party has ever applied to the Bank of Ghana for a banking licence. Moreover, one may say that since the Political Parties Act, 2000 (Act 574) is loudly silent on political party financing, it appears the law permits such a move by a political party. Meanwhile, Sections 23(1) of Act 574 allows only a citizen to contribute cash or in-kind to the funds of a political party. And according to Section 23(2) of Act 574, a company registered under Ghanaian laws, which has 75% of its capital owned by Ghanaians, is a citizen. Furthermore, one may erroneously say that Section 156 of Act 930 covers every conceivable idea of deposit-taking, including the 'political party bank', under the rubric of SDTI, even if it is not a bank. Similarly, one may mistakenly suggest that the definition of bank and SDTI under Act 930 also covers companies that control a bank or an SDTI as a holding company of a bank or an SDTI or their respective subsidiaries.

But contrary to such possible erroneous suggestions, it is argued that a careful reading of the definition of bank or SDTI under Section 156 of Act 930 does not cover 'political party bank'. A close examination of the differences and similarities between a bank and an SDTI shows that the two appear to be essentially undifferentiated in their respective permitted activities, except for their nominal differences and separate licenses. Thus, by their different licences, a bank is a deposit-taking body corporate registered with a banking licence under Act 930. An SDTI is a deposit-taking body corporate registered under Act 930 with a deposit-taking institution licence. Thus, all banks in Ghana are deposit-takers, but not all deposit-takers in Ghana are banks. Another difference is that the law prohibits an SDTI from foreign exchange trading or services denominated in a foreign currency.<sup>117</sup> But the law requires banks and SDTIs to comply with other laws like the Securities Industry Act, 1993 (PNDCL 333), Foreign Exchange Act, 2006 (Act 723), the Credit Reporting Act, 2006 (Act 726), the Insurance Act, 2006 (Act 724) or any

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<sup>117</sup> Section 18(2) of Act 930.

other relevant enactment.<sup>118</sup> Again, the law forbids banks and SDTIs from dealing directly in a commercial, agricultural or industrial undertaking. They are not to build, purchase or take a lease of immovable property,<sup>119</sup> except with (a) provision of business premises or for housing staff of the bank or SDTI; (b) amenities for staff; and (c) acceptance of immovable property as collateral security. In addition, a bank or an SDTI has to ensure that it maintains a minimum paid-up capital in Ghana. This minimum paid-up capital must be unimpaired by losses, including accumulated losses or other adjustments prescribed by the Bank of Ghana for banks and SDTIs.<sup>120</sup>

Furthermore, much as the scope of Act 930 may appear to cover every conceivable deposit-taking business in Ghana, it does not cover credit unions licensed and supervised under the Non-Bank Financial Institutions (NBFI) Act, 2008 (Act 774). And understandably so because according to section 156 of Act 930, a credit union is a body corporate established as a co-operative and not-for-profit to provide savings, credit, and other financial services to members of that body corporate based on a common bond and linkage of association. Moreover, only Ghanaians are allowed to be shareholders of a deposit-taking microfinance institution.<sup>121</sup>

Now, a deposit-taking business means one of two things, namely, (a) taking money on deposit and making loans or other advances of money; and (b) financial activities prescribed by the Bank of Ghana.<sup>122</sup> One requires a licence issued under Act 930 before accepting deposits from the general public or carrying on a deposit-taking business in Ghana or from within Ghana.<sup>123</sup> And the Bank of Ghana has the discretion to prescribe classes of liabilities that constitute deposits.<sup>124</sup> Thus, Act 930 targets for-profit establishments in the financial service industry. Therefore, even if we accept that political parties can apply to operate banking businesses, I argue that they cannot do so under Act 930 unless they intend to set up a for-profit enterprise. And to operate as a profit enterprise would defeat the non-commercial public-oriented character of the political parties.<sup>125</sup> Similarly, requiring political parties to operate as a credit union under

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<sup>118</sup> Section 18(3) of Act 930.

<sup>119</sup> Section 19(1) of Act 930

<sup>120</sup> Section 28(1) of Act 930.

<sup>121</sup> Section 4(3) of Act 930

<sup>122</sup> Section 4(5) of Act 930

<sup>123</sup> Section 6(1) of Act 930

<sup>124</sup> Section 6(2) of Act 930

<sup>125</sup> Political parties are supposed to be national in character and must have broad appeal but asking that parties operate their own banks does not necessarily mean that they should be inward looking. Indeed, political parties do receive dues from their members as seen in one of the problematized stories above, and so channelling this through

the Non-Bank Financial Institutions (NBFI) Act, 2008 (Act 774) also defeats the purpose of raising funds to finance their political activities.

The preceding shows that the best option for regulating the 'political party bank' is to enact special legislation by dovetailing Act 930 and Act 574 for banking regulatory, supervisory requirements,<sup>126</sup> and directives.<sup>127</sup> But the most attractive benefit in extending banking laws to campaign finance laws is probably the potential benefits of minimum capital requirements for the operations of political parties. As banks, SDTIs, and FHCs are required, under Act 930, to maintain in Ghana a minimum paid-up capital, unimpaired by losses, I argue that the legislative intervention for the 'political party bank', should at the minimum incorporate such minimum capital requirements. In this respect, the BOG, or another regulator, will prescribe different requirements for 'political party banks' as a separate class of deposit-taking institutions. Similarly, such an arrangement may benefit from Act 930's calculation of impairment of paid-up capital.<sup>128</sup>

Another regulatory requirement worthy of note for the 'political party bank' is the BOG's power to require the restructuring of the ownership of bank or SDTI,<sup>129</sup> and its power to withdraw the registration of an FHC and to require divestiture of a bank or SDTI on stated grounds.<sup>130</sup> Similarly, the BOG may disapprove a proposed transfer of shares in the interest of sound and prudent management of a bank or SDTI and the functioning and stability of the overall financial system preventive measures.<sup>131</sup> Furthermore, in a merger application, the BOG may require a director or key management personnel of the applicant to furnish it with additional information or documents. And on receipt, it may consider the application and refuse or approve it<sup>132</sup> after considering some statutorily specified factors.<sup>133</sup> Again, the BOG also has the power to prescribe a cap on the ownership of banks or SDTIs.<sup>134</sup> But applying such a requirement to the 'political

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a 'political party bank' would not be anything strange. Instead, what is new is using banking and financial laws to bolster regulations.

<sup>126</sup> Section 97

<sup>127</sup> Sections 98 and 29.

<sup>128</sup> Section 28.

<sup>129</sup> Section 47

<sup>130</sup> Section 48

<sup>131</sup> Section 50

<sup>132</sup> Section 53

<sup>133</sup> Section 54.

<sup>134</sup> Section 51

party bank' would require shared discretion collaboration<sup>135</sup> between the Electoral Commission and the BOG.

Thus, the current state of Act 930 cannot apply to the 'political party bank'. Doing so will mean adopting stand-alone legislation to cater to the needs of the 'political party bank'. In one notable example, Act 930 provides that a person who wants to carry on a deposit-taking business either in Ghana or from within Ghana must first satisfy the requirement of being a body corporate under the laws of Ghana.<sup>136</sup> Thus, the law automatically disqualifies an individual from carrying on a deposit-taking business in Ghana or from within Ghana. Only companies qualify, and this extends to political parties as corporate bodies. But it is also evident that several licensing requirements would not make sense when applied to the 'political party bank.' For instance, the location of the deposit-taking business is interesting as regards political parties. The targeted setting of the deposit-taking business is both in Ghana and from within Ghana. Thus, one can accept deposits made locally in Ghana and outside Ghana whilst the recipient is physically present in Ghana. Hence, the law implicitly proscribes a recipient physically located outside Ghana from accepting deposits made in or from within in Ghana, except under the Foreign Exchange Act, 2006 (Act 723). Allowing political parties to operate banking businesses under Act 930 as it is now might violate Act 574 as they are likely to receive deposits from non-citizens.

Again, it is evident that the ownership requirement under Act 930 is likely to create several property rights problems unhealthy for bank bargains in Ghana. Moreover, for the operations of political parties, such capping of ownership of the 'political party bank' may not align with the democratic character of political parties, especially in mergers between political parties.<sup>137</sup> But it would help in knowing who controls the 'political party bank', and the application of such requirements ought to be modified to meet the democratic character of the 'political party bank', especially as corporate governance is

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<sup>135</sup> Borrowing the term 'shared discretion' from John D Donahue and Richard J Zeckhauser, *Collaborative Governance: Private Roles for Public Goals in Turbulent Times* (Princeton University Press 2011).

<sup>136</sup> Section 4(1) of Act 930

<sup>137</sup> For instance, under Section 52, one can only enter into an agreement or an arrangement to (a) sell or dispose or transfer either the whole or a part of business of a bank, SDTI, or FHC, (b) amalgamate or merge a bank, SDTI or FHC with any other bank, SDTI, or FHC, (c) reconstruct a bank, SDTI or FHC, by submitting an application on the proposed agreement or arrangement for the approval of BOG. And the BOG has six months from the date of receipt of the complete information to communicate its decision. Section 55 also provides to the effect that where BOG has proof of non-compliance it can, by order, (a) annul the transfer, merger, amalgamation or reconstruction, (b) prohibit the exercise of voting rights in respect of the shares; (c) prohibit the payment of dividend in respect of the shares; and (d) prohibit the issue of 'bonus shares' or 'right issue' in respect of the share



on the rise.<sup>138</sup> And in this respect, it is gratifying to note that Act 930 tasks the BOG to prescribe rules regarding any matter of corporate governance of a bank, SDTI or FHC that it considers necessary or appropriate to ensure prudent operation.<sup>139</sup>

## Conclusion

By contributing to the debate on political party financing, this paper dovetails banking and electoral laws together through the 'political party banks' in Ghana. This dovetailing is necessary to ensure effective ascertaining of political parties' membership and funding and detecting and shaming incumbency abuse through disclosure regulation<sup>140</sup> since unapproved sources of finance for political parties are key drivers of corruption.<sup>141</sup> Furthermore, such legislation would help avoid situations where some political parties, particularly incumbents, can entrench their positions and thus stultify competition<sup>142</sup> through cartels.<sup>143</sup> Indeed, worldwide, democracies are grappling with the issue of State funding of political parties. And the several campaign finance systems are a mixed bag of approaches. Thus, this paper calls for vigorous competition among political parties with the 'political party bank'. The argument is that we can adopt special rules for the 'political party bank'. And to this end, the ideal 'political party bank' legislation should, for example, require the 'political party bank' to furnish the BOG<sup>144</sup> and the Electoral Commission with a report listing its contributors or members. Doing so would help in

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<sup>138</sup> See Deborah Hicks Midanek, *The Governance Revolution: What Every Board Member Needs To Know, Now!* (Walter de Gruyter Inc, 2018) loc. 563 of 7573 (Kindle), noting an increased global focus on corporate governance following the 2008 financial crisis.

<sup>139</sup> Section 56

<sup>140</sup> See Baldwin, Cave and Lodge (n 80) 119.

<sup>141</sup> See The Private Sector Anti-Corruption Group (PSACG), 'Policy Paper on Corruption and Business in Ghana: Towards a Better Anti-Corruption Agenda (Submitted to the Government of Ghana)' (2019) 26 <[https://ukgcc.com.gh/wp-content/uploads/2020/07/PSACG\\_Final-Policy-Document\\_2019.pdf](https://ukgcc.com.gh/wp-content/uploads/2020/07/PSACG_Final-Policy-Document_2019.pdf)> accessed 21 October 2020.

<sup>142</sup> See for example Richard Heffernan, 'Political Parties' in Matthew Flinders and others (eds), *The Oxford Handbook of British Politics* (Oxford University Press 2010) 441–446; See also Peter Mair, 'The Party System' in Matthew Flinders and others (eds), *The Oxford Handbook Of British Politics* (Oxford University Press 2010) 289–295.

<sup>143</sup> See generally Daniela R Piccio and Ingrid van Biezen, 'Political Finance And The Cartel Party Thesis' in Jonathan Mendilow and Eric Phelippeau (eds), *Handbook Of Political Party Funding* (Edward Elgar Publishing Ltd 2018).

<sup>144</sup> In Section 49, one cannot, without the prior written approval of BOG, directly or indirectly, either alone or in concert with others; (a) acquire shares in a bank, SDTI or FHC, which in total constitute significant holding, (b) increase the ownership interest in a bank, SDTI, or FHC, if aggregate ownership interest after the increase, would exceed any one of following supervisory thresholds of 5%, 10%, 20%, 30%, 50% or 75% of equity, (c) sell or dispose of shares in a bank, SDTI, or FHC, if as a result of the transaction, the shareholding will fall below any one of following supervisory thresholds of 5%, 10%, 20%, 30%, 50%, (d) enter into an agreement which will result in a change in the control of an FHC.

weeding out political parties that are criminally inclined. It would, *ex-ante*, also incentivise voters to know about the economic management capabilities of a political party before they give the responsibility of managing the national economy to such a political party at the polls.

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