

Constitutional Economic Considerations for Safeguarding Critical-informative Journalism

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Abstract: Modern journalism exhibits strong tendencies toward market failure. In recent decades, cases of fraud, manipulation of information, inaccurate research, and fake news have repeatedly been published. This article explores possible solutions based on constitutional economic considerations. It demonstrates that a societal effort is needed to strengthen journalism as a democratically important communication channel so that it comprehensively serves the social welfare of society.

Keywords: Journalism; Market failure; Solutions; Social welfare; Democracy

1. Introduction

Serious problems in journalism have been evident for decades. Renowned media companies such as the *Washington Post* and the *New York Times* have faced widespread fraud by their reporters. Janet Cooke is a case in point. She received a Pulitzer Prize in 1981 for an article written for The Washington Post. The story was later discovered to have been fabricated and Cooke returned the prize (Sager, 2020). Jayson Thomas Blair, a former American journalist who worked for The New York Times, *resigned* in May 2003 from the newspaper following the revelation of fabrication and plagiarism within his articles (Blair, 2004).

In 1983, a renowned news magazine in Germany even published what appeared to be Adolf Hitler's diaries (Hamilton, 2021). After extensive publication,

these diaries turned out to be plagiarism. Hitler never wrote diaries. The editors had failed to conduct an adequate review process. The list of journalistic misconduct is almost endless. Given this possibility, it can certainly be argued that journalism in modern, open, democratic societies exhibits tendencies toward market failure.

But how can one respond to this? How can a regulatory system be created that safeguards critical, informative journalism as an important institution in Western, democratic societies? This article presents possible solutions based on constitutional economic considerations.

2. Theoretical Framework: The Constitutional Economics

Constitutional economics deals with the rules intended



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to protect institutions (choices within rules). Thus, it is not about a classical legal constitution, but rather the constitution of an existing system of rules. Constitutional economics is "a practical science because it analyzes the functional properties of different rules and provides affected citizens with factual arguments for evaluating different rules and systems of rules" (Märkt, 2002, p. 2). "While traditional economics views rules as restrictions or environmental conditions within which individuals attempt to improve their situation, for the constitutional economist, rules do not represent immutable constraints. The constitutional economist seeks rules that, assuming individual moves, lead to a better outcome pattern for all participants and result in mutual improvement" (Märkt 2002, p. 3).

From a constitutional economic perspective, it is necessary to examine the extent to which reflexive regulation of action might prevail among journalists, i.e., whether there might be a simple, intentional action that is not freely chosen, thus placing the actors in a moral dilemma. Or, to put it another way: It is necessary to question the extent to which journalistic action falls outside an institutional framework and what solutions (new sets of rules) may need to be found. A first step in this regard would be to classify the issue from a media ethics perspective, and a second step would be to address possible solution strategies based on a comprehensive quality management system (i.e., a draft of a new/modified set of rules).

3. The Powerlessness of Individual Responsibility

The ethical responsibility of journalistic action is often linked to the moral obligations of journalists. Even if personal responsibility appears important as an individual regulatory mechanism, attributing responsibility to the individual is highly problematic in such a highly complex institutional situation. "An ethics—like formalized law—assumes (...) that an individual is always responsible. Actions must be individually attributable if moralization is to take effect. This, in any case, is the basis for a 'liability responsibility' that is guided by Max Weber's ethics of professional action." (Weischenberg, 2004, p. 173) Such liability responsibility is often rejected by journalists because they find it difficult to be held accountable for the effects of their reporting

(Weischenberg, 2014). Instead of an ethics of responsibility, they see themselves as committed to an ethics of conviction. Thus, they refer to the correctness of their professional actions and not to the effects of their reporting. This is understandable, as a connection between reporting and its effects is difficult to prove (many intervening variables play a key role). However, it also often implies a carelessness regarding welfare-economic and thus individual aspects (such as respect for human dignity).

Therein lies the problem with ethical guidelines. They strongly rely on the autonomous behavior and decision-making power of individuals. However, in most cases, this power is not present and is not anchored in the individual's moral mindset. There is only partial decision-making power. "The reason for the failure of self-regulatory authorities is that the moral behavior of individuals is exploitable due to internalized norms in the new dilemma structures (competition, individualization) that characterize modernity and thus cannot remain stable." (Homann & Suchanek 2000: p. 460)

A sole focus on ethical theories in the sense of principles of right action is therefore problematic. Self-commitment and social responsibility as ethical and professional standards and sole measures fall short – even if they are important aspects. Fengler & Ruß-Mohl draw attention to an interesting aspect in this regard: "With regard to the effectiveness of moral appeals, one can therefore (...) draw a sobering conclusion: '(...) in a world of utility-maximizing actors, it is not ethics but 'conditional cooperation' that leads to success.'" (Fengler & Ruß-Mohl 2005, p. 191) A more comprehensive approach to a solution could be transparency between different reference groups that allow for a basic economic model (through transparent quality standards) and, in doing so, anchor an institutional moral concept and moral action as strongly as possible.

In journalism, such media ethics as business ethics appears to be particularly relevant due to its strong economic foundation. Furthermore, media ethics appears to be important in journalism and media management as two closely intertwined groups of actors. It is therefore necessary to find an approach that overcomes the "structural incompatibility" of "ethical reason" and "instrumental-rational wisdom" (Karmasin,

1999, p. 345). Applying utilitarianism appears difficult in this context, as it is very narrowly focused on the needs and responsibilities of a reference group. However, in journalism, numerous groups of actors are increasingly interacting, and their respective needs and responsibilities must be taken into account if one wants to analyze norms for the practical actions of and in media (organizations) and address possible standards. Given the internationalization and globalization of the media market, this appears all the more important. “The fact that the boundaries of (media-mediated) reality are increasingly approaching the boundaries of the market, the economic causes and consequences of globalization and internationalization (...), the relationship between market and state, and the conditions of production of reality are thus not sufficiently reflected in media ethics.” (Karmasin, 1999, p. 345)

In summary, from a media and business ethics perspective,

- “the relationship and ethical conflicts of and between ethical and economic rationality and normativity are reflected and analyzed,
- ethical responsibility has been expanded from individual ethical responsibility, which was long primarily assumed of journalists, to include those acting economically (e.g., media managers) and ultimately the media company as an ethically responsible actor,
- the interface between business and media ethics is consistently addressed (...),
- and initial proposals for the operational and organizational implementation of ethical reflection processes that are not exclusively aimed at individual reflection are available.” (Kamarsin & Krainer, 2016, p. 231)

The stakeholder management approach offers such a media and business ethics perspective. This seems particularly important in journalism, as we are dealing with a strongly economically motivated profession that is still mired in an unresolved dilemma. “Many appeals to the morals and ethics of media professionals are ineffective because existing institutions, especially media companies and editorial staff, encourage benefit-maximizing journalists to engage in countervailing behavior with incentives (...). In case of doubt, more effective than all attempts at regulation are economic incentives in the broadest sense, which include not only money and monetary benefits, but also increases

in attention, reputation, etc.” (Fengler & Ruß-Mohl 2005, p. 195) Or as Homan & Suchanek (perhaps somewhat exaggeratedly) put it: “The only control that functions seamlessly and cost-effectively under the conditions of the modern world is self-control based on incentives: The control of modern societies is increasingly achieved through incentives, through the institutional design of the conditions that guide individual advantage/disadvantage calculations.” (Homan & Suchanek 2000, p. 461)

4. Stakeholder management as a practical integration of ethical and economic rationality

The stakeholder approach is essentially about the “need to include all (legitimate) stakes and interests in business and organizational decisions, including ethical issues.” (Kamarsin & Krainer 2016, p. 232) Various organizational proposals have been put forward for this. “Taking them all into consideration, it is about ensuring that all stakeholders affected by ethical decisions have the right to participate in ethical decision-making, and at the same time, it must be ensured that the decisions made are subject to regular review (evaluation).” (ibid.) This can lead to contradictions and tensions between the stakeholders. “Serious stakeholder management recognizes contradictions and conflicting interests and seeks opportunities to engage with pluralistic stakeholders.” (Kamarsin & Krainer 2016, p. 232) Not only strategic stakeholders but also non-strategic stakeholders are included in the analysis, so that we are not dealing with economic interest groups here, but with an economic and social actor construct. “Stakeholders or (strategic) stakeholder groups can therefore be understood as all directly articulated (and organized) interests or environmental influences that are brought to the attention of the company and all those interests that are (or could be) affected by the company’s actions.” (Karmasin 1999, p. 355f.)

Ethical arguments such as responsibility and justice play a key role here, as do arguments based on success. The idea of the “quasi-public value creation event” or the “economic citizen society” is of great importance. This means that stakeholder concepts (...) (enable) the ex ante involvement of social stakeholders in the decision-making process and (...) enable ex post control and feedback (Karmasin 1999, p. 357). In

doing so, 1) the rules of discourse, 2) the concession of significant arguments to others, 3) the attempt to argue rationally, and 4) openness and self-reflexivity (transparency) must be ensured (ibid.). Such a task can be implemented through molar quality management.

It seems important to “overcome the simple juxtaposition of market and state, while also avoiding the superficial category of ‘market failure,’ which then suggests an equally simplistic bias in favor of ‘politics.’” Rather, it is more important to mobilize and strengthen the economic conditions of self-regulation and the ability to organize oneself.” (Ladéur 2000, p. 459) “Ultimately, it is not about setting tighter limits on the media in the interest of ‘truth,’ but about the concept of ‘risk management.’” (Ladéur 2000, p. 458) Liability privileges or exemptions must be justified/earned accordingly. In this context, Ladéur points out that many media goods have become trust goods because direct experience with the objects of reporting is no longer available. Experience has been devalued and replaced by a “reflexive moment of self-observation” (Ladéur 2000, p. 459). “Standards of quality must be produced and experimentally developed in the process of producing goods and services.” (ibid.) In this case, this would be a self-observation and self-reflection of journalism, which is currently not apparent.

Even though media ethics aspects are certainly of great relevance to actors and their institutions, expanding media ethics as business ethics to include another level seems sensible: quality management.

5. Quality Management with Special Consideration of Journalism

The following interest groups can be identified as key stakeholders in journalism. Directly affected stakeholders are the reporting subjects (and their intermediaries (agencies)) as well as the editorial team. Media management and the advertising market can be considered primarily economic stakeholders. The audience, politics, and the legal system can be considered more journalistic stakeholders.

The various stakeholders' interests can be served in three areas of quality management: A. media; B. legal; and C. political quality management. All three areas must be intertwined and have reflexive structures. Content controls must be prevented, but their quality during production must be ensured.

For all areas, it is important to create the greatest possible ex ante and/or ex post transparency. This visibility is important in the B2B, B2C, and B2B2C sectors. Furthermore, quality criteria should not necessarily be aligned, but should be presented as transparently as possible. This allows cooperation to be rationally justified and concluded and the moral risk of individual actors to be minimized.

5.1. Media Quality Management

In media quality management, it is striking that many measures have been taken (out of necessity) by individual actors. Such measures include new voluntary commitments, guidelines and directives, the establishment of ombudsman offices and hotlines, the strengthening of documentation and verification units, editorial ethics training, and thus a sense of (ethical) responsibility. However, such ad hoc measures cannot be described as sustainable quality management. These are individual measures taken sporadically (and usually on a short-term basis) by individual actors. Comprehensive media quality management, however, requires sustainable quality standards that are transparent to external stakeholders, as well as standards that do not limit but, at best, promote economic benefits. In this regard, some measures are important, ideally implemented, managed, and monitored by the industry. For example, establishing recommendation systems for other providers can be useful. A mutual (independent) recommendation system can create greater trust in the industry overall. Other providers in a business model could also benefit from an independent recommendation (e.g., Twitter, Facebook), and another business model could be established. Industry-wide self-regulation and self-commitment regarding quality standards also seem possible. The creation of independent units to review content (e.g., academic units) is also possible.

Documentation and verification units (not located within the respective media company) are being considered. Thus, self-commitment/self-regulation can only prove successful if “a consistent separation of recommendation systems and content production on the one hand, and the rest of the company on the other” is implemented (von Engelbrechten-Ilow 2023, p. 201). Each media unit can ensure its economic and journalistic positioning through additional screening,

signaling, scanning, monitoring, and reporting systems. Internal and external control seem to be important in their interplay.

A repositioning of content regarding information gathering and processing could be helpful from an economic perspective. With digitalization, the pressure to be up-to-date has increased significantly. “The more frequent the updates, the weaker the journalistic selection. Periodicity forces selection and weakens the influence on attention-oriented metrics.” (von Engelbrechten-Illow 2023, p. 173) Through critical classification (secondary topicality), reference groups become aware of the added value and minimize the moral hazard associated with poor quality information processing. Through auditing by independent bodies and quality circles with the most important stakeholders (audience monitoring is also possible here), quality standards can be developed and their implementation monitored. Such measures allow for strong transparency, which can lead to (new) trust building and appear economically viable.

Other options, which can be implemented less in terms of content than in terms of communication strategy, are brand policy as a way of building trust, as well as licensing, franchising, and certification. “Numerous institutions arise to counteract the effects of quality uncertainty. One obvious institution is guarantees. (...) A second example of an institution which counteracts the effects of quality uncertainty is the brand-name good.” (Akerlof 1970, p. 499) Akerlof is thus referring to the possibility of licensing, franchising, and certification as quality assurance. Certification through quality seals is possible in all areas of journalism. Licensing conditions are conceivable in the entertainment production service sector of sports journalism. The idea of franchise systems can be related to brand management.

5.2. Legal quality management

A journalistic welfare economics approach is still severely hampered by the currently limited legal framework. Numerous opportunities arise to place low-quality information on the attention market without facing legal prosecution. Media freedom, which can be considered a special privilege, is not tied to any obligations regarding media quality. There are certainly opportunities to combine these privileges with a

system of (self-)evaluation. Constitutional amendments regarding liability standards and due diligence requirements could be made. Higher compensation claims are also a possibility. Since transparency is a central problem of media and journalistic production and distribution, it also seems sensible to legally require transparency disclosures, while ensuring the protection of informants (see also political quality management on the following pages). It is entirely understandable to impose special legal obligations on nationally limited journalism that is editorially institutionalized in media organizations, as these are professional media units that have a special cultural relevance.

Such legal anchoring, which must not influence the selection of content, can provide economic revenue opportunities in times of internationalization and digitalization. Since 2022, the “Digital Services Act” stipulates that, according to Article 8 of the Digital Services Act, there is no general obligation for service providers to “monitor the information they transmit or store or to actively investigate circumstances that indicate illegal activity.” This case law is of interest for media quality management, as it was not previously the case as long as a digital platform moderated recipient contributions (cf. von Engelbrechten-Illow 2023). This new platform privilege now makes it possible for journalistic providers to engage in greater (co)production with recipient content and to act as moderating information producers. This has made secure community management possible.

5.3. Political Quality Management

The aforementioned media and legal quality management measures result in numerous restrictions for sports journalists. Accordingly, political measures that can create an economic incentive system seem sensible. Constitutionally, the state is subject to strict limits on media funding. The state may not influence editorial decisions. However, according to the Federal Constitutional Court, tax incentives may be granted to support diversity of opinion. Funding criteria include journalistic purposes (e.g., through voluntary commitments, press codes) and institutions for voluntary self-regulation. Media quality management would thus provide argumentative support for state quality management. Furthermore, a journalistically and editorially designed offering is considered a

funding criterion. “Journalistically and editorially designed offerings are characterized by a certain degree of selectivity and structuring, the selection based on their assumed social relevance, a focus on facts (factuality), a high degree of topicality, a high degree of professionalism in their working methods, and a certain degree of organized consolidation.” (von Engelbrechten-Ilow 2023:170) Sports journalism, which is nationally limited and editorially institutionalized in media organizations, meets these criteria.

If the above criteria are demonstrably met, it is possible under the Income Tax Act (EStG) to “credit donations for charitable purposes against taxable income. The classic case is a donation to a non-profit organization.” (von Engelbrechten-Ilow 2023, p. 177)

In journalism, the largest client is still the press, which is particularly at risk. One possibility would be press subsidies by guaranteeing newspaper subscribers a discount on the broadcasting fee. This could regulate the strong market power of public broadcasters and increase the likelihood that end consumers receive multiple opinions from (mutually) independent journalistic institutions. The likelihood that a few broadcasters will be received to the extent that a

diversity of opinion would emerge is considered to be lower. A digital journalism platform could also be helpful in this regard (von Engelbrechten-Ilow, 2023, p. 190f.). A similar option to offsetting the broadcasting fee is offsetting the tax liability against subscriber costs.

Selection algorithms can be geared toward optimal diversity of opinion and the greatest possible transparency can be created in this regard. “To enable better control of the algorithms, journalistic platforms can be required to publish the criteria used for ranking—i.e., aggregation, selection, and presentation—and to provide academics with access to the algorithms (transparency).” (von Engelbrechten-Ilow, 2023, p. 200). The editorial team is consistently separating itself from the corporation.

So far, platform providers in Germany have been able to use news as content without (adequate) remuneration. The legal basis for strengthening journalists’ copyright and related rights exists in Article 15 of the Copyright Directive, but has yet to be adequately implemented at the national level (von Engelbrechten-Ilow, 2023).

A tabular classification of the various measures can be done as follows:

Table 1: Molar quality management as an economic-journalistic solution approach

A. Media Quality Management	<ul style="list-style-type: none"> - Self-regulation / Self-commitment - Self-evaluation - Auditing - Ombudsman offices - Hotlines - Journalistic guidelines (organization & association) - Development of quality standards - Reducing information asymmetries through screening, signaling, monitoring, and reporting - Division of labor (differentiation/splitting) of information and entertainment production - Stakeholder control - Audience control - "Quality circles" - (Ethical) understanding of responsibility - Ethics training - Platform moderation - Increased periodicity (secondary topicality) - Aligning selection algorithms to ensure optimal diversity of opinion and transparency - Collaboration with academia - Establishing recommendation systems for other providers (industry regulation) - Branding (brand policy) - Certification, franchising, licensing
B. Legal Quality Management	<ul style="list-style-type: none"> - Combining media freedom, especially freedom of reporting, with a system of (self-)evaluation - Constitutional amendments regarding liability standards - Constitutional amendments regarding due diligence obligations/requirements - Higher claims for damages - Compliance with the public service mandate - Obligation to provide transparency information - Tightening of ancillary copyright law (implement Article 15 of the Copyright Directives nationally)

Continuation Table:

C. Political Quality Management	<ul style="list-style-type: none"> - Press councils - Incentive systems through (financial) subsidies - "Artificial" supply of reflective knowledge - External evaluation (Stiftung Medientest/Weizäcker Commission) by an independent institution - Funding through professional training and research - Reduced VAT rate & equal tax treatment with political party donations - Offsetting against the broadcasting fee and/or offsetting against tax liability
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6. Conclusion

In order to examine the extent to which journalism can operate within the existing framework, a reflection on media and business ethics was undertaken from a constitutional economic perspective. It was made clear that a uniform and currently existing moral concept(s) is neither realistic nor productive, especially since it contradicts pluralistic values and potentially overemphasizes individual freedom of action in a complex working environment.

Even though journalists' moral attitudes are important, it is important to find a molar approach that pursues media and business ethics premises and integrates various social institutions to improve the status quo of journalism. It is clear that multi-layered, multi-institutional quality management is crucial to counteracting existing problems. Media ethics aspects are important in this context, but only as one piece of the puzzle in a larger overall context.

The theoretical considerations presented in this article lead to the overall conclusion that a new institutional framework must be created for journalism so that it can not only continue to exist in the future, but also fulfill its core tasks better than in its current crisis-ridden state. A new institutional framework does not appear to be able to develop from within journalism itself; rather, a societal-wide approach that installs a new media, legal, and political quality management system seems promising. Resolving the crisis-ridden state of journalism, which in many areas shows a tendency toward market failure, can probably only be solved as a societal task. However, it appears solvable without having to resort to a merit-based, less economic basic structure or making dangerous, democratically endangering interventions in the autonomy of journalism. Rather, an economic basic structure is possible, one that promotes journalistic quality through incentive systems.

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