

## THE CURIOUS CASE OF THE CODE

### A Marxist Analysis of the Australian News Media and Digital Platforms Mandatory Bargaining Code

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**Abstract** This paper critically examines the Australian News Media and Digital Platforms Mandatory Bargaining Code, a regulation which mandates negotiated remuneration between large digital platforms like Google and Facebook and news media businesses. Adopting a Marxist lens, it analyses the interplay between economic interests, law-making and ideological narratives in the development of the Code. It considers how the Code, initially intended to address economic and power imbalances between news media and tech giants like Google or Facebook, ultimately reflects the economic imperatives of these platforms. The practical impacts of the Code on journalism, democratic society and digital platform regulation require further research.

*Keywords: Digital Platform Regulation, Law, Technology, Marxism, Interdisciplinary*

## I. Introduction

The controversy surrounding the News Media Bargaining Code (hereafter, “the Code”) presents a curious case study. The developments explored in the following paper, cover the journey of a contentious legislative proposal (the Code) in Australia, from its initial draft to its final enactment as law. The objective of the draft Code was to address the imbalance in bargaining power between Australian news outlets and two major technological players, Google and Facebook, by compelling these platforms to compensate news publishers for hosting their content, enforced through mandatory third-party arbitration. Both Google and Facebook initially criticised the draft Code as “unworkable” (Facebook, 2020, p. 6). Yet, despite intense debate, it gained approval from the Second Chamber of the Australian Parliament. In response, Facebook “went dark” temporarily blocking all news content (and more) in Australia. The Government continued to negotiate, and amendments with concessions to the bill were drafted. Eventually, both Facebook and Google acquiesced and the amended bill became law. However, they ultimately circumvented the Code’s application through an “exception”, i.e., by forming private agreements directly with major news outlets instead (Bailo et al., 2021; The Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021, 2021). Thus, the final Code does not presently apply to any news companies, but it leaves a door open for such a possibility.

The challenges posed by digital platforms to journalism tend to revolve around the economic (e.g., the free use by platforms of content produced by news media, algorithmic ranking on platforms determining the visibility and monetisation of news, etc) and the societal value of news (e.g., freedom of information and pluralism of the media) (Hendricks & Vestergaard, 2019). Such challenges extend far beyond Australian borders, and these globally relevant issues are growing as regulators grapple to govern the novel powerful digital entities (Colangelo, 2022). To understand these multi-faceted issues, employing an interdisciplinary approach incorporating sociological, economic and legal perspectives is valuable. The case of the Code, with its intersection of societal interests, economically powerful actors and the legal process serves as an example of the necessity for this multifaceted analysis. This paper aims to contribute by analysing the legislative development of the Code using a Marxist lens. The central hypothesis is that *the Code is shaped by economic interests, dressed in ideology, and sustains the influence of capital*. This will be scrutinised in a systematic manner, beginning by outlining the theoretical framework underlying the analysis. Subsequent sections delve into the elements of the hypothesis: the impact of economic interests on the Code’s design, the ideological dimensions inherent in the Code, and finally, the Code’s function in sustaining the supremacy of capital.

## 2. Theoretical Framework: Marxism

Marx and Engels did not focus much on law in their writings, which were mainly about historical and economic movements (Stone, 1985). For Marx, law was one of the tools used by the elite in a capitalistic economy, and legal change was driven primarily by class conflict. Multiple scholars have built on the basic tenets of Marxian theory, with widely varying interpretations (Sutton, 2001, Chapter 3). For this paper, in addition to Marx's model, a few of these themes are selected and introduced in the following subsections to form a theoretical toolkit.

This combination allows the paper to highlight nuances that would be missed if only a purely essentialist classical model was applied (Spitzer, 1983). Using this broadened Marxist lens on the development of the Code helps highlight relationships between economic considerations and the law that might be missed when looking through sector-specific approaches (e.g., doctrinal research).

### 2.1 The Base-Superstructure Model

Marx uses the base-superstructure dichotomy to describe societal structure, dividing it into the *base*, comprising forces and relations of production, and the *superstructure*, which encompasses societal institutions like law, religion and morality (Stone, 1985; Hunt, 2010). The *forces of production* include technology, organisational structures of production and human skills, while the *relations of production* involve ownership and class dynamics between the bourgeoisie and the proletariat (Sutton, 2001, Chapter 3). The superstructure follows from, is formed by, conforms to, and reinforces the economic base. Thereby, law is not an abstract neutral entity, but a dominant ideology shaped by the capitalistic base in favour of the elite (Hunt, 2010). For example, law creates concepts, like private property, and the state—legitimised through the rule of law—enforces these concepts (Spitzer, 1983).

This model comes dangerously close to economic/instrumentalist determinism. However, a softer model was sometimes adopted by Marx and developed by subsequent Marxist scholars (Spitzer, 1983). In this “softer determinism” the superstructure is allowed relative autonomy, in that elements (including law) can interact amongst themselves as well as “react back” on the economic base. Nonetheless, the economic base is the final determinant in the long run (Hunt, 2010). This theory forms the backbone of the paper, and three key concepts that are particularly relevant for analysing the Code are outlined below.

### 2.2 Ideology and Hegemony

In cases where society is not a direct reflection of the economic base but is indirectly linked to it, such as in modern Australia, *ideologies* (political, moral, or

legal) play an important role in obscuring the links. Law is special in that it is both ideologically constructed and, due to its general legitimacy, acts as a dominant bearer of ideology (Arthur et al., 1970; Hunt, 2010).

Legal ideologies are part of the unconscious, so law is not only external regulation but actively shapes the arena in which social relationships occur (Althusser, 1969). Indeed, ideologies are not obviously visible but instead constitute different elements (such as concepts and ideas) which function as frameworks that (re)order thought. Such a view encourages a closer analysis of the *content of law*, to look below its seemingly impartial black-letter surface at the underlying elements of social, political, and economic influences and conflicts (Hunt, 2010).

The *form of law* (e.g., property rules) is seen both as a product of capitalist economics and intertwined with core societal values like democracy and individualism, enhancing its role in legitimising capitalism subtly (Hunt, 2010; Kennedy, 1979). Deciphering legal ideologies, whether conveyed through content, form, or both, is important as they might help legitimatise capitalistic repression through a “logic of obfuscation” despite appearances to the contrary (Kennedy, 1979, p. 220). This concept is used mainly to analyse the ideological goals of the draft Code version in part 3.2 of this paper.

The main aim of dominant ideologies is to solidify social formation under the leadership of the dominant class, through consent (Hunt, 2010). Thereby, both the elite and disadvantaged groups consent, the latter to their subordination, because both groups share similar values. This is termed as *hegemony*. Law performs a key role in this project because every group encounters it (Akhtar, 2015). Hegemony is used to understand the general acceptance of the underlying structure of data economy by users who consent to it in part 3.3 of this paper.

### 2.3 Alienation

Marx views alienation, i.e., individuals losing control over their creativity under capitalism, as fundamental to social institutions. This leads to a gap between the potential of individuals and the actual realisation of it, stemming from warped social relationships. Consequently, workers face fragmented identities and often resort to consumption to reclaim their sense of self (Sutton, 2001, Chapter 3). This concept is applied in relation to social media users who are alienated from their data in part 3.3 below.

### 3. The Code

Now that a toolkit of relevant Marxist concepts has been established, it can be used to analyse the case of the Code. This will be done in three sections, (i) economic interests, (ii) ideology and (iii) influence of capital.

#### 3.1 Economic Interests

This section explores how economic interests and shifting power dynamics between traditional news media and digital platforms help shape Australia's controversial draft Code.

In the 2000s, journalism in Australia was facing financial trouble. The advertising revenues for news media had declined drastically over the years, whilst the advertising revenues for digital platforms had steeply increased. Between 2001 and 2016, classified advertising revenue fell from AU\$3.7 billion to AU\$225 million for news businesses in Australia. Most of this revenue went to Google and Facebook. Furthermore, as more Australians began to consume their news online, news media grew increasingly dependent on these platforms or gatekeepers, to distribute and display news content (Colangelo, 2022). This resulted in a bargaining power imbalance, where even the established dominant news media said they could not negotiate effectively with powerful platforms who were using free news content (ACCC, 2019).

The rise of digital platforms signals a shift in the economic base. They represent a change in *forces of production* (technology) and ownership (platforms), with the product being attention to advertising (Hendricks & Vestergaard, 2019). A shift in the base should reflect in the superstructure. Indeed, public law under capitalism usually serves as an arena for competing interest groups from class segments to gain advantages over other interest groups (Stone, 1985). The news media (especially the three biggest players, i.e., Nine, News Corp, and Seven West) lobbied hard politically over three years, and eventually the draft Code was born. The main feature of this Code was a mandatory third-party arbitration between the two platforms and news media. Third-party arbitration is a proceeding to settle disagreements in which each party submits their best offer and the arbitrator chooses the most reasonable one (ACCC, 2020). The decision allowed the news media to receive remuneration from the two tech giants.

Three factors suggest a link between the economic interests of the publishers and the existence of the draft Code. First, the draft Code states its purpose is “to address bargaining power imbalances between digital platforms and Australian news businesses” (Explanatory Materials, 2020, p.9). Second, Rupert Murdoch (the head of News Corp, Australia’s largest news conglomerate) has powerful eco-

conomic, social and personal links with the government, and has been outspoken about making social media platforms pay (Davis, 2018). Indeed, some critics have called the draft Code a “pay-out to Murdoch” (Patel, 2021, 11:50-12:45). Third, the fact that the Code was eventually rendered irrelevant due to private economic arrangements between the parties, implies that the non-economic provisions it contained were deemed to be of lesser significance.

The capitalist system, driven by competition and bargaining, naturally inclines conflicting parties towards legal recourse (Hunt, 2010). In Australia, as the draft Code reached the House, it faced strong opposition from Google and Facebook. They objected to paying for news content that others chose to upload and engage with, arguing that they already generated significant value for news media through referrals and hosting. Particularly contentious was the clause contained in the Code for third-party arbitration, which was perceived as a threat to their bargaining autonomy. In response, Google aggressively campaigned against the bill, experimented with its news features and even threatened to pull Google search away from Australia altogether. However, once the bill passed in the House, Google started forming private agreements with major news corporations, starting with Murdoch’s News Corp, hoping this would exempt Google from being subject to the Code. As a search engine, Google has a large interest in maintaining news content on its platform (The Economist, 2021).

Facebook claimed that news formed only a tiny part of its business and threatened to block news originating from Australia if the draft Code passed (Facebook, 2020). On 18 February 2021, Facebook did exactly that. However, instead of only blocking news, its algorithms also blocked a range of pages including essential emergency services, weather and healthcare information, and even the government’s own page (Bailo et al., 2021). Although Facebook said this was an accident, internal documents released by whistle-blowers suggest that it was a planned endeavour. Indeed, Facebook had criticised the definition of news as being too broad in the draft Code (Linebaugh et al., 2022). Publicly, the government responded with outrage, implying that Australia would not deal with bullies (Bailo et al., 2021). However, in private, the government continued to participate in back door negotiations with both Facebook and Google. Agreements were reached, the draft Code was amended and Facebook restored news in Australia (Leaver, 2021). These anecdotes highlight how economic interests influenced the legislative process and helped shape the content of the Code from its draft to the final version.

The amendments to the Code included concessions for Google and Facebook, such as recognising existing deals, modifying arbitration procedures, extending the notification period before a company was designated under the Code, and acknowledging the non-applicability of the Code in cases where news content

was completely removed, such as that of Facebook. Crucially, if platforms made “enough” private deals before the enactment of the Code, they would not be designated under it (Bailo et al., 2021). These amendments aligned with the economic interests of these powerful platforms and, as internal documents from Facebook indicate, this was a desired outcome (Linebaugh et al., 2022).

Therefore, the amended Code is now law but is effectively inapplicable as both platforms made enough private deals with Australian publishers. Consequently, it can be said that the *economic interests* of capital influenced the formation of the law. This is reflected in the fact that if a platform avoids designation under the law, it is exempt from the Code's non-economic minimum standards requirements. Furthermore, the criteria for “enough” deals are determined by the Treasurer and are opaque. Finally, private bargaining tends to benefit larger platforms and news media, even though mid-small news media can choose to bargain collectively (Bailo et al., 2021 & Linebaugh et al., 2022). To sum up, this suggests that the law was shaped by the economic interests of the giants, to the detriment of other economic and non-economic interests. This is worrying in a modern democracy, in which the legislature should operate independently.

### 3.2 Ideology

The section explores the main ideological grounding that underlies the Code, i.e., the safeguarding of public interest journalism due to its importance for democracy, and why this might obscure the dynamics explored in the section above.

Extensive research providing the factual backing for the Code, highlighted a troubling trend in public-interest journalism. Between 2008-2018, 106 local and regional newspapers ceased their operations. Moreover, a qualitative review of the three major metropolitan news outlets revealed a decline in public-interest journalism over 15 years, both numerically and proportionally. Since public-interest journalism is “journalism that performs a critical role in the *effective functioning of democracy* at all levels of government and society”, the decline was a cause of concern (ACCC, 2019, p. 19). Additionally, while independent news media create this content, they do not often receive remuneration for it. These factors formed a primary motivation for the Code (Explanatory Materials, 2020).

The ideological dimension of the law suggests that the effectiveness of hegemonic law is rooted in encapsulating an externally formed consensus. Capitalist law frequently uses concepts like “democracy” or “property”, both present in this case. Indeed, the ideological content of law is not a given, rather it is acquired in each set of circumstances (Hunt, 2010). It is beyond the scope of this paper to access whether this ideological motivation to ensure quality public-interest journalism for democratic benefit was fact or fiction. Nonetheless, three observations can be

made. First, to qualify as news-media under the Code, a publication must engage in public-interest journalism, but once qualified, all news produced becomes eligible for monetary bargaining (ACCC, 2020). This setup arguably fails to strongly incentivise the creation of public-interest journalism, as platform algorithms favour sensational clickbait or engaging content over public-order journalism (Bailo et al., 2021). The bargaining process, whether under the Code or privately, values news based on popularity rather than quality, leading to the commercialisation of all news. On the one hand, this can lead to scenarios like Sky news catering to conspiracy theorists (Davis, 2018) or fake news topping Facebook and the Google news showcase for multiple days. On the other, it can lead to a news company that has been reporting for over 20 years on energy policy being told they do not fall under public-interest journalism, without being given the possibility to appeal (Parkinson, 2021).

Second, nowhere in the Code (or in private deals made outside the Code) does it say that the money received by news media from these platforms must be invested back into journalism, therefore it could easily be used for unrelated purposes (Patel, 2021). Furthermore, estimates suggest that the three big news corps receive most of the revenue from private deals made with the tech giants, further concentrating Australia's already-condensed news market. It is less clear how journalists belonging to smaller or more diverse media outlets benefitted (Myllylahti, 2021). Third, despite acknowledging the significance of two public broadcasters in contributing to public-interest journalism, the Australian Government has continued to cut their funding, while allocating part of the funds previously allocated to them to developing the Code (B&T Magazine, 2021). These public broadcasters were excluded from the bargaining process and do not benefit from the non-monetary minimum standards, since the Code currently does not apply to any tech giant (Explanatory Materials, 2020).

Regarding ideology in the form of the law, contracts and bargaining emerge as the predominant legal tools here. While this may seem obvious and even essential in a capitalist society, it merits acknowledgement. The unquestioned acceptance of these tools, and the creation of contractual relations where none existed before, reinforces the concept of societal hegemony (Stone, 1985).

In summary, the Code is *dressed in ideological concepts* that lend it broader legitimacy. The intrinsic value of public-interest journalism to democracy is undeniable, but whether the Code genuinely upholds this principle or is merely camouflaged in it is impossible to determine without further research (Sutton, 2001, Chapter 3; Patel, 2021). Given the facts discussed above, it might appear that the final version of the Code does more to support the economic interests of big media and big tech, than the broader goal of public-interest journalism.



### 3.3 Influence of Capital

This section contextualises the Code in light of the broader data economy as viewed through a Marxist lens.

Capitalistic societies are remarkably adaptive to various changes and times. The project that follows is aligning Marxist notions with these changes (Sutton, 2001, Chapter 3). Adapting Marxist theory to digital capitalism is a newly emerging field. The following looks closely at the *relations of production*, i.e., the relationship between the “elite” (the platform) and the “workers” (the users). Scholars have studied how Facebook and Google sell the “audience commodity” to advertisers. This commodity is created by the users, through their attention, interactions and data collection (Hendricks & Vestergaard, 2019). Managed from a distance (e.g., by creating a “like” button) the users perform free labour; therefore, the endeavour does not need to be very productive to be profitable. The audience commodity is highly valued, especially as few large platforms are better at producing it. Finally, the users consent freely, with many believing digital labour does not exist (Beverungen et al., 2015).

From the viewpoint where the users are the subordinate class, three factors are noted. First, the research underlying the Code also addressed issues such as targeted advertising, consent, data ambiguities, user rights, privacy, etc. (ACCC, 2019). None of this was translated into the Code. In fact, the Code requires platforms (if they are ever designated) to share user data generated with news-media, thereby arguably legitimising the advertising model. Furthermore, the Code does not address “the most pressing systematic data collection and exploitation models that digital platforms thrive on, rather it seeks to make sure that news media benefits from them” (Digital Rights Watch, 2020, p. 3).

Second, platforms aim to maximise data collection. This is best done with sensationalist news, which due to impact of the Code/ private deals is beneficial for the news media to create as well. According to Marxist theory, this compromises news quality but exploits user attention, aligning rather neatly with capital interests (Beverungen et al., 2015). Third, it offers a potential explanation as to why Facebook news bit the bullet and decided to stop news services in Australia (Leaver, 2021). Consistent with capitalistic domination, perhaps it was willing to brave the discontent of the lower “class”, to ensure that the fundamental legal relations remained unchallenged (Stone, 1985). Google did not (temporarily) leave because news was more essential for its utility as a search engine, and thus for the creation of its audience commodity (Bailo et al., 2021).

It may seem strange that users subscribe to the status quo, despite being exploited for their audience commodity by platforms, mirroring the proletariat’s lack of revolt against the bourgeoisie. Marx might attribute this to alienation, as

user- workers lack control over their data and remain oblivious to its subsequent use. Furthermore, “they are estranged from and enslaved to the institutions they create” (Sutton, 2001, p. 61). The ubiquity of platforms makes disengagement challenging, as they are increasingly integral to aspects of daily life (Zuboff, 2015). The concept of consent (resembling hegemony) also plays a crucial role, from accepting terms of service to deciding when to engage with these platforms (ACCC, 2019). Both users and platforms may emphasise the positive aspects of platform use, reinforcing shared values and gradually cementing the position of the dominant class (Sutton, 2001, Chapter 3). This dynamic could perhaps partly explain how platforms like Facebook can weather severe public relations crises, like Cambridge Analytica, and still remain powerful (Iandoli et al., 2021).

To sum up then, by accepting these advertising models through its design, the Code plays a part in legitimising them. While the Code might have been conceived, *inter alia*, to safeguard public-order journalism and prevent exploitation of the news media, in its final form it mostly balances the economic interests of the older media giants and the newer technology giants. Thus, it could be argued that while the Code, which is part institution of law of the superstructure, might have aimed to address different interests, it has ended up conforming to the economic base. Users (workers) are in a way complicit in the system because they share the ideological values in which the Code is couched. Users are also dependent on the tech giants, maintaining a hegemonic and consensual relationship with them through the underlying data economy. This relationship is characterised by the alienation of users from their own data.

#### 4. Conclusion

The analysis of the Australian News Media and Digital Platforms Mandatory Bargaining Code demonstrates how adopting a Marxist lens can reveal nuances inherent in law and legislative process. Flexibly using the Marxist theoretical concepts of base-superstructure, ideology and hegemony and alienation, the contentious interplay between society, economic forces and the legislative process is examined. While the Code initially purported to address the bargaining power imbalance between dominant tech platforms and the news media, for the benefits of democratic society, the analysis reveals that the final form and application of the Code were significantly influenced by the economic interests of the powerful tech entities, Google and Facebook.

Furthermore, the concessions made in the amendments to the Code initially, as well the resulting private agreements, suggest a shift from the ideological purpose

of the Code to economic considerations, calling into question the extent to which it still genuinely supports public-interest journalism. Indeed, the commercialisation of news content, driven by platform algorithms that favour engagement sensationalism over quality journalism potentially distorts the media landscape in favour of existing (media) and new (tech) capitalist interests. This commercialisation, coupled with the lack of requirements for reinvestment of revenues into journalism, raises concerns about the marginalisation of smaller (public-interest) news entities.

The analysis suggests that the Code, contrary to its anticipated impact, has ended up serving as a tool for maintaining the status quo rather than challenging the powerful institutions of capital, i.e., a small number of established media giants and newer social media companies. The findings provide tentative support for the central hypothesis that *the Code is shaped by economic interests, dressed in ideology, and sustains the influence of capital*. However, more research is needed to determine this definitively.

The societal significance of such an interdisciplinary analysis can be widespread. Public-interest journalism is essential for democracies, as are the power relationships between public institutions (legislature), private entities and the people (Woods, 2021). As the societal dependence on and the power of platforms grows, there are calls for legislation to address certain issues, such as protecting human rights or market considerations. However, as seen in this curious case, it may be possible for the law to (inadvertently) entrench certain imbalances that it purports to address. By employing an interdisciplinary approach, one might scrutinise similar situations and potentially uncover such relationships. These endeavours are crucial in the modern democratic world, where more of our lives are being lived online.

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