

BOOK REVIEW

SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH

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BOOK: *Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech.* **AUTHOR:** Martha Minow **Year:** 2021 **FORMAT:** Digital **PUBLISHER:** Oxford University Press

The transition of the media from the printing press to the internet has now been universally accepted as an inevitable reality. While old-timers may lament the gradual capitulation of the morning's newspaper in the hands of the advertiser in a desperate and uphill struggle for survival, one cannot deny the fact that the internet has been radically transformative, both in form and in substance, to the way the media industry operates. One of the highlights of such transformation is in the way information and analysis of such information reaches us almost simultaneously with the occurrence of the said event. But the unavoidable evil that creeps into this instantaneous information dissemination process is the malaise of misinformation and disinformation that has developed an overwhelming presence in the media ecosystem. In the process of information crossfires between two warring echo-chambers thriving on fake news, the basic access of people to free speech feels stifled and compromised. Martha Minow's book titled *Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech* extensively highlights this fact in the context of the American free speech jurisprudence, and highlights the need for a greater degree of positive state intervention to preserve and protect people's free speech. While Minow's book is clearly written with the American perspective at the forefront of her analysis, the concepts and ideas she discusses are equally applicable to a country like India, where the newly emerging internet-fuelled media faces similar crises of credibility.

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I. CONSTITUTIONALLY ENFORCED ACCOUNTABILITY – THE WAY TO GO

The book is divided into four chapters and a brief conclusion. Along with a very articulate preface and introduction preceding them. The elaborate preface by Newton N. Minow, former Federal Communications Commission Chairman and the author Martha's illustrious father who had caught the world media's ire sixty years ago when he famously said that Television is a vast wasteland,¹ is thought-provoking in more ways than one. He makes five observations in his preface. *First*, Public Interest is disappearing from communication policies across nations. *Second*, changes in communication technology have transformed not only the lives of individuals, but also of the institutions, including governmental institutions. *Third*, as opposed to the past when Television united people in times of crises (he alludes to two such situations – the assassination of President Kennedy in 1963 and the 9/11 terrorist attacks in 2001), the media today tends to divide people on lines of what they *know*, premised on not only different ideas but also different facts. *Fourth*, the ever-burgeoning importance and influence of Artificial Intelligence ('AI') on our social as well as policy choices needs critical introspection because AI can be used in multiple ways that are antithetical to the public interest. Lastly, the democratisation of the mediascape has led to bad actors flooding the social media space, thereby contributing to serious muzzling of free speech and consequently a serious degradation of the democratic ethos. These five cardinal propositions find resonance all over the book, and Martha, former Harvard Law School Dean and Professor of Law, seeks to respond to her father with some decisive and far-reaching policy prescriptions.

In the introductory chapter, Minow seeks to chronicle the reasons behind the drifting away of people away from the press to the AI-driven media platforms where algorithmic curations of information and the creation of echo-chambers lead to what she refers to as "digital gerrymandering". Minow posits a central hypothesis that while the First Amendment to the US Constitution does not govern actions of entirely private enterprises, there is nothing that precludes governmental actions in situations of market failures of the information media. It is in that spirit that she proposes that the State should evolve concerted reforms, including a *Fairness Doctrine* using which digital platforms shall be regulated as public utilities by means of governmental actions, including actions based on anti-trust laws, laws on misrepresentation and fraud, Intellectual Property Rights etc. She argues that these governmental actions are not only plausible ideas, they are an absolute imperative if the First Amendment has to have any relevance in the

¹ Michael Hiltzik, 'Column: Six Decades Ago, Newton Minow Called TV a 'Vast Wasteland.' It's Even Vaster Today' (*Los Angeles Times*, 6 May 2021) <<https://www.latimes.com/business/story/2021-05-06/newton-minow-tv-vast-wasteland>> accessed 13 December 2021.

twenty-first century. Referring to Amartya Sen's *Development as Freedom*² where Sen had opined that no famines occur in functioning democracies with regular elections, opposition parties, basic freedom of speech and a relatively free media even if the country is poor, Minow observes that unlike in the past when repressive and draconian laws and high-handed governmental interferences had resulted in dangers to the American free speech paradigm, this time it is quite different – today, the challenges to free speech come from the digital communication systems that adversely impact the synthesis and dissemination of news.

The first chapter involves a discussion of the growing proliferation of the technology-driven media and the gradual death of the traditional press. This process, she observes, is highlighted by undesirable phenomena like risks of news deserts, the creation of echo chambers, blurring of advertisement and news, shrinking number of professional journalists and the rise of the algorithmic editors.

In the second and third chapters, Minow chronicles the journey of the First Amendment in great detail and categorically emphasises how governmental involvement in formulating policies and imposing necessary regulations had historically contributed towards the evolution of the vibrant American news industry. She claims that these lessons learnt from history clearly militate against the conjecture that First Amendment prohibits governmental interferences in the private domain of news gathering and dissemination. In fact, she argues that First Amendment mandates such governmental actions because the creation of an informed citizenry is absolutely essential to the working of a functioning democracy.

Eventually, in the fourth chapter, she comes to offer a series of reform measures that are compliant with the First Amendment. An illustration of the reform measures, clubbed under separate sub-categories, shall be instructive.

A. TREAT INTERNET PLATFORM COMPANIES AS RESPONSIBLE ACTORS:

Internet platform companies should be held responsible for their actions, just like traditional forms of media. Accordingly, it is pertinent that they are required to –

- a) Pay for news circulated on social media;
- b) Have their immunities curtailed and be subject to similar liability regimes as traditional publishers;

² Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), 16, 152-153.

- c) Be subject to antitrust investigations and possible enforcement;
- d) Large digital platform companies should be treated as public utilities; and
- e) Comply with new fairness and awareness doctrines.

B. VITALISE PROTECTIONS AGAINST HARM AND ABUSE:

There should be capacity-building – both in the public and private spheres – against deception, fraud and manipulation. In addition to strengthening norms and their implementation, steps should also be taken to bolster the efforts of civil society groups in preserving the sanctity of the internet ecosystem. Private and corporate firms should also regulate the probity of cyberspace by regulating the flow of advertisement revenues to deserving outlets. Therefore, the following structures should be strengthened -

- a) Contractual terms-of-service agreements should be enforced;
- b) Protection of individuals from misrepresentation, fraud and violation of contractual terms should be strictly regulated and enforced;
- c) Transparency should be maintained on Choice Architecture and Curation; and
- d) Civil Society efforts to monitor and protect individual users should be encouraged.

C. AMPLIFY AND SUSTAIN NON-PROFIT AND VARIED SOURCES OF NEWS AND ACCOUNTABILITY:

Public support for public and non-profit media should be secured by providing for allocation of public resources to them. In this way, for-profit media outlets will be required to reinvent themselves in the face of stiff competition and in the process, the quality and sanctity of the information will improve, and news deserts will be eliminated. The author thus proposed the following measures -

- a) Non-profit news sources should be supported with Tax Exemptions, Deductions and Credits; and
- b) State support should be extended towards Public Media and Media Education.

A careful perusal of these reform proposals suggests the culmination of a very carefully and logically articulated chain of thought. Methodologically, the author has taken resort to historical developments to map the onslaught of the digital media simultaneously with the collapse of the traditional media, and at

every stage of these mutually opposite-directional journeys, she has explored the scope and application of the First Amendment as a tool for ensuring that an individual's access to information and the consequent expressional freedoms are not stymied. In sync with her fundamental hypothesis, Minow's eleven-point reform measures can be bound by one common thread – constitutionally enforced accountability. This, in today's *laissez faire* marketplace where profit-making is the rule of the game, is a very revolutionary and appropriate path to take.

II. IMPLICATIONS FOR INDIA

The observations made by Martha Minow in the context of the US are equally applicable to the Indian media market. The last decade or so has seen a huge upsurge in technology-driven media platforms and the traditional printing press has naturally had to bear the brunt. There has been a virtual redefinition not only with regards to the packaging and presentation of information, but also with regards to the information itself. Just as Martha Minow has referred to 'news deserts', the popularity-driven Indian media has also been guilty of the deliberate creation of news deserts based on populist consumer choices and algorithmic patterns. Senior Journalist P. Sainath had once remorsefully lamented that to the Indian media, 75 percent of the population does not matter.³ In this context, Minow's reform prescription of providing state support in the form of tax exemptions etc., towards the non-profit media could substantially alter the media landscape.

The suggestions for treating the internet-based platforms on the same pedestal as the traditional media forms have to be looked at in the context of Article 19(1)(a) of the Indian Constitution, which provides no special status to the Press, unlike the First Amendment in the US. Every citizen is entitled to the same gamut of expressional freedoms, and are subject to the same array of reasonable restrictions, whether or not they constitute themselves into an organised news-disseminating body. However, to secure a citizen's right to be informed accurately and timely, which is the hallmark of a vibrant and functional democracy, the State may impose regulations on the outlets that are responsible for curating and providing information to the populace. Therefore, it is apposite that if a social media intermediary is in any ways found to be complicit in or indifferent to the spread of misinformation or disinformation that may have a debilitating impact on public peace and tranquillity or is deliberately and maliciously instrumental in creating echo-chambers of hate-mongering, then the State should have all the means at its disposal to reasonably restrict, based on the criteria as laid down in Article 19(2), the actions of such intermediary. The recently made

³ Shruti Kedia, 'To Indian Media, 75 Percent of Population does not Matter: P. Sainath' (SocialStory, 28 June 2017) <<https://yourstory.com/2017/06/p-sainath-indian-media/>& accessed 14 December 2021.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('IT Rules') seeks to regulate *inter alia* the dissemination of such information through the means of digital media that is constitutionally or legally proscribed. Rule 3 deals with the general due diligence that every intermediary would be required to adhere to. Additionally, Rule 4 mentions the additional due diligence that is to be observed by a significant social media intermediary, defined in Rule 2(v) as "a social media intermediary having the number of registered users in India above such threshold as notified by the Central Government". Subsequently, Rule 5 requires additional due diligence required to be observed by an intermediary in relation to news and current affairs content. Like the Protection from Online Falsehood and Manipulation Act that Singapore had enacted in 2019 to deal with the menace of online misinformation, the IT Rules seek to enforce a robust grievance redressal mechanism resulting in decisive and stringent regulation on errant online intermediaries. One can find logical reverberations of Martha Minow's reform recommendations in such regulatory measures.

III. CONCLUDING THOUGHTS

What is remarkable about Martha Minow's book is that she is pragmatic about the enormous potential that this new form of content curation brings to society. And it is this stoic acceptance of the inevitable modernity that she underscores the consequent necessity to ensure that the democratic ethos is not irreparably destroyed by an unfettered profit-driven regime. The need to regulate using the First Amendment as the guiding principle that Minow has so meticulously articulated in the book bears testimony to this unflinching zeal to preserve the cornerstones of democratic ideals, which are under serious threat in contemporary times.