

András Koltay, *New Media and Freedom of Expression: Rethinking the Constitutional Foundations of the Public Sphere* (Book Review)

Hart Publishing, Oxford, 2019, 224 p, ISBN 978-1-50991-649-8

Anett Pogácsás*

“The history of free speech law is [...] entering a new stage that is just as exciting and unpredictable as any of its previous stages.”¹ Nothing shows better how much the public sphere has changed than the Index of a book on this topic, with the majority of references pointing to ‘Social media platforms’, ‘Search engines’ or ‘Gatekeepers’. “One might almost say that Google and Facebook gave birth to (the public sphere of) the twenty-first century”² the author muses, emphasizing that online communication has had a huge impact on our lives, including the public sphere. Gatekeepers (*i.e.* persons or entities whose activities are necessary for publishing the opinion of another person or entity, including ISPs, blog service providers, social media, search engine providers, entities selling apps, webstores, news portals, news aggregating sites as well as content providers of websites who decide on the publication of comments to individual posts)³ are indispensable parts of the system, influencing the public sphere and, better yet, they have also become dominant players in the public sphere. This is why Koltay’s book mainly focuses on the issue whether or not online gatekeepers must be regarded as media.

The author, András Koltay is not an ‘outsider’. He has the academic credentials and regulatory experience to perfectly combine theory and practice to arrive at a substantiated position. *Inter alia*, he is the rector of National University of Public Service, he is also professor of law at Pázmány Péter Catholic University, and not least, he was a member of the Media Council of the Hungarian National Media and Communication Authority for nine years. His imposing professional career assures us that his statements and opinion are well grounded and authentic.

Ten years ago, the term ‘gatekeepers’ – coined by David Manning White referring to traditional press products in 1950⁴ – seldom appeared in media law literature. No reference was made to it in András Koltay’s 2009 monograph

* Anett Pogácsás: senior lecturer, Pázmány Péter Catholic University, Budapest; member of the Hungarian Council of Copyright Experts.

1 András Koltay, *New Media and Freedom of Expression: Rethinking the Constitutional Foundations of the Public Sphere*, Hart Publishing, Oxford, 2019, p. 242.

2 *Id.* p. 1.

3 *Id.* p. 82.

4 David Manning White, ‘The “Gate Keeper”: A Case Study in the Selection of News’, *Journalism Quarterly*, Vol. 27, Issue 4, 1950, pp. 383-390.

either,⁵ but the possible future of the internet, the difficulty of content regulation and of using the conventional concepts to describe this platform was already addressed at the time. Already then he had recognized how complex this problem was, but encouraged his readers to persevere in searching for ways of acceptable and proportionate legal control over such platforms.⁶ Since then, he has been continuously working to help achieve this goal, especially because in the last ten years it has become clear that the activities of some gatekeepers may be regarded as a sort of editing – even if not everyone shares his position⁷ –, and that gatekeepers have an increasing influence over the operation of the public sphere. As Koltay put it:

“This is a bizarre turn indeed, considering that the initial promise of the public Internet was to make traditional gatekeepers (press houses, newspapers stands, post offices, cable service providers, *etc.*) less important and influential. Instead, the Internet created new gatekeepers with greater influence over the public than ever before (in addition to creating a radical expansion of the public sphere).”⁸

Hence, the central issue of his new book is the direct impact of gatekeepers on content, as well as the impact of the gatekeepers’ services on the public sphere. While Koltay concentrates only on the core of this question, issues that indirectly affect content regulation are unfortunately not discussed in the book. Although he recognizes the importance of data protection, privacy-related issues, copyright, trademark and ownership restrictions, these problems are merely mentioned, but not dealt with thoroughly in the book.⁹ However, after our first ‘disappointment’ over the restricted focus of the volume, delving into the book we soon realize that the author’s decision to mainstream the topic was indeed correct: the chapters do not ‘fall apart,’ the entire volume has a thematic cohesiveness, heading towards a well-defined goal.

In current scientific literature, a growing number of publications deal with different aspects of online communication and the position of gatekeepers.¹⁰ The

5 András Koltay, *A szólásszabadság alapvonalai – magyar, angol, amerikai és európai összehasonlításban*, Századvég, Budapest, 2009, p. 361.

6 Id. p. 359.

7 Zsolt Zódi, *Platformok, robotok és a jog: új szabályozási kihívások az információs társadalomban*, Gondolat, Budapest, 2018.

8 Koltay 2019, p. 3.

9 Id. p. 5.

10 Natali Helberger *et al.*, ‘Regulating the New Information Intermediaries as Gatekeepers of Information Diversity’, *Info*, Vol. 17, Issue 6, 2015, pp. 50-71; Uta Kohl, ‘Intermediaries Within Online Regulation’, in Diane Rowland *et al.* (eds.), *Information Technology Law*, Routledge, London, 2016, pp. 85-87; Francesco Buffa, *Freedom of Expression in the Internet Society*, Key Editore, Vicalvi, 2016; Frederik Stjernfelt & Anne Mette Lauritzen, *Your Post Has Been Removed: Tech Giants and Freedom of Speech*, Springer, Copenhagen, 2020; Mart Susi *et al.* (eds.), *Human Rights Law and Regulating Freedom of Expression in New Media: Lessons From Nordic Approaches*, Routledge, London, 2019; Tamás Klein (ed.), *Tanulmányok a technológia- és cyberjog néhány aktuális kérdéséről*, Médiatudományi Intézet, Budapest, 2018.

majority of these are journal papers cherry picking certain interesting sub-questions of content regulation, without however offering a complete picture. Koltay mapped out all the relevant sources, synthesizing them, but he follows his own chain of thoughts presenting the issue in a uniquely detailed way. Meanwhile, he relies on an impressively broad scope of sources, analyzing more than two hundred ECtHR and CJEU cases, but he also looks at cases from the UK, the US, Germany, Australia, Canada, Hong Kong and Ireland. He identifies new problems and posits old problems in a new context.¹¹ At first glance, one may find it redundant that the book starts with a detailed general overview on the foundations of free speech and the freedom of the press. But we can accept his argument that an overview of these theories will be a useful point of departure, since the various authors referred to in the volume typically invoke these well-entrenched theories to more recent questions.¹² Koltay also builds on these traditional principles, but he comes to the conclusion, that it does not seem possible to “enforce the principles and doctrines of free speech in the online world with the same fervor as offline”.¹³ Some researchers used the expression of ‘deconstitutionalization of freedom of speech’ already in 2007,¹⁴ but for today the author argues that the ‘privatization of the freedom of speech’ results in a paradigm shift in the constitutional protection of speech, as well as the role of government in maintaining and preserving the democratic public sphere.¹⁵

The greatest strength of the book is indeed that the author does not embark upon ‘fortune telling’ regarding this often mentioned and highly possible change, but after detailed analysis he devotes a separate chapter to the possible interpretations of existing legal doctrines concerning public sphere, and in the most significant chapter of the book he sketches the possible models of future European regulation. This section outlines four possible regulatory models. As Koltay emphasizes, each model may have a number of variations, and the models may also be implemented in combination with each other.¹⁶ The four models are presented in the order of increasing burdens on gatekeepers, and the Author does not argue for any of them – he meticulously presents their respective pros and cons. His findings will definitely have an invigorating effect to the broader scientific debate as it becomes ever so clear that the model of traditional media regulation is no longer a viable path.

Koltay is correct in his assertion that even if the law of free speech is apparently entering a new era of development, the course of which is not absolutely clear at this point, we must give thought to the future. Just after the author closed the manuscript, several events have proven that the position of gatekeepers does not tolerate procrastination. Suffice to mention the fake news

11 Koltay 2019, p. 72.

12 Id. p. 8.

13 Id. p. 241.

14 Damian Tambini *et al.*, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence*, Routledge, London, 2007, p. 275.

15 Koltay 2019, p. 5.

16 Id. p. 230.

scandals over and over again related to *e.g.* the COVID19 pandemic,¹⁷ or the tragic event in March 2019 when after thousands of views and massive shares Facebook managed to remove the live-streamed massacre at a mosque in New Zealand.¹⁸ These events are evidence that public sphere of this day and age really have a different quality,¹⁹ which also means that even social media platforms must adapt (*e.g.* they have to react faster and they have to draw up requirements for their users).²⁰ But it is indispensable that decision-makers “provide an accurate definition of what gatekeepers are expected to do and indicate what they are to expect from the law by accurately laying down the duties and scope of liability of gatekeepers.”²¹ Meanwhile, this book is necessarily a ‘snapshot of reality’, since its field of enquiry keeps changing on a daily basis,²² but for the future it does not seem possible to enforce the principles and doctrines of free speech in the way we are used to it. And this, as Koltay stresses, demands a degree of cooperation between public and private actors that is unprecedented in this field.²³

In conclusion, Koltay’s new book is a must read, because it provides a sure scholarly scaffolding to discuss the rapidly changing world of online communication. His explication and commentary about gatekeepers’ relationship to content not only gives deeper insight to his readers, but also a hint of encouragement: this uncertainty is also a sort of certainty for us, that this is not the first – and even not even the last – turning point in the story of media law. “The history of free speech law is thus entering a new stage that is just as exciting and unpredictable as any of its previous stages.”²⁴ The solution however, remains the same: government decision-makers and shapers of public policy need to adapt and innovate even if the main principles and objectives of regulation remain valid. Although it is likely that legal scholars and practitioners are going to struggle with the problem for a long time,²⁵ with his book Koltay, puts a sure compass in our hands to guide us through this exciting journey.

17 See *e.g.* David Molloy & Leo Kelion, *Coronavirus: Call for Apps to Get Fake Covid-19 News Button*, 9 April 2020, at www.bbc.com/news/technology-52157202.

18 Meagan Flynn, *No One Who Watched New Zealand Shooter’s Video Live Reported It to Facebook, Company Says*, 19 March 2019, at www.washingtonpost.com/nation/2019/03/19/new-zealand-mosque-shooters-facebook-live-stream-was-viewed-thousands-times-before-being-removed/.

19 Koltay 2019, p. 1.

20 See Frank Fagan, ‘Optimal Social Media Content Moderation and Platform Immunities’, *European Journal of Law and Economics*, forthcoming 2020.

21 Koltay 2019, p. 242.

22 *Id.* p. 7.

23 *Id.* p. 242.

24 *Id.*

25 *Id.* p. 7.