

## Book reviews

*The European Court of Human Rights between Law and Politics*, edited by JONAS CHRISTOFFERSEN and MIKAEL RASK MADSEN.

Oxford: Oxford University Press, 2011, xvii + 229 + (index) 6pp (£60 hardback). ISBN 978-0-19-969449-5.

*The European Court of Human Rights between Law and Politics* (hereinafter ‘*Law and Politics*’) offers a timely interdisciplinary analysis of the current need for reform of the European Court of Human Rights (ECtHR) through the analytical framework of the institution’s origins and function. As well as being the most prevalent trend in academic discourse concerning the ECtHR,<sup>1</sup> reform is also an express political priority of the Council of Europe together with many signatory countries to the European Convention on Human Rights and Fundamental Freedoms (ECHR). The UK’s six-month Chairmanship of the Council, which began in November 2011, is avowedly committed to reforming the ECtHR and strengthening the implementation of the ECHR.<sup>2</sup> Such is the strength of political sentiment supporting the reform agenda that the package of measures on which the UK’s proposals are based have already been agreed, following conferences on the future of the ECtHR at Interlaken and Izmir.<sup>3</sup> At the domestic level, the UK government’s calls for reform have been linked to unpopular ECtHR decisions, in relation to which the Court has been criticised for adjudicating on matters that should more appropriately be determined by Parliament.<sup>4</sup> Given contemporary political efforts to reform the ECtHR, therefore, an analysis of the political influences that have shaped the Court is of significant relevance to the pre-existing discourse. Exploring the interconnection between politics and the ECtHR is at the heart of *Law and Politics*.

1. On reform of the ECtHR generally, see, eg, L Caflisch ‘The reform of the European Court of Human Rights: Protocol No. 14 and Beyond’ (2006) 6 Hum Rts L Rev 403 at 403–415; A Mowbray ‘Faltering steps on the path to reform of the Strasbourg Enforcement System’ (2007) 7 HRLR 609; A Mowbray ‘Crisis measures of institutional reform for the European Court of Human Rights’ (2009) HRLR 647; C Paraskeva ‘Reforming the European Court of Human Rights: an ongoing challenge’ (2007) 76 Nordic J Int’l L 185; S Greer *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006) pp 136–165.

2. United Kingdom Chairmanship of the Council of Europe: Priorities and Objectives, pp 1–2, [http://www.coe.int/t/portal/c/document\\_library/get\\_file?uuid=46e525f1-23ca-4cff-ab23-e8eb9b183ed2&groupId=10227](http://www.coe.int/t/portal/c/document_library/get_file?uuid=46e525f1-23ca-4cff-ab23-e8eb9b183ed2&groupId=10227)

3. See High Level Conference on the Future of the European Court of Human Rights, *Interlaken Declaration* (Interlaken, Switzerland, 18–19 February 2010); and High Level Conference on the Future of the European Court of Human Rights, *Final Declaration* (Izmir, Turkey, 26–27 April 2010).

4. Such as regarding prisoner voting rights, in *Hirst v United Kingdom* (74025/01) (2006) EHRR 41 (ECHR (Grand Chamber)). For an analysis of this decision, see S Foster ‘The long and winding road: the battle for prisoners’ right to vote’ (2011) 16(1) Cov LJ 19.

## STRUCTURE AND CONTENT

After an Introduction by the editors, the first five chapters of *Law and Politics* are based on the theme of 'Politics and Institutionalization' with each contributor arguing that the evolution of the ECtHR has been heavily influenced by underlying political struggles. In the first chapter, Ed Bates outlines the historical background against which the ECHR and the ECtHR were founded.<sup>5</sup> Bates suggests that the contextual circumstances were instrumental in determining both the original shape of the Convention and the ECtHR, as well as their subsequent development. By first highlighting the high hopes and then the considerable disagreement and disappointment felt in relation to the 'European Movement', Bates offers the first of several indications within *Law and Politics* that a sense of crisis and need for reform have been enduring hallmarks of the ECtHR since its inception.

Bates' analysis of the foundational years of the ECtHR is moved chronologically forward by Mikael Rask Madsen's chapter evaluating the development of the Court during the 1970s.<sup>6</sup> For Madsen, this was a decade of two halves: the first half continuing the measured development which had marked the operation of the ECtHR since its establishment in 1959, and the second half founding the Court's subsequent dynamic approach to the European human rights doctrine. Madsen explains this change in terms of geopolitical developments, including the easing of Cold War tensions and an increase in Western Europe's confidence concerning human rights, and the new social politics which took root in Europe during the late 1960s and early 1970s.<sup>7</sup> Coupling the marked shift in jurisprudential approach of the ECtHR directly with the Court's external context highlights the value of the type of interdisciplinary analysis found in *Law and Politics* for fully understanding the ECtHR.

Erik Voeten's chapter focuses on the connection between the ECtHR's jurisprudence and judicial politics.<sup>8</sup> In particular, he considers the extent to which the Court's judges have been motivated by personal political considerations in reaching their decisions.<sup>9</sup> Using empirical data, Voeten concludes that whilst the judiciary have been, and continue to be, motivated by political considerations, national bias has rarely influenced the outcome of reported cases.<sup>10</sup> Further, where there is the strongest evidence of national bias (ie, amongst the justices from Eastern Europe) it runs contrary to national allegiances.<sup>11</sup>

Rachel Cichowski continues Voeten's focus on the human agents within the ECtHR by analysing the role of civil rights groups, social activists and

5. E Bates 'The birth of the European Convention on Human Rights – and the European Court of Human Rights' in *Law and Politics*, pp 17–42. A more in-depth analysis by Bates can be found in E Bates *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010).

6. MR Madsen 'The protracted institutionalization of the Strasbourg Court: from legal diplomacy to integrationist jurisprudence' in *Law and Politics*, pp 43–60.

7. Ibid, pp 55–59.

8. E Voeten 'Politics, judicial behaviour and institutional design' in *Law and Politics*, pp 61–76.

9. See also E Voeten 'The impartiality of international judges: evidence from the European Court of Human Rights' (2008) 102 *American Political Science Review* 417.

10. *Law and Politics*, pp 70–74.

11. Ibid, p 73.

nongovernmental organisations (NGOs) in expanding the Court's human rights jurisprudence.<sup>12</sup> Cichowski's chapter begins by evaluating the role of rights groups from an historical perspective before offering a comparative analysis of the role of activist organisations in cases brought against Turkey and the UK over a 15-year time frame. She finds that although the number of cases involving rights groups over the history of the ECtHR has been relatively low, they have been of a consistently high quality, enabling their impact on European law to outstrip their numerical significance.<sup>13</sup> Further, despite country-specific differences in the role of civil rights groups, Cichowski sees their operation as indicative of the important interaction between civil society and the Court in shaping the development of the Convention system.<sup>14</sup> The emphasis on the human agents within the ECtHR structure provides a welcome additional dimension to analysis of the Court, moving beyond purely mechanistic, structural and legal considerations. In addition, Cichowski's country-level analysis serves to emphasise the different levels to which the Court's jurisprudence has been entrenched in the contracting nations.

In the final chapter of Part I, Lord Lester of Herne Hill offers an unequivocal plea for urgent reform of the ECtHR.<sup>15</sup> Whereas the constant cycle of crisis and reform described up to this point could be interpreted as normalising the process of change as part of the ECtHR's evolution, Lord Lester's chapter leaves no room for such illusions. In a tone that is perhaps more pessimistic than that of his earlier writings about reform efforts,<sup>16</sup> Lord Lester calls for the immediate passage of a 15<sup>th</sup> Protocol together with a range of other reforms.<sup>17</sup> For him, a particular source of the problems faced by the ECtHR is the case law arising from newly acceded countries from the former Soviet bloc.<sup>18</sup> Looking back at the relatively halcyon days of his earlier involvement with the Court, Lord Lester assesses the current situation with the starkest possible warning, amounting to a call for the ECtHR to reform or face increasing obsolescence.<sup>19</sup> Through both his personal retrospective view and his assessment of the contemporary situation facing the ECtHR, Lord Lester's chapter emphasises the overall theme of Part I of *Law and Politics*: the importance of approaching reform of the Court today with an appreciation of its foundations and history.

Part II comprises a consideration of internal institutional legitimacy. Bridging the transition from the external and political analysis in Part I is Robert Harmsen's chapter entitled 'The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights'.<sup>20</sup> Harmsen considers the apparent permanence of calls for reform of the ECtHR. He looks specifically at the reforms enacted by Protocols 11 and 14 and uses differences in the discussions surrounding each to

12. RA Cichowski 'Civil society and the European Court of Human Rights' in *Law and Politics*, pp 77–97.

13. Ibid, pp 95–96.

14. See also L Hodson *NGOs and the Struggle for Rights in Europe* (Oxford: Hart, 2011).

15. A Lester 'The European Court of Human Rights after 50 years' in *Law and Politics*, pp 98–115.

16. See A Lester 'The European Court of Human Rights after 50 years' (2009) EHRLR 461.

17. Lester, above n 15, p 114.

18. This effect was predicted – see P Mahoney 'Speculating on the future of the reformed European Court of Human Rights' (1999) 20 HRLJ (1999) 1 at 4.

19. Lester, above n 15, p 115.

20. R Harmsen 'The reform of the convention system: institutional restructuring and the (geo-)politics of human rights' in *Law and Politics*, pp 119–143.

demonstrate how the Court changed between the two periods. Harmsen suggests that while the Protocol 11 discussions were limited to bureaucratic considerations surrounding the case management of the Court, the Protocol 14 debates covered a broader reform agenda which looked at the role and nature of the ECtHR itself.<sup>21</sup> The reform efforts that Harmsen highlights have in part been responsible for the development of a wider discourse concerning the institutional legitimacy of the ECtHR and, in particular, whether it should provide an individualist or constitutionalist model of justice. It is upon this topic of 'Law and Legitimization' that Part II of *Law and Politics* focuses.

In separate chapters, Stéphanie Henneville-Vauchez and Jonas Christoffersen challenge the persistence of the individualist-constitutionalist divide that is central to the debate over the sources of institutional legitimacy and appropriate adjudicatory role of the ECtHR.<sup>22</sup> Henneville-Vauchez and Christoffersen reject the arguments of advocates of individual justice, who maintain that the ECtHR should hear any case from any individual and provide a remedy against all breaches of the ECHR,<sup>23</sup> as well as those supporting a constitutional model of adjudication, who consider the purpose of the ECtHR as being to provide fully reasoned and authoritative decisions to cases involving new and complex areas of Convention law.<sup>24</sup> Instead, for both Henneville-Vauchez and Christoffersen, the key to the Court's continuing legitimacy lies in a greater emphasis on national courts in upholding European human rights law.<sup>25</sup> Christoffersen ends by asking 'who is prepared to take up the challenge?',<sup>26</sup> suggesting scepticism over the whether his vision may be realised. This reflects a wider concern that contracting states are differently positioned to respond to the challenge of reform, dependent upon the political independence of their national courts and domestic entrenchment of human rights ideals.<sup>27</sup>

Separating the contributions by Henneville-Vauchez and Christoffersen, Laurent Scheeck evaluates the influence of the ECtHR's jurisprudence on the Court of Justice of the EU.<sup>28</sup> Scheeck argues that despite the fragility of the ECtHR it has managed to

21. Ibid, pp 121–131.

22. S Henneville-Vauchez 'Constitutional v international? When unified reformatory rationales mismatch the plural paths of legitimacy of ECHR law' in *Law and Politics*, pp 144–163; J Christoffersen 'Individual and constitutional justice: can the power balance of adjudication be reversed?' in *Law and Politics*, pp 181–203.

23. See, eg, P Leach 'Access to the European Court of Human Rights: from a legal entitlement to a lottery?' (2006) 27 HRLJ 11; M-B Dembour "'Finishing off" cases: the radical solution to the problem of the expanding ECtHR caseload' [2002] EHRLR 604 at 621.

24. See, eg, L Wildhaber 'A constitutional future for the European Court of Human Rights' (2002) 23 HRLJ 161 at 162–163; P Mahoney 'New challenges for the European Court of Human Rights resulting from the expanding caseload and membership' (2002) 21 Pennsylvania State Intl L Rev 101 at 105.

25. *Law and Politics*, pp 190–202. See also R Blackburn and J Polakiewicz *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950–2000* (Oxford: Oxford University Press, 2001).

26. *Law and Politics*, p 203.

27. See LR Helfer 'Redesigning the European Court of Human Rights: embeddedness as a deep structural principles of the European human rights regime' (2008) 19 EJIL 125 at 158. See also H Keller, A Fischer and D Kuhne 'Debating the future of the European Court of Human Rights after the Interlaken Conference: two innovative proposals' (2010) 21(4) Eur J of Int Law 1025.

28. L Scheeck 'Diplomatic intrusions, dialogues and fragile equilibria: the European Court as a constitutional actor of the European Union' in *Law and Politics*, pp 164–180.

influence its more institutionally robust counterpart through a process of ‘diplomatic intrusions’, including informal dialogues with EU judges that have been taking place since the end of the 1990s.<sup>29</sup> Scheeck’s chapter, therefore, places the ECtHR within its broader institutional framework and recognises the important role of the Court in developing the European human rights mandate outside the confines of formal judgments. Despite the value of this dialogue, Scheeck cautions that it may now be under threat as a result of the institutional changes arising out of the Treaty of Lisbon.<sup>30</sup>

In the final chapter, Luzius Wildhaber focuses on perhaps the single most recurrent theme in the book and the reform discourse: that of the challenge of the ECtHR’s crippling case load.<sup>31</sup> Citing oft-quoted statistics concerning the number of applications per year and the rapidly growing case backlog,<sup>32</sup> Wildhaber argues that if nothing is done to manage this problem the Court risks losing its own legitimacy. Such warnings, coming from a former President of the ECtHR, provide further confirmation, if any was needed, that radical reform of the Court is an urgent priority. Echoing Lord Lester’s warning at the end of the Part I of *Law and Politics*, Wildhaber makes a number of suggestions for radical reform of the ECtHR to ensure that it is best able to fulfil its ongoing human rights mandate.<sup>33</sup>

## ANALYSIS

*Law and Politics* leaves the reader with no doubt as to the scale of the problems that the ECtHR is currently facing and the need for reform. These are most dramatically demonstrated by repetition of statistics reminding us that the Court may be petitioned by any one of over 800 million people, is constituted of 47 judges, receives over 50,000 new applications every year, has a backlog of over 140,000 cases (a number that is growing by around 20,000 per year) and finds over 90 per cent of applications inadmissible.<sup>34</sup> In line with the general discourse, the contributors to *Law and Politics* agree that the ECtHR is a unique and valuable institution, but with significant flaws. In evaluating the need for reform, *Law and Politics* draws into its analysis key avenues of current and proposed reform, including the pilot judgment procedure, changes to judicial tenure, the return to a split court structure, Protocol 14 reforms and the need for domestic courts within the contracting states to take an increased role in human rights.<sup>35</sup> Both the need for reform and the shape that the reform should take have been covered elsewhere in the literature concerning the ECtHR, including by the contributors to this volume,<sup>36</sup> and neither of these themes represent the main focus of *Law and*

29. Ibid, pp 168–171.

30. Ibid, pp 175–179.

31. L Wildhaber, ‘Rethinking the European Court of Human Rights’ in *Law and Politics*, pp 204–229.

32. Ibid, pp 209, 210, 223, 225.

33. Ibid, pp 224–226.

34. See also ECtHR *Annual Report 2010* (Strasbourg: Registry of the European Court of Rights, 2011) p 6.

35. See also Final Report of the Group of Wise Persons to the Committee of Ministers, Council of Europe (November 2006); Council of Europe, Opinion of the Court on the Report of the Group of Wise Persons (adopted by the Plenary Court on 2 April 2007).

36. See, eg, L Wildhaber *The European Court of Human Rights 1998–2006: History, Achievements, Reforms* (Kehl-Strasbourg-Arlington: NP Engel, 2006); Wildhaber, above n 26; Bates, above n 5 (*The Evolution of the European Convention on Human Rights*); Voeten, above n 10;

*Politics*. Recognising this should not, however, be allowed to overshadow the fact that the volume draws together the main themes within the existing reform debate by way of accessible and balanced analysis presented by some of the leading academics and practitioners within this area of law.

Aside from a restatement of the reform debate, the more important contribution of *Law and Politics* to the ongoing discourse surrounding the ECtHR is its analysis of the need for reform as a symptom of deeper systemic characteristics of the Court, which in turn are a product of the Court's foundations and subsequent development. *Law and Politics*, therefore, approaches the current obstacles facing the ECtHR by placing the contemporary need for reform of the Court within its broader context and identifying it as a product of the its social, political and historical background. In drawing together the range of influences on the ECtHR *Law and Politics* offers an important additional dimension to pre-existing discourse in this area. This approach is particularly successful where the contributors to *Law and Politics* have tied jurisprudential and institutional developments to the Court's historical background. *Law and Politics* also excels in its consideration of the role of human agents within the Court's institutional framework through the contributions from legal practitioners within the Court, analyses of judicial decision-making and informal discourses, and the exploration of the role of rights organisations in ECtHR litigation. Through its range of approaches, therefore, *Law and Politics* offers an institutional view of the political influences on the enforcement of human rights within Europe, opening up a link between *Law and Politics* and study of the politicisation of rights.<sup>37</sup>

Because *Law and Politics* does not simply aim to provide a summary of the proposals for reform of the ECtHR readers looking for an overview or introduction to this debate would not be best advised to start with this publication, as it presupposes a certain level of existing knowledge. This is not a criticism of *Law and Politics*, but rather recognition that it does not aim to provide an introductory text. Further, despite the interdisciplinary nature of *Law and Politics*, its focus is expressly on the legal core of the ECHR system.<sup>38</sup> Consequently, whilst reference is made to political and historical events that have shaped the ECtHR, *Law and Politics* does not deal with these in any particular depth. Whilst this has no detrimental effect on the value of the book per se, it is likely to affect its readership such that its primary appeal will be for readers with an understanding of the ECtHR, but for whom this is probably a first exploration of analysing legal topics from an interdisciplinary perspective. For such individuals, *Law and Politics* offers an accessible and insightful route into interdisciplinary study of the ECtHR.

In light of the importance of the recurring themes within *Law and Politics* it is perhaps surprising that the editors did not attempt to offer a concluding chapter. Explaining their decision not to do so, Christoffersen and Madsen suggest that it would be a futile exercise because of the ever-changing nature of the ECtHR and the inevitable rapidity with which any conclusions would be out of date.<sup>39</sup> This explanation suggests

Lester, above n 17; R Harmsen 'The European Court of Human Rights as a "constitutional court": definitional debates and the dynamics of reform' in J Morison, K McEvoy and G Anthony (eds) *Judges, Transition and Human Rights Cultures* (Oxford: Oxford University Press, 2007) pp 33–53.

37. See, eg, C Douzinas *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2000).

38. *Law and Politics*, p 2.

39. *Ibid*, p 11.



that a conclusion would have had to offer a once-and-for-all solution to the difficulties faced by the Court – something that the analysis within *Law and Politics* demonstrates is impossible. An alternative approach to providing a conclusion could have been to offer this collection as an indication of the state of the reform debate at this particular moment in time, with the potential to have historical value for future studies. This would have been entirely in keeping with the aim within *Law and Politics* of placing the evolution of the ECtHR within its sociopolitical historical context, although may represent too significant a departure from the book's legal focus. In any event, the absence of a conclusion does not detract from the importance of the range of insights into the nature of the ECtHR provided within *Law and Politics*.

## CONCLUSION

None of the contributors would contest the statement that reform of the ECtHR is absolutely imperative, not just from the point of view of the institution's legitimacy and efficiency but in terms of it fulfilling its mandate of safeguarding human rights within Europe. However, as *Law and Politics* demonstrates, successive efforts at reform have failed to yield the desired improvements whilst the challenges faced by the Court have exponentially increased. With concerns about the limitations of Protocol 14 already being voiced,<sup>40</sup> it is unquestionably time for a more radical approach to reform. Some such proposals are suggested by the contributors to *Law and Politics*. Aside from its restatement of the reform debate, *Law and Politics* offers further value in terms of instructing the reformist agenda: that of placing current issues within their institutional and contextual framework. It is only through taking such an approach that those working on reform of the ECtHR can truly understand the nature of the difficulties facing the Court, and only once such an understanding is gained will it be possible to enact appropriate and adequate changes.

RACHEL CLARE HERRON<sup>41</sup>

*Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection*, by AARON SCHWABACH.

Farnham: Ashgate, 2011, vi + 161 + (bibliography + index) 16pp (£55 hardback). ISBN:: 978-0-7546-7903-5.

Two key trends characterise contemporary copyright law. The first is the pervasiveness of copyright protection; and the second is the ease with which creative works can now be made and distributed online. The pervasiveness of copyright is best illustrated by its duration, which is now set at the life of the author plus 70 years in respect of literary, dramatic, musical and artistic works in many jurisdictions.<sup>42</sup> The EU even

40. See, eg, speech by Luzius Wildhaber, President of the European Court of Human Rights, on the occasion of the opening of the judicial year, 21 January 2005 in ECtHR, *Annual Report 2004* (2005) p 6; S Greer 'Protocol No. 14 and the future of the European Court of Human Rights' [2005] PL 83 at 104.

41. Durham Law School.

42. Directive 2006/116/EC on the term of protection of copyright and related rights; Copyright, Designs & Patents Act 1988, s 12(2) (UK); Copyright and Related Rights Act, s 24 (Ireland).

agreed in 2011 to extend the term of copyright in respect of sound recordings and performances from 50 years to 70 years.<sup>43</sup> This means that the set of works protected by copyright at the end of 2011 included those written by authors who left this Earth in 1941 – so the early twentieth-century novels of James Joyce and Virginia Woolf, for example, were still protected against copying, adaptation, translation and more under the law of copyright until 1 January 2012.<sup>44</sup>

Although the person with tens of thousands or hundreds of pounds just lying around can indeed purchase studio equipment, imaging software and printing presses to produce creative works, anyone with access to a mass-market computer can publish literary works and make them available to a global audience, remix audio and video material and upload it to YouTube, and discuss their work or the work of others on discussion boards, social networking sites and even humble email lists. Individuals can simply make and distribute creative works far more freely and easily now than they could in the past.

Where these two trends meet, fascinating but difficult legal questions arise. More works are protected than ever before (and this is not just about duration, but also scope and enforcement), yet there are more opportunities to ‘infringe’ the rights of the original authors than was previously the case. The example of ‘fan fiction’ creates a context in which questions of this kind can be considered, and it is the legal status of ‘fan fiction’ that is the concern of Aaron Schwabach’s monograph *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection*.

Fan fiction matter has been the subject of a series of articles in (mostly American) law journals and edited collections in recent years<sup>45</sup> and has also been considered in books on wider themes of change and conflict in copyright law, but Schwabach’s book (based in part on his earlier journal articles) is the only full-length analysis of the status of these works to date. As such, he is simultaneously defining the contours of academic legal analysis of fan fiction, explaining it to the wider intellectual property community, and reflecting on some of the controversial disputes between authors and fans (and there have been many) whether they have been fully litigated or not. It is a short book, but a very well-referenced one, with extensive footnotes pointing the curious reader towards academic literature, examples of fan fiction and online discussions, while maintaining a lightness of touch that rewards careful reading.<sup>46</sup>

Who am I to say that the readership of *Legal Studies* does not include some fan fiction authors? Maybe members of the Society of Legal Scholars do indeed spend their late evenings constructing scenarios where Lord Denning and his army of men

43. Directive 2011/77/EU on the term of protection of copyright and related rights.

44. A number of organisations collaborate in promoting an annual ‘Public Domain Day’, celebrating those works which are no longer protected by copyright law. Each year, a list of authors so affected is published at <http://www.publicdomainday.org>, and events take place at universities and libraries across the world.

45. J Lipton ‘Copyright’s twilight zone: digital copyright lessons from the vampire blogosphere’ (2010) 70 Maryland Law Review 1; R Tushnet ‘Copyright law, fan practices and the rights of the author’ in J Grey (ed) *Fandom: Identities and Communities in a Mediated World* (New York: New York University Press, 2007).

46. The best example being footnote 80 on page 47, which attaches to the word ‘inconceivable’ in the main text a beloved quote from the 1987 film *The Princess Bride*. At the time of writing, the scene in question is available on YouTube as a six-second clip: <http://www.youtube.com/watch?v=G2y8Sx4B2Sk>. Another is the gentle teasing of his own interests in footnote 29 on page 69: ‘I could offer pages of examples and argument here, but that’s something for a fan forum.’



on the Clapham omnibus fight intergalactic crime,<sup>47</sup> or reimagining the personal life of Atticus Finch.<sup>48</sup> Yet it does seem only fair to pause here before going through the wardrobe (or before we leave Kansas, if you prefer), and consider what fan fiction actually is. 'Fan fiction' describes works of fiction (primarily but not exclusively literary) that make use of characters (or other features) from other works of fiction. In some cases, a very substantial number of works of fan fiction can pertain to a single book or series, such as the *Harry Potter* novels by JK Rowling. Much of the fan fiction posted on the Internet is made available on a non-commercial basis, and there are large communities of fan fiction authors and readers. The FanFiction.net site, for example, contains over six million individual works.<sup>49</sup> Some (but certainly not all) of it falls into the 'slash' category, characterised by sexual, romantic or erotic themes and (depending on how you define the category) same-sex pairings.<sup>50</sup> Yet as a much-read discussion of fan fiction for the middlebrow audience of *Time* magazine reassuringly put it: '[T]here's plenty of sex in fan fiction, but it's only a small part of the picture.'<sup>51</sup> Schwabach does acknowledge the complexity of gender and sexuality within fandom, and also the impact that the nature of the fiction may have on the reaction of the authors and their agents, but chooses to focus on issues of general legal principle.

The questions that the author sets himself, then, fall into two neat categories. The first is whether the characters of the original stories are indeed protected by copyright law. In this section, the author demonstrates his comfort with literary history and criticism as well as copyright law, following a line that goes from Shakespeare to Nancy Drew to Godzilla to James Bond. He concludes that the direction of travel is in favour of a high level of protection of 'copyright in characters', pointing to the 2009 finding of a District Court<sup>52</sup> regarding a book (*60 Years Later: Coming Through The Rye*) which was alleged to violate JD Salinger's copyright in *The Catcher In The Rye* (1951). The two main tests for character copyrightability – that it is 'sufficiently delineated' or alternatively that the character 'constitutes the story being told' – are explained and critiqued clearly and fairly.

The second category, assuming the answer to the overarching question of copyrightability in the first category is 'yes', relates to infringement. Schwabach considers the various exceptions, limitations and defences under copyright law which may operate in favour of the author of fan fiction. The key provisions here (and recalling that we are talking about US law) are those on fair use. The Copyright Act sets out four factors for courts to consider when assessing an argument that fan fiction (or anything else) is fair use and therefore not a violation of the exclusive rights of the author.<sup>53</sup> The four factors are the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the market/value of the work. Crucially, latter-day courts have shown a particular

47. Sadly, this is merely this author's hypothetical example. Anyway, this would be RPF (Real People Fiction), which is a parallel category.

48. Actually, there are 431 stories on FanFiction.net based on *To Kill A Mockingbird*: [http://www.fanfiction.net/book/To\\_Kill\\_a\\_Mockingbird/](http://www.fanfiction.net/book/To_Kill_a_Mockingbird/)

49. Figures published on <http://ffnresearch.blogspot.com>

50. Again, in order to provide a good example here, one must guess at the reading habits of the membership of the Society of Legal Scholars, but if I say Kirk/Spock, Holmes/Watson and Harry/Draco, hopefully that causes appropriate bells to ring for most.

51. L Grossman 'The boy who lived forever' *Time*, 7 July 2011, <http://www.time.com/time/arts/article/0,8599,2081784,00.html>

52. *Salinger v Colting* (2009) 64 F Supp 2d 250 (Southern District, New York).

53. 17 USC §107.

interest in how ‘transformative’ a second work is.<sup>54</sup> In this chapter, as well as in a later section of the book, we encounter some of the celebrated cases where judges have found themselves trying to make sense of the fair use tests and the substantial jurisprudence and to apply it to novel situations. The dispute between Warner (producers of the *Harry Potter* films) and Steven Vander Ark (creator of the *Harry Potter* Lexicon website) is a particularly interesting one.<sup>55</sup> Vander Ark’s website is a colossal collection of information on the *Harry Potter* universe, but he and his publisher (RDR) were the target of an action brought by Warner when they prepared to publish elements of the Lexicon in book form. The court did issue an injunction against Vander Ark and RDR, but as Schwabach explains over a number of pages, the result is not unwelcome within the fan fiction community as the law was clarified (and favoured fans in many regards) so as to make it possible for Vander Ark and others to continue operating with a heightened and more precise understanding of the impact of copyright law on their various projects. However, this book does not limit itself to considering those disputes that have gone before the courts; some of the most compelling passages trace the relationships between authors and their fans, particularly how some authors rely on direct appeals to ethical considerations, but also the way in which authors initially supportive of fan fiction may come to rescind declarations of support at a later stage.

Although this is a book about the law of the US, it offers valuable information to those of us in the UK and Ireland who are engaged in debates on the reform of copyright law. Reviews in the UK chaired by Andrew Gowers (in 2006)<sup>56</sup> and Professor Ian Hargreaves (in 2011)<sup>57</sup> both recommended changes to exceptions in copyright law. They particularly criticise the lack of a ‘parody’ exception in UK law, despite it being expressly permitted under the terms of the relevant European directive,<sup>58</sup> and call for a new statutory exception to be introduced. The Hargreaves Review was specifically asked to consider the question of fair use, but concluded that a series of statutory exceptions would be a more feasible recommendation.<sup>59</sup> In the Republic of Ireland, a Copyright Review Committee chaired by Dr Eoin O’Dell reported in 2012.<sup>60</sup> It, too, has been asked to report on fair use, but also to give particular consideration to the relationship between copyright and innovation. *Fan Fiction and Copyright* does not set out to make this case, nor is it a critique of the difference between fair use and fair dealing, but the depth of the author’s knowledge about the fan fiction ‘scene’ does serve as a good argument of what a less protective approach to the exclusive rights of the first author (whether through fair use or otherwise) might facilitate, in cultural terms as well as the development of new business models.

54. Much of this can be traced to a journal article: P Leval ‘Toward a fair use standard’ (1990) 103 Harvard Law Review 1105, and its use by Justice Souter in *Campbell v Acuff-Rose* (1994) 510 US 569. (This was the second-most interesting thing about Souter’s opinion; the most interesting thing was, of course, the inscription in the bound law books of the lyrics of 2 Live Crew’s alternative version of *Pretty Woman* that so exercised the author of the original.)

55. *Warner Bros v RDR Books* (2008) 575 F Supp 2d 513 (Southern District, New York).

56. <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>

57. ‘Digital opportunity: a review of intellectual property and growth’, <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

58. Directive 2001/29/EC on the harmonisation of certain aspects of copyright law in the information society, Art 5(3)(k).

59. ‘Digital opportunity’, above n 57, ch 5.

60. [http://www.djei.ie/science/ipr/copyright\\_review\\_2011.htm](http://www.djei.ie/science/ipr/copyright_review_2011.htm)

The other theme touched upon in this book, but continuing to develop in the period between its publication and the publication of this review, is that of non-written forms of fan fiction. The author does consider (in brief) ‘other media’, including art, music and in particular, video. Indeed, the ease with which videos can be produced and distributed is demonstrating the limits of copyright law. A video, by its very nature, may well include a range of different sources, engaging all sorts of different facets of copyright law. To complicate things further, some sites have introduced identification and monitoring systems to deal with the problems of blatant copyright infringement. These systems are designed to make it easier to locate and remove infringing works, but they are not perfect and can ‘overreach’ by blocking or removing videos potentially protected under doctrines such as fair use. Hosts in the US and EU are also required to comply with systems of ‘notice and takedown’ to avoid liability, meaning that a host has a strong incentive to act on requests from rights holders and little incentive to take the side of the user. As such, fan fiction remains vulnerable to challenge, even if in accordance with the law.

Schwabach rightly goes beyond considering the impact of law on the publication of fan videos, discussing the legal obstacles to *making* them and how the rulemaking process provided for under the Digital Millennium Copyright Act<sup>61</sup> led to a new exemption for certain uses of encrypted DVDs so as to ‘incorporate short portions of motion pictures into new works for the purpose of criticism or comment’ in non-commercial videos. The author of this review would like to have read more about Schwabach’s views on machinima (works created using video games, virtual worlds or similar software), which has emerged as another site of conflict between rights holders, on the one hand, and fans and other creators, on the other.<sup>62</sup>

This book comes at an important time for the law of copyright. Taken together with works like Kembrew McLeod and Peter DiCola’s wide-ranging *Creative License: The Law and Culture of Digital Sampling*<sup>63</sup> and William Patry’s *cri de couer, Moral Panics and the Copyright Wars*,<sup>64</sup> *Fan Fiction and Copyright* is an essential part of the reading list for those considering the future direction of copyright law outside of the US as well as a thorough source of information on many cultural and legal aspects of fan fiction in that jurisdiction. It may deal with a phenomenon which will baffle some audiences who might wonder why anyone would bother to write stories about stories, but in a time when the Internet offers opportunities for audiences to be engaged in a dialogue with authors and with fellow fans, the true question is ‘why not?’

DAITHÍ MAC SÍTHIGH<sup>65</sup>

61. 17 USC §1201(a)(1).

62. R Jones ‘From shooting monsters to shooting movies: machinima and the transformative play of video game culture’ in K Hellekson (ed) *Fan Fiction and Fan Communities in the Age of the Internet* (Jefferson, NC: McFarland, 2006); G Reynolds ‘All the game’s a stage: machinima and copyright in Canada’ (2010) 13 *Journal of World Intellectual Property* 729; see also the special issue of the *Journal of Visual Culture*, volume 10(3) (2011).

63. Duke University Press, 2011.

64. Oxford University Press, 2009.

65. University of East Anglia.

*International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments*, by N. ORKUN AKSELI.

Abingdon: Routledge, 2011, xxviii + 284 + (bibliography + index) 26pp (£80 hard-back). ISBN 978-0-415-48810-5.<sup>66</sup>

This book is an attempt to elucidate 'the unifying principles' of international secured transactions ('IST') law, as well as providing a framework for analysis of IST and the process and impact of international harmonisation.<sup>67</sup> It does so by utilising various national and international regimes<sup>68</sup> in an attempt to draw out the relevant principles of IST law. At the outset the key underlying principle is presented: the need for predictability, justified as facilitating 'access to lower cost credit'.<sup>69</sup> A negative thesis is also presented: that while international regimes appear to be influenced by the Uniform Commercial Code Article 9, the reality is that any such influence is not supported by theory or in practice.

The Introduction provides brief vignettes of the different international regimes considered: the UNIDROIT Convention on International Factoring, the UN Convention on Assignment of Receivables in International Trade, the EBRD Model Law on Secured Transactions, the UNIDROIT Convention on International Interests in Mobile Equipment (the Cape Town Convention) and the UNCITRAL Legislative Guide on Secured Transactions. The beneficial effect of secured transactions, particularly for small and medium enterprises ('SMEs'), and the global and economic characterisation of security means that the 'law of international secured transactions provides an optimal lens through which to examine how different international conventions and instruments confront key policy issues'.<sup>70</sup> But what exactly is an 'optimal lens'? What exactly is it about IST law that makes it 'optimal' for the analysis of the process of harmonisation? Other than the common nature of secured transactions, a clear rationale is difficult to discern. Akseli asserts that the 'primary purpose of secured transactions is economic',<sup>71</sup> and although he acknowledges the potential role of policy factors<sup>72</sup> it is the economic function of security that is emphasised. Akseli seems to follow the main school of thought that secured credit provides certainty (for both creditor and debtor) at low costs (in terms of information costs, insurance (risk-avoidance) costs, and in terms of breadth of applicable objects of security).<sup>73</sup> He considers the absence of adequate laws on secured finance as harmful to both states

66. Hereafter, '*ISTL*'.

67. *ISTL*, p xi.

68. Throughout the book Akseli uses the general terms 'conventions' or 'instruments'. This reviewer prefers 'regimes' simply because it indicates a broader range of structures that attempt to provide law.

69. *ISTL*, p 19.

70. *ISTL*, p 1. Oddly, the Introduction is numbered 0, the chapter following being 1 (and so on). The purpose of this numbering system, whilst perhaps mathematically accurate, is not explained.

71. *Ibid*, p 12.

72. *Ibid*, p 33 fn 80, citing L Gullifer *Goode on Legal Problems of Credit and Security* (London: Sweet & Maxwell, 4th edn, 2009) p 1 (noting that security and priority may not be intrinsically connected due to policy-based interjecting interests (such as preferential creditors)).

73. *ISTL*, pp 1–2.

and enterprise,<sup>74</sup> with the modernisation of relevant laws being presented as the key to increasing the availability of credit; for Akseli global finance needs global laws on security,<sup>75</sup> but there are difficulties (unsurprisingly) with the harmonisation process *per se*.<sup>76</sup>

The first substantive chapter, 'Secured Credit and Fundamental Principles of International Instruments', considers the nature of secured transactions in terms of form (primarily undertaken from the internationalist perspective that is at the core of this book) as well as analysing the rationale and justifications for secured credit. This chapter provides an outline of the different broad types of security: secured transactions, security interests and assignment of receivables, along with quasi-security interests. Akseli explores the various regimes in light of the need for access to credit and the value (presented, as it usually is, as a requirement) of certainty and predictability of the law in this area. Access to, and certainty and predictability of, credit 'should . . . lower the cost of credit'.<sup>77</sup> After a succinct overview of the (interminable) debate over the efficiency (broadly understood) of secured credit,<sup>78</sup> Akseli argues that that debate (which is focused on Article 9) is of 'little importance' to the international harmonisation of secured transactions law. The international approach is to 'provide predictability' which 'facilitates the flow of credit that critical for SMEs in developing countries, whereas the domestic US debate appears to be a nationalistic effort to create equality' between secured and unsecured creditors.<sup>79</sup> But is it really a 'romantic effort' to achieve a balance between secured and unsecured creditors, as Akseli asserts?<sup>80</sup> If it is, should the exercise be abandoned? Furthermore, while it may be virtuous to enhance the development of SMEs in developing economies, why exactly should this be the primary aim of international harmonisation of secured transactions law? Is the aim of achieving predictability for SMEs in developing economies the same as achieving predictability between different classes of creditors (which is, at its root, the aim of the debate over Article 9)? Is the 'romantic effort' of Article 9 any different to utopian internationalism (a charge against harmonisation that Akseli later notes, but does not fully counter<sup>81</sup>)?

This reviewer also feels the need to question the notion of 'predictability'. What exactly does it mean? Akseli's discussion of the concept appeared to this reviewer to really be a reference to publicity and the consequent role of registration and notice;<sup>82</sup> yet publicity and predictability are not necessarily the same. Even though Akseli has commendably reduced the mass of IST law into a coherent form, this reviewer still finds it difficult to look at IST law and say with confidence that the law is predictable (though, of course, this may alter according to future developments). Furthermore, is there really any law which does not have an underlying principle of predictability?

74. Ibid, p 2. It may be that the issue is at least partly one of practical enforcement of legal provisions. SMEs in developing countries appear to suffer from inefficient property regimes as a whole – for which, see, eg, H de Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London: Black Swan, 2001). Oddly, this argument (which is, admittedly, not uncontroversial) is not referred to at all in *ISTL*.

75. *ISTL*, p 3.

76. Ibid, p 3 et seq.

77. Ibid, p 21.

78. Ibid, pp 34–38.

79. Ibid, p 39.

80. Ibid.

81. Ibid, p 60 et seq.

82. Ibid, pp 51–53.

Akseli then shifts his analysis, away from the question 'why secured credit?' to 'why the forms of secured transactions under international regimes are normatively better'. For Akseli the answer is that they cover a wider range of assets and security mechanisms<sup>83</sup> and provide considerable party autonomy (a key principle running through all internationalised commercial law).<sup>84</sup> There is also a focus on the distinction between the creation and enforceability of security interests (especially with regard to the 'international interest' under the Cape Town Convention).<sup>85</sup>

Chapter Two, 'Harmonisation of Secured Transactions Law in Context', analyses the nature of and advocates for international harmonisation (with specific reference to secured transactions). This argument is predicated on the notion that harmonised IST law will benefit lenders and borrowers specifically (and in particular, SMEs in developing *and* developed economies), and consequently the wider economy. Akseli begins by considering the controversial field of legal transplantation (and associated concepts), correctly acknowledging the difficulties in achieving successful transplantation. In particular, there is the need for social, economic, commercial and jurisprudential similarity (essentially, convergence). He argues that the UNCITRAL Guide is best seen as harmonised law (rather than law by transplantation or viral propagation) because it 'considers the views of different legal cultures'.<sup>86</sup> He asserts that during the development of the Guide 'all delegations', including interest groups', views were considered equally'.<sup>87</sup> Does the fact that 'all . . . views were considered equally' necessarily mean they were *treated* equally? The interest groups and delegates would have had varying degrees of interest and power, the consequences of which can be problematic. Furthermore, Akseli unfortunately sets up a rather awkward contradiction. On page 60 he states the views of interest groups were, at least, 'considered equally',<sup>88</sup> yet two pages later he asserts 'international instruments for the harmonisation of secured transactions law, or in general, are not the product of interest groups'.<sup>89</sup> This is unexplained. Akseli briefly notes the problem of interest groups with a single citation to Schwartz and Scott's important work on private lawmaking,<sup>90</sup> but his response seems to be focused on the error in assuming the identical nature of harmonisation, uniformity and codification. In itself this is accurate: harmonisation is best seen as part of a process that may lead to codified uniform law. But this is *not* a response to the dangers of treating interest groups as equal in aim and capacity. Akseli does not therefore counter Schwartz and Scott. Instead he notes one critique of the harmonisation process, that it is utopian.<sup>91</sup> In this reviewer's view he would be better off merely accepting this charge. Aiming towards a utopia is not necessarily an indefensible position; it is the assumption that it is an easy task that can be swiftly achieved that is fallacious. The limitations and problems of this discussion

83. Ibid, pp 46–48.

84. Ibid, pp 48–49.

85. Ibid, pp 49–50.

86. Ibid, p 59.

87. Ibid, p 60. See also, at p 4, suggesting that the transparency of international organisations will necessarily prevent States from manipulating those organisations so as to further their own agenda.

88. Ibid, p 60. Brendan Nash.

89. Ibid, p 62.

90. Ibid, p 60, fn 27. He notes the important study, A Schwartz and RE Scott 'The political economy of private legislatures' (1995) 143 U Pa L Rev 595, but there is no discussion of the Schwartz and Scott's analysis or any of the accompanying literature.

91. *ISTL*, p 60, fn 24, and accompanying text.



about the making of IST regimes may be excusable as a necessary economy justified by the focus on the end product – that is, the underlying principles of harmonised IST regimes (as noted above). But it remains a weakness, not least because Akseli argues that the history of codification ‘can be used as an inspiration and inception point for international harmonisation that is a consequence of globalisation’.<sup>92</sup> The next section provides another analysis of the rationale for and difficulties with harmonisation; this time it is framed by the problems arising due to doctrinal differences between civil and common law countries.<sup>93</sup> Akseli’s preference for the flexibility of the common law seems clear: the common law is ‘less burdensome’.<sup>94</sup> The final substantive section of the chapter provides further evidence and arguments in favour of harmonisation, with particular reference to the benefits for developing countries,<sup>95</sup> alongside evidence of the contemporary positive impact of that harmonised law which does exist.<sup>96</sup>

Chapter Three explores the applicability of international regimes in terms of their substantive scope, their interrelationships and the meaning of party autonomy in light of such regimes. In terms of scope, Akseli notes that ‘most’ regimes adopt a comprehensive functionalism as to defining a secured transaction,<sup>97</sup> which has the benefit of predictability,<sup>98</sup> which in turn can reduce the cost of credit. Furthermore, the pros and cons of functionalism are discussed.<sup>99</sup> The interaction between the different regimes, in particular the *need* for this in certain cases, is well handled.<sup>100</sup> Similarly, there is analysis of which regime takes precedence.<sup>101</sup> The analysis of party autonomy<sup>102</sup> begins by noting that its effect is limited by the nature of secured transactions, which sits at the intersection of contract and property.<sup>103</sup> Akseli argues in favour of flexibility, which would lead to greater balance in lender–borrower bargaining power. He then proceeds to analyse the concept of party autonomy in IST law. Party autonomy in the international regimes exists ‘in order to balance the interests of all parties’;<sup>104</sup> it usually takes the form of capacity to dis-apply the relevant regime or to vary its provision. These powers are limited to one degree or another depending on the regime in question – the key overarching limiting factor on party autonomy appears to be the capacity of the parties to affect the proprietary aspects of the transaction. Since the IST regimes govern the relationship of these proprietary aspects, the parties should not be able to trump the regimes. This is a sensible and coherent position to take.

Chapter Four is concerned with the creation of a security interest. Akseli aims to demonstrate the importance of simplicity, in terms of minimum formalities, for the efficient creation of security interests. The international regimes achieve this by avoiding a formalist approach to creation. Instead, a functional approach with a

92. Ibid, p 63.

93. Ibid, pp 67–73.

94. Ibid p 71.

95. Ibid, pp 76, 81–82.

96. Ibid, pp 82–83.

97. Ibid, p 88.

98. The exceptions are the EBRD Model Law, which retains a formalist distinction between possessory and non-possessory security, and the Cape Town Convention, where a *prima facie* formalist approach is rendered illusory by the utilisation of a strong priority rule.

99. *ISTL*, p 91.

100. Ibid, pp 98–100.

101. Ibid, p 111.

102. Ibid, pp 113–123.

103. Ibid, p 114.

104. Ibid, p 116.

unitary security interest is favoured, with the ‘international interest’ (under the Cape Town Convention) coming in for particular favour. There is an outline of the difficulties faced in unreformed systems (such as English law),<sup>105</sup> followed by consideration of the two main approaches to the question whether creation alone suffices to bind third parties or whether an additional perfecting step is required.<sup>106</sup> The international regimes tend to take the latter view, which helps to separate contractual and proprietary issues. The special meaning and use of the term ‘attachment’ in Article 9 is briefly considered,<sup>107</sup> followed by an exposition of creation under the different international regimes,<sup>108</sup> which illustrates the distinction between creation and registration. This leads on to a detailed exposition of the formalities required for creation (such as they are) under the international regimes and under the English and Article 9 systems.<sup>109</sup> There then ensues a well-handled discussion of the complex issue of assignment of receivables (under the various regimes),<sup>110</sup> particularly with regard to the interaction of party autonomy and the need to protect bona fide purchasers.

Chapter Five concerns perfection – that is, the process of making security interests effective against third parties. Akseli argues for a system which reduces the costs of perfection. His initial suggestion is for an electronic register accessible for a nominal fee by any interested party (alongside tangible alternative such as possession).<sup>111</sup> This is the common argument, and with the current state of electronic technology such a system is both feasible and sensible.<sup>112</sup>

Chapter Six, concerning the issue of priority, begins by acknowledging the recurring theme of predictability in the international regimes.<sup>113</sup> Akseli notes that priority disputes are often between a seller and a lender, with the seller having ‘super-priority’, and international regimes tend to determine priority according to the date of registration of the security interest.<sup>114</sup> Following this is a brief description of the *nemo dat* problem (ie, title conflicts), but without a full engagement with the issue.<sup>115</sup> Akseli calls the Article 9 priority system ‘extremely detailed’,<sup>116</sup> as well as making a similar point about the UNCITRAL Guide.<sup>117</sup> This may be a mere *prima facie* observation because such systems are (for this reviewer) simple to operate as they work on the basic principle of registration. Moving on from this, Akseli offers a detailed analysis of the Receivables Convention and the Factoring Convention,<sup>118</sup> noting the choice-of-law approach to priorities in the Receivables Convention and the absence of any priorities system under the Factoring Convention (which is given as the reason for the low take-up of that Convention). Akseli argues that the choice-of-law approach is

105. Ibid, pp 125–128.

106. Ibid, pp 128–132.

107. Ibid, p 130.

108. Ibid, pp 131–132.

109. Ibid, pp 132–139.

110. Ibid, pp 140–157.

111. Ibid, p 163.

112. This reviewer is not convinced that electronic systems are fool proof, though that is a different argument.

113. *ISTL*, pp 200–201.

114. Ibid, p 201.

115. Ibid, pp 202–205. The limited discussion of the *nemo dat* problems is entirely justifiable; *nemo dat* is a minefield no-one should necessarily have to traipse through.

116. Ibid, p 205.

117. Ibid, p 207.

118. Ibid, p 209 et seq.

defensible and justifiable in light of the intangible nature of receivables, and in the context of modern financing by means of assignment of bulk receivables.<sup>119</sup> There is also a satisfactory exposition of the rules on priorities under the EBRD Model Law,<sup>120</sup> and the Cape Town Convention.<sup>121</sup> Akseli concludes by pointing out that the international regimes' use of a register-based system provides certainty, clarity and predictability.<sup>122</sup>

Chapter Seven considers the role of acquisition finance devices (such as purchase-money security interests (PMSI)) and quasi-security (such as retention of title). After a brief discussion of the types of acquisition financing, including retention of title clauses,<sup>123</sup> the text considers the unitary/non-unitary approach in the UNCITRAL Guide, whereby a State can choose whether the acquisition financing device is a functional security interests (the unitary approach) or not (the Guide recommends the unitary approach). Similarly the Cape Town Convention provides a choice for States to characterise the acquisition finance device, but does not give PMSI or retention of title clauses super-priority.<sup>124</sup> Akseli's preference is clearly for the approach taken in the UNCITRAL Guide (and the Article 9 method is considered '*sui generis*' and thus only of particular relevance to the US).<sup>125</sup>

Chapter Eight focuses on the choice-of-law approach as a mechanism to enable harmonisation, either as a sole method or combined with substantive rules. Akseli argues that the *lex situs* rule only works for assets that cannot cross borders, whereas for intangibles the grantor's location is the 'only feasible connecting factor' between the UNCITRAL Guide and the Receivables Convention.<sup>126</sup> He further argues that because of the proprietary nature of secured transactions and the consequent effect on third parties, party autonomy should not govern *vis-à-vis* choice-of-law because to allow so would be to reduce predictability.<sup>127</sup> Akseli argues that centralised registries, such as that under the Cape Town Convention, help to avoid this problem.

The final concluding chapter draws together the various arguments made about harmonised IST regimes. Akseli is clear in his support for regimes based on registration with minimal formalities, of functional security interests, on the grounds that certainty and predictability will be (positive) results. He accepts that while registration is not needed for the creation of the security interest, it is for determining third-party effectiveness (other than special cases where possession or control suffices). He also accepts the problems of acquisition finance devices,<sup>128</sup> and recommends the fine tuning of separate rules for retention of title clauses and financial leases (appearing to favour the approach set out in the UNCITRAL Guide). Finally, he refuses to condone regional harmonisation as being non-conducive to the aims of broader (international) harmonisation.

119. Ibid, pp 216–217. This is the main difficulty in English law under the rule in *Dearle v Hall* (1828) 3 Russ 1; 38 ER 475.

120. *ISTL*, pp 218–220.

121. Ibid, pp 221–225.

122. Except for the Model Law which determines priority according to creation, which may be explicable in light of its semi-formalist approach (ibid, pp 26–27). However, this aspect is not fully explored.

123. Ibid, pp 228–232.

124. Ibid, p 237.

125. Ibid, p 243.

126. Ibid, pp 245, 249, 257 et seq.

127. Ibid, pp 245–246.

128. Ibid, p 282.

Although Akseli makes no claim as to the exhaustiveness of his analysis, we might still question whether some further contextual detail would have been beneficial. On this basis, this reviewer would have appreciated some analysis of a basic question: why did the drafters of Article 9 – Karl Llewellyn, Allison Dunham and Grant Gilmore – independently conclude<sup>129</sup> that a functional approach to security interests was appropriate? The context around this intellectual leap, which was a paradigm shift in commercial jurisprudence,<sup>130</sup> may well provide valuable information especially in light of the basic similarity of the various IST regimes on this point. In the absence of a direct connection between Article 9 and the IST regimes, it is perhaps even more important to determine how it is that the functional security interest came to dominate thinking on this matter. One of Akseli's arguments against a direct mapping of Article 9 and the debates thereon to international harmonisation of secured transactions is that: 'Business practices in the US and in other countries differ. The US, as a leading common law jurisdiction, is known to be creditor friendly.'<sup>131</sup> Whilst this is a justifiable point, it is only half the story. To analyse secured transactions requires understanding that they exist to deal with the effects of default: if, for the sake of argument, default could not occur security would lose its attractiveness. The social, economic, commercial and jurisprudential mentality towards default and its consequences is a vital element in analysis of secured transactions. This problem resurfaces towards the end of the text: 'UCC Article 9 is a *sui generis* legislation taking its genesis from the domestic American business traditions. Its relation to other articles of the UCC should also be considered and debated before transplanting it.'<sup>132</sup> While the second sentence makes a valid point, the non-engagement in such a debate arguably renders Akseli's discussion of Article 9 less helpful than it might otherwise be. Article 9 has influenced some IST regimes to one degree or another, but there are also substantial differences; however, Akseli's analysis of the relationship between Article 9 and IST regimes is undertaken implicitly. This reviewer felt that this issue, being important *per se* as well as appearing as a substantial sub-thesis in this book, needed to be tackled head-on (with a specific section, or even a whole chapter).

As noted, Akseli's aim was to elucidate the 'unifying principles' of IST law. Nevertheless, this reviewer struggled at the very outset with the presentment of these notional 'unifying principles', which can only really be grasped at following a reading of the text as a whole. Following such a reading, some important question are only partially answered: (1) Are there 'unifying principles' of IST law which exist independently of the existing regimes, or are the 'unifying principles' merely those common to the selected national and international regimes? (2) Is there a sufficient communality between the selected national systems and international regimes to enable the determination of 'unifying principles'? (3) Are these 'unifying principles' principles of IST law or do they relate to harmonisation (both its process and its end result)? Nevertheless, these questions, and their answers, are really part of the next step in the debate, and Akseli's aim was clearly focused on the identification of the 'unifying principles'.

Overall this is a useful book, which demonstrates a considerable breadth and depth of knowledge and understanding of both security interests and IST regimes. However,

129. G Gilmore *Security Interests in Personal Property* (Boston, MA: Little, Brown, 1965) vol I, p 290, fn 2.

130. Though not a complete revolution (see, eg, *ibid*).

131. *ISTL*, p 39, fn 124, and accompanying text.

132. *Ibid*, p 243.

the process of harmonisation is a continual one. Thus, the question of Article 9's influence may already be of merely historical value. Perhaps the distinctions between security over tangible and intangible assets will be reduced and even eradicated. Maybe the UNCITRAL Guide will serve as a focal point for future harmonisation (this reviewer shares Akseli's distrust of regional harmonisation). This appears to be Akseli's preference, though for this reviewer different combinations of the selected regimes are equally justifiable. Easy, cheap access to credit requires clear and predictable rules on the security of that credit. But with the multiplicity of national systems and IST regimes, realising the principles of clarity and predictability may take some time.

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