Introduction

This book is a critique of the European Court of Human Rights' case law dealing with the right to a fair trial in criminal cases.[1] It explores the extent to which the European Court's case law in this area is consistent, predictable, transparent, and coherent.

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') provides protection for the right to a fair trial in civil and criminal proceedings. Article 6 includes multiple 'component' rights, some explicitly listed in the Convention, and others recognised by the European Court as implicit in the text. The explicitly listed component rights range from the right 'to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' to the rights, for those 'charged with a criminal offence', to 'be presumed innocent until proved guilty according to law' and have 'the free assistance of an interpreter'. Examples of implicit rights include the accused's right 'to communicate with [the accused's] advocate out of hearing of a third person'[2] and the right 'to silence and . . . not to incriminate oneself'.[3]

Article 6 occupies a prominent place in the Convention system: between 1959 and 2009, more than half of the European Court judgments in which a violation was found included an Article 6 violation, either criminal or civil.[4] In 2013, the most recent year for which statistics are available, nearly one-third of the judgments in which a violation was found included a violation of Article 6; this was more than for any other Article.[5] This book looks at the case law concerning criminal proceedings from the beginning of the Court's operation through to 2014.[6] This Introduction frames the scope of the book's argument and outlines the ways in which that argument will be developed.

[1] The European Court of Human Rights will hereafter be referred to as 'the European Court' or 'the Court' as appropriate.

[2] *S v Switzerland* (App 12629/87) (1992) 14 EHRR 670, para 48.

[3] *Saunders v United Kingdom* (App 19187/91) (1997) 23 EHRR 313, para 68.

[4] European Court of Human Rights, *The European Court of Human Rights: Some Facts and Figures: 1959–2009* (Council of Europe, 2009) 6. See D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights*, 2nd edn (Oxford University Press, 2009) 202.

[5] European Court of Human Rights, *The European Court of Human Rights in Facts and Figures: 2013* (Council of Europe, 2014) 7.

[6] The case law is up to date as of 17 March 2014.

1.1 Framing the Scope of the Argument

There is significant scholarship on Article 6, either focusing directly on Article 6,[7] or dealing with it in the course of a broader Convention survey.[8] Usually, these works approach Article 6 as a series of component rights, and their treatment is divided into chapters or sections, each devoted to one or several component rights. These works are important and useful. This book does not aspire to be an exhaustive guide to any of Article 6's components, let alone to all of them. Instead, it takes a different approach. The book pursues an original doctrinal approach to the Article 6 material, and aims to provide a complement to the existing scholarship that will be of use to practitioners and scholars alike. It does so in the following ways.

First, the doctrinal approach in this book is one that is best described as 'cross-cutting' rather than a right-by-right analysis. It aims to consider those ideas, difficulties and debates that are common to many, or all, of the Article 6 component rights and to examine how the European Court deals with those challenges. By examining these cross-cutting issues, it is hoped that the book will more easily contextualise, and emphasise points of similarity and difference among, the Court's approaches to the Article 6 rights. In this way the book aims to act as a *complement* to, and not a *replacement* for, the work of other doctrinal authors such as Trechsel, van Dijk and van Hoof, or Harris, O'Boyle and Warbrick, by uncovering new points of contention and disagreement in the way that the Court approaches Article 6 criminal fair trial case law.

It is also hoped that the cross-cutting approach allows the book to function, in part, as a reference work. If a practitioner preparing submissions for a case wishes to identify the cases in which the 'fourth instance rule' has been circumvented, for example, she might turn to part B.5 and find fodder for her arguments; if a scholar wishes to argue for the recognition of a new implied right within the Article 6 framework, part D.3 will provide him with arguments which may be useful in formulating the right; if a judge wonders whether it is appropriate to utilise a balancing analysis in an Article 6 case, part E provides examples of case law for and

[7] See, eg, Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff, 1993); Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2006); Sarah J Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing, 2007); Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice*, 3rd edn (Sweet & Maxwell, 2012).

[8] See, eg, Pieter van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights*, 4th edn (Intersentia, 2006); Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 4 above); R Clayton and H Tomlinson (eds), *The Law of Human Rights*, 2nd edn (Oxford University Press, 2009); Clare Ovey and Robin White, *Jacobs and White: The European Convention on Human Rights*, 4th edn (Oxford University Press, 2006); Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, 2nd edn (Cambridge University Press, 2006); C Gearty, *Principles of Human Rights Adjudication* (Oxford University Press, 2004); Kai Möller, *The Global Model of Constitutional Rights* (Hart Publishing, 2012).

against the use of such an analysis. In this way this book acts as a complementary volume to the more traditional reference works.

Second, the book is critical of the Court. It challenges suggestions that 'the judgments of the Court are exceptionally well reasoned'[9] and that the Court 'has developed an impressive case law' on Article 6.[10] Indeed, my central argument in this book is that the Article 6 criminal fair trial case law of the European Court is incoherent, under-theorised, and poorly explained. The book establishes that there are inconsistencies in the way that the Court approaches issues, and that the Court often does not acknowledge the significant complexity inherent in its own judgments. Later in this Introduction, this central argument is outlined further.

Third, this is a doctrinal book rooted in the detail of the European Court's case law. It focuses almost exclusively on the Court's case law, and is the result of an extensive survey of Article 6 criminal cases identified through the Court's HUDOC database system;[11] readers will find a short note summarising the methodology used in conducting this survey before the book's introduction. Well over 1,000 cases were reviewed in preparing the book, and some 500 are cited in its text. This broad research base allows the book to describe and critique the European Court's case law in innovative ways, and to identify a greater range of inconsistencies than that which has previously been described. It should be acknowledged, however, that this focus on the European Court's case law means that the book does not consider the ways in which domestic courts have applied Article 6, or the ways in which domestic courts apply European Court case law. The targeted focus on the case law itself also means that the book does not attempt to identify political or sociological explanations for the approaches taken by the European Court: there is considerable analysis and debate elsewhere in the scholarly and policy literature on the theoretical and institutional functioning of the Court,[12] and on the Court's

[9] Francois Ost, 'The Original Canons of Interpretation of the European Court of Human Rights' in Mireille Delmas-Marty and Christine Chodkiewicz (eds), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Martinus Nijhoff, 1992) 284.

[10] Paul Lemmens, 'The Right to a Fair Trial and its Multiple Manifestations' in E Brems and J Gerards (eds), *Shaping Rights in the ECHR* (Cambridge University Press, 2013) para 2.3.4.

[11] HUDOC is accessible at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en. The book focuses on European Court decisions rather than Commission decisions or the Committee of Ministers' practice, but reference to Commission decisions is made wherever relevant. Similarly, the focus is on Article 6 criminal fair trial rights decisions, but reference is made to civil Article 6 cases and other European Convention cases where such reference is necessary in order to understand the criminal Article 6 cases.

[12] See, as some examples, Marie-Benedicte Dembour, '"Finishing Off" Cases: the Radical Solution to the Problem of the Expanding European Court of Human Rights Caseload' [2002] *EHRLR* 604; M-B Dembour and M Krzyzanowska-Mierzewska, 'Ten Years On: The Voluminous and Interesting Polish Case Law' [2004] *EHRLR* 517; S Greer and L Wildhaber, 'Reflections of a Former President of the European Court of Human Rights' [2010] *EHRLR* 165; Robin White, *Judgments in the Strasbourg Court: Some Reflections*, SSRN Working Paper Series (2009); A Lester, 'The European Court of Human Rights after 50 Years' [2009] EHRLR 461; C Gearty, *Civil Liberties* (Oxford University Press, 2007); C Gearty, 'The European Court of Human Rights and the Protection of Civil Liberties: An Overview' (1993) 52 *Cambridge Law Journal* 89; Gearty, *Principles of Human Rights Adjudication* (n 8 above) 33–114; K Möller; R White and I Boussiakou, 'Separate Opinions in the European Court of Human Rights' (2009) 9(1) *Human Rights Law Review* 37; G Letsas, *Judge Rozakis's Separate Opinions and the Strasbourg Dilemma*, SSRN Working Paper Series (2011); K Dzehtsiarou, *Consensus from Within the Palace Walls*,

relationship with the courts of Council of Europe states.[13] Such debates are of great interest, but they are beyond the limits of this book. This book's focus is, instead, on the detail of the case law.

Fourth, to the extent that the book offers a normative argument, it may be broadly described as an argument that the Court should adopt a rejuvenated approach to Article 6 criminal cases. As will be further explained in greater detail in the next section of this Introduction, this book calls for an approach that is more consistent, more coherent, and better explained. Where that is not possible or desirable, I argue for greater and plainer explanation of why. At the conclusion of each of the parts of this book I offer some more specific normative recommendations as examples of ways in which the broader normative argument might begin to be implemented by the European Court. It is hoped that these constructive suggestions, taken together with the criticisms made throughout the book, will provide foundations for further descriptive and normative work by scholars, by those preparing arguments in Article 6 litigation, and by the Court. But even if the European Court prefers not to adopt these *specific* arguments, it is hoped that recognition of the more *general* concerns about coherence and predictability will produce an Article 6 case law that is better able to provide a sense of guidance.

It is worth emphasising at the outset that this book does not make a normative argument that the European Court should implement or seek out a *broader, more expansive* protection of criminal fair trial rights. Equally, it does not make a normative argument that the Court should implement or seek out a *narrower or more restrictive* approach to criminal fair trial rights. Instead, this book considers the degree to which the European Court's case law in these areas provides citizens, lawyers, and officials with a consistent, coherent, and theorised approach to the law.

University College Dublin Working Papers in Law, Criminology and Socio-Legal Studies Paper 40/2010; Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102(4) *American Political Science Review* 417; Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2011) *British Journal of Political Science* 1; B Cali, 'The Purposes of the European Human Rights System: One or Many?' [2008] *EHRLR* 299.

[13] See, as some examples, N Bratza, 'The Relationship between the UK Courts and Strasbourg' [2011] *EHRLR* 505; CC Murphy, *Human Rights Law and the Challenges of Explicit Judicial Dialogue*, Jean Monnet Working Paper No 10/2012; M Lasser, *Judicial Transformations: the Rights Revolution in the Courts of Europe* (Oxford University Press, 2009) 90–115; Gearty, *Principles of Human Rights Adjudication* (n 8 above); C Gearty, 'The Human Rights Act: an Academic Sceptic Changes his Mind but not his Heart' [2010] *EHRLR* 582; A Lester, 'The ECtHR and the HRA: British Concerns' (2012) 17 *Judicial Review* 1; Lord Hoffman, 'The Universality of Human Rights' (Judicial Studies Board Annual Lecture, 19 March 2009); Lord Neuberger, 'The British and Europe' (Cambridge Freshfields Annual Law Lecture, 12 February 2014); C Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006); M Pinto-Duschinsky, *Bringing Rights Back Home* (Policy Exchange, 2011); J Sumption QC, 'Judicial and Political Decision-Making: the Uncertain Boundary' (FA Mann Lecture, 8 November 2011); Mark Coen, '"With Cat-like Tread": Jury Trial and the European Court of Human Rights' (2014) Human Rights Law Review (Advance Access) 1, 21–25; G Clayton and H Wray, 'Editorial: Othman v United Kingdom (2012)' (2012) 26 *Journal of Immigration, Asylum and Nationality Law* 2; S Briant, 'Dialogue, Diplomacy and Defiance: Prisoners' Voting Rights at Home and in Strasbourg' [2011] *EHRLR* 243.

1.2 Framing the Measuring Stick Against which the European Court's Case Law will be Tested

This book is critical of the European Court's treatment of Article 6 criminal fair trial cases. In order to structure that criticism, a measuring stick is needed. As is foreshadowed above, the measuring stick in this book is: to what extent does the Court's case law provide a clear, stable, predictable, consistent and understandable sense of the current state of European human rights law? To what extent does the case law provide citizens, lawyers and officials with adequate guidance as to their position under the law?

This book does not aspire to be a work of legal theory or of philosophy, but it draws support for these criteria from the accounts that a number of legal philosophers have provided of the indicia of the rule of law. Any reference to 'the rule of law' inevitably conjures up a variety of politically- and legally-charged meanings.[14] It is, as Jennings wrote, 'apt to be rather an unruly horse'.[15] This book does not attempt to tame the horse, but instead draws upon formalist accounts of the rule of law to explain the measuring stick against which the European Court's case law is to be assessed.[16] If one looks at the work of Joseph Raz and Lon Fuller, for example, one can identify factors which 'can be derived from the basic idea of the rule of law'[17] or which are 'distinct standards by which excellence in legality may be tested'.[18] Importantly for present purposes, both Raz and Fuller argue that law should be prospective, open, clear, and relatively stable.[19] Indeed, as Raz explains, law '*must be capable of guiding the behaviour of its subjects.* It must be such that they can find out what it is and act on it'.[20] Of course, such insights are not those of Raz and Fuller alone. Hayek, for example, highlighted the importance of 'rules fixed and announced beforehand':

[14] The rule of law is also, of course, an idea inherent in the fair trial, and has been used by the European Court in several cases: see, eg, Gearty, *Principles of Human Rights Adjudication* (n 8 above) 68 *et seq*; Steve Foster, *Human Rights and Civil Liberties*, 2nd edn (Pearson Education, 2008) 54, citing *Thynne, Wilson and Gunnell v United Kingdom* (App 11787/85) (1990) 13 EHRR 666; *T and V v United Kingdom* (App 24724/94; 24888/94) (2000) 30 EHRR 121; and *Stafford v United Kingdom* (App 46295/99) (2002) 35 EHRR 32. It is also 'a core concept in international human rights instruments jurisprudence': ME Badar, 'Basic Principles Governing Limitations on Individual Rights, and Freedoms in Human Rights Instruments' (2003) 7 *International Journal of Human Rights* 63, 65.

[15] Ivor Jennings, *The Law and the Constitution*, 5th edn (University of London Press, 1959) 60.

[16] The reference to 'formalist' accounts is made while acknowledging that it conceals some complexity; see B Tamanaha, *On the Rule of Law* (Cambridge University Press, 2004) 92; NW Barber, 'Must Legalistic Conceptions of the Rule of Law have a Social Dimension?' (2004) 17 *Ratio Juris* 474.

[17] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 2002) 214.

[18] Lon Fuller, *The Morality of Law* (Yale University Press, 1964) 42.

[19] Raz, *The Authority of Law* (n 17 above) 214; Fuller, *The Morality of Law* (n 18 above) 49–65, 79. On the similarities, and differences, between Fuller and Raz, see Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing, 2012) 148–54; Tamanaha, *On the Rule of Law* (n 16 above) 93–94. Further on desiderata of this sort, see also T Bingham, *The Rule of Law* (Penguin, 2011).

[20] Raz, *The Authority of Law* (n 17 above) 214 (emphasis in original).

> [G]overnment in all its action is bound by *rules fixed* and *announced beforehand* – rules which make it *possible to foresee* with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[21]

It is not the aim of this book to provide an exhaustive account of different views on the rule of law or the consequences of non-compliance with those views, or to deal with the complexities involved in that area of legal philosophy. Instead, these statements provide a useful tool with which to analyse the case law of the European Court, and with which to consider the extent to which the European Court's case law is capable of providing guidance and reasonable certainty as to the state of the law.

This account of a rule of law measuring stick may be qualified and clarified in five ways. First, one can acknowledge that no legal system can be perfect,[22] but that, as Endicott argues, these rule of law factors are ideals to aspire to, even if they cannot be attained.[23] Second, and as a related point, we can consider the notion of 'guidance' more closely. In assessing the extent to which the European Court's case law is capable of providing guidance, this book's standards are not overly demanding: as Endicott puts it, we are concerned with the extent to which the case law may be used 'as a guide', and not the extent to which the case law 'dictate[s] an outcome in every possible case'.[24] As will become apparent, the book argues that the case law lacks these characteristics in a number of crucial respects, and that this undermines its ability to provide the sort of guidance that Endicott describes.

Third, the accounts of the rule of law outlined above may be thought to have special application in the human rights context. Indeed, in the human rights context there can be said to be an 'onus of justification' on 'the judiciary and all public authorities to justify limitations of human rights'; the rule of law requires that limitations on rights comply with principles of legality and be 'accessible, certain, and foreseeable'.[25] Liora Lazarus argues that this onus of justification requires that

> judicial reasoning around human rights is transparent, consistent and clear. If citizens are to engage fully and critically with rights reasoning – be it legislative, executive or judicial – they must at the very least know why rights are asserted or limited.[26]

[21] Friedrich Hayek, *The Road to Serfdom* (Routledge Classics, 2001) 75–76 (emphasis added).

[22] Raz, *The Authority of Law* (n 17 above) 222; Fuller, *The Morality of Law* (n 18 above) 41–42.

[23] Timothy Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1.

[24] ibid 18.

[25] L Lazarus, 'Conceptions of Liberty Deprivation' (2006) 69 *Modern Law Review* 738, 740–41, drawing on H Mountfield, 'The Concept of a Lawful Interference with Fundamental Rights' in J Jowell and J Cooper (eds), *Understanding Human Rights Principles* (Hart Publishing, 2001).

[26] L Lazarus, 'Mapping the Right to Security' in B Goold and L Lazarus (eds), *Security and Human Rights*, 2nd edn (Hart Publishing, 2007) 326. See also Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 32 ('a culture in which every exercise of power is expected to be justified'); Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012) 4.

Thus, if the onus of justification is seen as a particular manifestation of the desiderata of the rule of law, and is taken together with the more general statements about the rule of law outlined earlier, a clear picture is formed of what is required of the European Court's case law: reasoning that is transparent, consistent, clear, coherent, and capable of providing guidance.

Fourth, in terms of the particular importance of coherence, a point on which it will be argued that the European Court's case law falls down all too often, there is considerable philosophical and theoretical scholarship.[27] Without summarising that scholarship here, it may be emphasised that my real concern is with what Raz describes as 'local coherence', what Levenbook describes as 'area-specific' coherence, and what Tobin terms 'internal system coherence'.[28] That is to say, the concern is with the application of a test of coherence to 'a subset, to a group of legal standards and decisions constituting a branch of law' rather than any more 'global' sense of coherence.[29] The goal of local coherence is one that 'judges with limitations of knowledge and time can be expected to achieve'.[30] Raz also makes the point that while the application of local coherence can overlap with a doctrine of *stare decisis*, that should not disguise the fact that a concern for coherence is applicable 'even in countries which do not have a formal doctrine of precedent'.[31]

Fifth, and related to the previous point, it must be emphasised that there is no part of the argument in this book that relies on common law principles of *stare decisis*. Indeed, the European Court does not operate under any binding system of precedent.[32] Nonetheless, as the Court said in *Stafford v United Kingdom* (and in many cases subsequently):

> While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases.[33]

[27] See, as examples, Joseph Raz, 'The Relevance of Coherence' in Joseph Raz (ed), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, 1995); BB Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) 3 *Law and Philosophy* 355; Gearty, *Principles of Human Rights Adjudication* (n 8 above) 174; L Moral Soriano, 'A Modest Notion of Coherence in Legal Reasoning: a Model for the ECJ' (2003) 16 *Ratio Juris* 296; J Tobin, 'Seeking to Persuade: a Constructive Approach to Human Rights Treaty Interpretation' (2010) *Harvard HR Journal* 1.

[28] See Raz, 'The Relevance of Coherence' (n 27 above) 317–19; Levenbook, 'The Role of Coherence in Legal Reasoning' (n 27 above) 371; Tobin, 'Seeking to Persuade' (n 27 above) 37.

[29] Levenbook, 'The Role of Coherence in Legal Reasoning' (n 27 above) 371; Raz, 'The Relevance of Coherence' (n 27 above); cf Dworkin on 'local priority': R Dworkin, *Law's Empire* (Hart Publishing, 1998) 250–54.

[30] Levenbook, 'The Role of Coherence in Legal Reasoning' (n 27 above) 371.

[31] Raz, 'The Relevance of Coherence' (n 27 above) 318.

[32] A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 Modern Law Review 671, 673; Gearty, *Principles of Human Rights Adjudication* (n 8 above) 197, 200; A Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (2009) 9 *Human Rights Law Review* 179, 180–87; Paul Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?' (2011) *Human Rights Law Review* 1. cf Lupu and Voeten, 'Precedent in International Courts' (n 12 above).

[33] *Stafford v United Kingdom* (n 14 above) para 68. See, eg, also *Micallef v Malta* (App 17056/06) (15 October 2009) para 81; *Bayatyan v Armenia* (App 23459/03) (2012) 54 EHRR 15, para 98; *Scoppola v*

Similarly, as Roberts put it, even if the Court does not operate under any 'strict doctrine of precedent', that does not discount

> the inherent (pre-judicial) rationality of treating like cases alike, and different cases differently, or the impact of collegiate judicial culture and institutional incentives, all of which promote consistency in decision-making.[34]

The point of this clarification is this: the book *does* focus on the Court's case law, and makes arguments on the lack of coherence, consistency, and predictability in that case law. To adapt Gearty's phrase, the book makes arguments exploring the Court's 'more relaxed approach to the challenge of internal consistency'.[35] Those arguments are not, however, grounded in any common law notion of *stare decisis*.

There are, of course, many alternative ways in which one might assess the case law of a court. A rule of law measuring stick is by no means the only choice one could make in writing a book such as this. For example, one might ask, instead, whether the body of case law does a good job of pursuing broader European geopolitical goals, or whether the case law tends to succeed at doing justice in the individual case.[36] An assessment of the Article 6 case law against those benchmarks might well provide fertile ground for future research by lawyers, sociologists, and political scientists. In this book, however, the focus is on the rule of law, a choice made not least because of the central importance of the rule of law to law itself. As Raz puts it:

> It is of the essence of law to guide behaviour through rules and courts in charge of their application. Therefore, the rule of law is the specific excellence of the law.[37]

The rule of law is, additionally, a standard to which the European Court itself, in a variety of contexts, has held itself.[38] Of course, the rule of law also provides a framework which will be of considerable interest, and it is hoped practical utility, to practitioners and scholars seeking to make sense of the European Court's corpus of case law and to apply it to the case in front of them.

And so, the question posed by this book is this: to what extent does the European Court's criminal fair trial case law measure up against the book's measuring stick? To what extent is the case law consistent, predictable, locally

Italy (No 3) (App 126/05) (2013) 56 EHRR 19, para 94. This statement is often qualified by an acknowledgment of the Court's 'evolutive' approach to interpretation, considered in part A.

[34] Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?' (n 32 above) 10–11.

[35] Gearty, *Principles of Human Rights Adjudication* (n 8 above) 179.

[36] Some authors may, of course, regard broader considerations such as these as forming part of a more substantive conception of the rule of law. See, eg, the discussion in Tamanaha, *On the Rule of Law* (n 16 above) 102–13. Such a substantive conception is not adopted for the purposes of this book.

[37] Raz, *The Authority of Law* (n 17 above) 225.

[38] See, eg, *Malone v United Kingdom* (App 8691/79) (1985) 7 EHRR 14; *Khan v United Kingdom* (App 35394/97) (2001) 31 EHRR 45; *Liberty and others v United Kingdom* (App 58243/00) (2009) 48 EHRR 1; *Thynne, Wilson and Gunnell v United Kingdom* (n 14 above); *T and V v United Kingdom* (n 14 above); and *Stafford v United Kingdom* (n 14 above).

coherent, and capable of acting as a guide to citizens, lawyers, officials, and judges? As will be seen in the next section, and throughout this book, the argument made here is that the case law does not measure up well.

1.3 Outlining the Structure of the Book and How the Argument is Developed

Having described the scope of the argument, and having delineated some theoretical foundations for the measuring stick that will be used to assess the Court's case law, I turn now to sketching the course of the argument in this book. In this subsection I first outline the thematic cross-cutting issues that are addressed in the book, and then the broad arguments that run through these thematic issues.

The book is divided into two sections. In section I, there are four principal parts, each dealing with a cross-cutting theme that is of relevance to all of the various Article 6 component rights. The parts are, of course, interrelated. Part A is foundational, and begins the book by considering the interpretative techniques used by the European Court in Article 6 criminal cases. It assesses a variety of techniques deployed by the Court, including what will be described as the 'democratic catchphrase', and analyses the extent to which the Court has made clear the content of each of those techniques and the relationship between them. In part B, the focus is on how the Court describes its own role in Article 6 criminal fair trial cases. Part B critiques various manifestations of the ostensibly deferential approach of the Court against the book's measuring stick. It also includes extensive analysis of the Court's 'fourth instance doctrine', ultimately arguing that the doctrine is riddled with exceptions in a way that significantly undermines its coherence and utility. The complexity of the internal structure of Article 6 is the focus of part C, as the book assesses a number of ways in which the European Court has explained the relationships between the various component provisions and rights that make up Article 6, and demonstrates significant incoherence in this area of law. The examination of the Court's views on the internal dynamics of Article 6 continues in part D, which looks at the Court's implied rights jurisprudence. After briefly outlining the implied rights, part D focuses on assessing the various foundations on which the Court has grounded the implied rights, and argues that its treatment of those foundations fails to meet the rule of law and legality standards.

Section II contains one part, part E, which deals with the Court's approach to assessing alleged infringements or violations of Article 6. Part E is the largest of the book's five parts and builds on the work done in parts A–D to consolidate many of the book's core arguments. It begins by setting out what I describe as 'the puzzle of Article 6': the complexity created by uncertainty over how to assess Article 6 violations. It then considers a number of tools used by the Court in this context: the assessment of the 'proceedings as a whole'; the use of counterbalancing and defect

curing; the notion that some infringements render proceedings irretrievably unfair; and the Court's 'sole or decisive' test in the context of evidence, and argues that these tools do not measure up favourably against the standards set out above. As I will show, not only do the tools demonstrate radical uncertainty within themselves, but they also form part of an overall system that is incoherent. Finally, part E considers the Court's willingness (or reluctance) to engage in 'attempts to limit Article 6 rights by reference to the community interest'.[39] This final section of part E examines the inconsistencies plaguing the Court's case law and the use of tools such as proportionality reasoning and references to 'the very essence of the right'.

In terms of the arguments that run through these cross-cutting thematic areas, there are two broad classes of argument that are used to substantiate the book's central thesis. The first relates to the Court's explanation of the details of how individual analytical approaches or interpretative tools work, what their content is, and what their limits are. The individual tools and approaches are often undertheorised, opaque, and poorly explained. As a result, I argue, they are insufficient to provide guidance of the sort outlined above. It is difficult to imagine how a potential applicant might begin to make sense of the case law.

Further, and in the alternative, is the second broad class of argument. If the first of the broad arguments related to the *inner workings* of each of the various analytical approaches and tools, the second broad argument relates to the Court's explanations of how those tools and approaches *relate to one another*. Here, I argue that the Court often deploys a variety of inconsistent approaches and tools, and does so without acknowledging or attempting to reconcile the inconsistency. As such, I will demonstrate, the Court provides insufficient guidance to those who seek predictability, consistency, and transparency from its judgments with respect to the various cross-cutting themes. Thus, for example, there is significant uncertainty of this sort as to the Court's views on the internal structure of Article 6 (part C) or as to the Court's approach to when the public interest may be taken into account in assessing a violation of Article 6 (part E). The Court's case law, as described in this book, provides the Court with what I might term *irrational flexibility*: the ability to apply different tests or approaches without explaining why one test or approach is appropriate in one situation but not in another. It should be emphasised here that the book accepts that the European Court *could* elect to adopt a highly nuanced series of analytical approaches or interpretative tools, each carefully chosen and adapted to the context of a particular right or a particular factual matrix; or that the Court *could* elect to adopt and explain a nuanced approach on the basis of its position as an arbiter of the philosophical and theoretical place of human rights in European democracy. What the book demonstrates, however, is that in key respects the Court has failed to make and explain any such choice, and that it has failed to explain or acknowledge the inconsistencies where they exist.

[39] Andrew C Stumer, *The Presumption of Innocence* (Hart Publishing, 2010) 110.

These two arguments manifest themselves in different ways in the book's various parts. But taken together, and across the sum of these parts, they demonstrate significant incoherence and uncertainty in the European Court's Article 6 criminal fair trial rights case law.