Chapter 4
Judicial Activism and Fidelity to Law

Gonçalo de Almeida Ribeiro

4.1 'Judicial Activism'

What do lawyers and non-lawyers mean by 'judicial activism'? When the phrase was introduced in popular discourse in 1947 by American historian Arthur Schlesinger Jr. it described pejoratively an interpretive tendency within the U.S. Supreme Court (Green 2009a). Since then it became a standard term of opprobrium. When I published a few months ago an Essay under the title 'Judicial Activism Against Austerity in Portugal' (Ribeiro 2013) I surely did not mean to pay a compliment to the judges of the Portuguese Constitutional Court, and I expected my readers to perceive that immediately. 'Activism' is rarely used as a term of approbation when speaking about judging—a judge charged with 'activism' is responsible for a mischief of some sort, although clearly not something as serious as miscarriage of justice or straightforward corruption.

We know that judicial activism has something to do with judges going beyond the law in their business of settling disputes, or that it involves judges substituting their personal views of justice and policy for those of the law when they decide cases. That, at any rate, is what some of the most common definitions out there convey. According to the English-language version of Wikipedia, 'judicial activism describes judicial ruling suspected of being based on personal or political considerations rather than the existing law'. Black's Law Dictionary in turn states that 'judicial activism' is a 'philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions' (Black and Garner 2000). The website of the conservative think tank Heritage Foundation supplies the most derogatory and muddled definition among the various I stumbled across in my perfunctory explorations: 'Judicial activism occurs when judges write subjective policy preferences into the law rather than

G. de Almeida Ribeiro (✉)
Universidade Católica Portuguesa, Lisboa, Portugal
e-mail: gar@ucp.pt

© Springer International Publishing Switzerland 2015

L.P. Coutinho et al. (eds.), *Judicial Activism*,
Ius Gentium: Comparative Perspectives on Law and Justice 44,
DOI 10.1007/978-3-319-18549-1_4

apply the law impartially according to its original meaning.' There is a common thread across these definitions, apart from the obvious fact that they are notoriously unsatisfactory: they imply a connection between proper judging and fidelity to law. An activist judge is one who consistently flouts his duty to decide cases or to settle disputes under the law, as opposed to any set of nonlegal or extralegal standards—often labeled 'personal' or 'political' judgments in this context.

These statements conceal a formidable difficulty. Since the definition of activism as a form of judicial mischief turns on the concept of law as the set of decision-making standards which claim the allegiance of judges, we must know what the law is before we furnish ourselves with criteria to identify and charge the activists within the judiciary. In other words, thinking about judicial activism pulls us irresistibly towards the most daunting and controversial of all jurisprudential problems—what is law? What begins as a simple-minded inquiry into a mainstream notion turns into a philosophical nightmare.

It is not quite as dramatic as it sounds though. When legal philosophers and other theoretically-minded jurists ask 'what is law?' they may be pursuing a wide variety of research agendas. Max Weber famously defined law as 'a system…[that is] externally guaranteed by the possibility of (physical or psychic) coercion through action aimed at enforcing compliance or punishing violation…' (Weber 1978: 34). This is a respectable account of law from a sociological standpoint, an account which looks at law as a certain type of social arrangement, practice or institution. It is certainly not a plausible account of law from the normative or so-called internal standpoint of the judge (Hart 1994: 88–91). Law as a set of standards to which judges owe fidelity must be of such character that it *justifies* judicial activity—activity that characteristically takes the form of authoritative and enforceable settlement of disputes. Put briefly, law in this normative or internal sense is the concept of the body of reasons binding on judges *qua* judges.

Now we find ourselves walking in a circle. Judges ought to decide cases according to the law and the law is the set of standards according to which judges ought to decide cases. In order to break the deadlock, we have to examine and contrast rival conceptions or models of adjudication, that is to say, accounts of how judges *ought* to decide cases. The main contenders are what I shall call legalism, idealism and pluralism.

4.2 The Legalist Model

According to the legalist model all law is positive in nature: norms are rendered legal by virtue of being posited by law-making authorities. Such positing may, of course, take a variety of forms, from legislative enactments to past judgments. What counts as law-making depends on legal practice in general and the behavior of judges in particular, which may be theorized along the familiar lines of either a rule of recognition—a social norm holding among officials (Hart 1994: 100–10)—or the

Grundnorm—a presupposed norm that renders legal claims intelligible (Kelsen 1978: 201–205).

The philosophical subtleties should not distract us from the basic point that we have no trouble identifying sources of positive law; everyone knows that the *Grundgesetz für die Bundesrepublik Deutschland* (GG) or the *Bürgerliches Gesetzbuch* (BGB) are law in Germany and that the *Administrative Procedure Act* or *Lawrence v. Texas* are law in the United States. What fidelity to law amounts to, according to this model, is quite straightforward as a matter of principle: judges should act as closely as possible as mouthpieces of legislation and adherents to precedent, that is to say, they should defer to the judgment of positive law. Failing to do so implies substituting their own views of how the case should be settled for those of the law—precisely the defining feature of judicial activism. It is as simple as that in theory.

There are, of course, all sorts of difficulties with the simple image of the judge as the 'mouthpiece of legislation' or the 'follower of precedent'. Statutes require interpretation and judicial opinions have to be construed in order for any legal norms to see the day of light; and while there are canons of legal argument guiding judges in such processes, any moderately reflective jurist knows that there are competing theories of interpretation and precedent out there, such that judges have a significant amount of leeway in their engagements with positive law. That certainly undermines the strongest conceptions of legalism, such as statutory positivism (*Gesetzespositivismus*) or legal formalism, which assert that personal or political judgment play *no* role in legitimate adjudication. But it does not hurt the moderate legalist who qualifies his definition of fidelity to law as adherence to positive law with the clause 'as much as possible' and then proceeds to spell out the more or less numerous instances of judicial discretion. In fact, a clever legalist will argue in favor of his position that the theory enables a reasonably clear distinction between judicial application of existing law and judicial law-making (Hart 1994: 135–36, 274–75).

The main issue with legalism, however, is of a different order. It is unable to answer the following question: Why should judges follow positive law at all? This might seem like a silly concern. Judges owe allegiance to positive law, one might be tempted to say, because it is the business of judges to settle disputes according to law. Yet this is a question-begging argument (Dworkin 1978: 47). The legalist cannot assume that fidelity to law means fidelity to legislation and to precedent, or to the set of recognized sources of law, since that is precisely what he is arguing for.[1] And the fact is that, upon closer inspection, there is nothing obvious about the

[1]One may, of course, stipulate that the term 'law' should be reserved for source-based norms, and add the proviso that a norm's legal character should be carefully distinguished from any binding force it may have on judges, an issue that is moral in nature. That is the point of view of sophisticated legal positivism. See, e.g., John Gardner (2001), Joseph Raz (2004), Leslie Green (2009b). Whether or not such an account of law can be sustained, it is clear that it is immune to the primary objection directed against legalism, namely that it derives judicial duty from contingent social facts about legislative, judicial or customary activity. Clearly, though, the sophisticated

binding force of positive law. Judges are bound to offer reasons—indeed, good reasons—for their decisions because they are bestowed with the authority to settle disputes and to order the enforcement of such settlements by the executive arm of government. Invoking a legislative act or a judicial decision as a reason for a judgment that entails the loss of either property or freedom on the grounds that legislation and precedent are law without further ado, or by definition, or because that is what judges have been saying all along, is hardly persuasive (Dworkin 1986: 6–11). Surely it would be more persuasive if the judge settled the dispute on the merits, weighting impartially the claims of the parties in the lawsuit and issuing a decision that she is prepared to argue as just or fair (Raz 2004: 8). In a word, substantive justice is a better candidate than positive law for the role of defining the term law in the phrase 'judicial fidelity to law'. This leads us to the idealist model.

4.3 The Idealist Model

According to the idealist model law is right reason or substantive justice: *ius* instead of *lex*. The judge is bound by justice instead of humanly made laws. It does not follow that the latter are irrelevant in legal argument. Statutory rules, for instance, are attempts to externalize or express the demands of justice in the circumstances of their application, and as such they carry a certain measure of heuristic or persuasive value. This is a conception of law that is quite alien to us, jurists shaped by late modernity and post-modernity, although it was the dominant view in medieval jurisprudence and, to some extent, in the early modern period of the so-called 'law of reason' (Wieacker 1995: §§16–17).

Let us move backwards some eight centuries and ask: How could the *Corpus Juris Civilis*, a compilation of law books with material drawn primarily from the classical period of Roman jurisprudence and arranged under the direction of a Byzantine Emperor in the sixth century, become law in thirteenth Century Europe? Indeed it became law even in Western Europe where the authority of the Holy Roman Emperor was notoriously weak and princes and jurists alike did not pay any allegiance to the doctrine of *translatio imperii*. Roman law was received in late-medieval Europe not because it had been enacted by a law-making authority but because it was regarded as *ratio scripta*, that is, a particularly felicitous formulation of natural justice, right reason, or *ius* (Stein 1993). That is why the medieval jurists, particularly in those regions beyond the political reach of the Holy Roman Emperor, claimed that the Digest of Justinian, an anthology of maxims and

(Footnote 1 continued)

positivist view of law is of no interest in the debate about judicial activism, since it denies the very premise upon which the debate is grounded, namely that judges ought to apply the law. The account of law underlying the rhetoric of judicial activism equates law with (good or legitimate) adjudication, whereas sophisticated legal positivists insist that theories of law and theories of adjudication belong in different jurisprudential departments.

opinions formulated by Roman jurists who lived in the first two centuries of our Era, were law not *ex ratione imperii* but *ex imperio ratione*—not on account of imperial authority but on account of the authority of reason (Hespanha 2003: 104–107).

Since the function of *lex*, on this view, is to establish a bridge between the invisible order of right reason and the observable world of texts and practices, what is ultimately decisive is not the letter but the spirit. 'Textual authority', writes legal historian Paolo Grossi, 'is not something completely fixed; on the contrary, it is flexible, the text can and should be translated into the situation of its reader and user, can and should be *interpreted*' (Grossi 1996: 162). He is at pains to stress that the medieval notion of *interpretatio* is altogether different, mostly in the sense of being far more liberal, from our understanding of (statutory) interpretation. I suspect that the key connection here is furnished by the Church tradition of picking on a passage of Paul's *Second Epistle to the Corinthians*—'The letter killeth, but the spirit giveth life'—to establish that Scripture is merely the vehicle in which the Holy Spirit drives the faithful to the actual Word of God.

The nearly sacred status of the *Corpus Juris Civilis* in the Low Middle Ages is, of course, inextricably tied with the intellectual and moral humility of medieval culture, according to which the individual can only hope to overcome his imperfection within the framework of the community, both that which he forms with his living peers and that which he forms with his ancestors. That is what lies behind both the veneration the medieval jurists held for their Roman counterparts and the idea that the standard of correctness of legal arguments is the community of experts —the *opinio communis doctorum*. If we fast-forward a mere three centuries, we stumble across Grotius mockery of the 'scholastic subtlety' (Grotius 2005: 1761) of medieval compendiums and Barbeyrac's impatience with the 'barbarous language' (Gordley 1991: 126) of the jurists affiliated with the *mos italicus iura docendi*. For them, authors of the great law of reason or modern natural law treatises, law is a matter of natural reason and therefore any educated person can study it and write about it in clear and elegant language (Gordley 1991: 129–32).

It is tempting to interpret this idealist conception of law as licensing just about any form of judicial activism. It appears that, on this view, so long as a judge follows his sense of justice and is prepared to articulate arguments in its favor he is exhibiting all the fidelity to law required from him. Yet even within the idealist framework there is room for a certain form of activism: the judge who takes advantage of his position to further an agenda of social policy at the expense of doing justice in the dispute at hand. Imagine that in the case of a boat collision involving a careless fisherman and a rich yacht owner the judge denies damages to the latter on the grounds that while the fisherman is responsible for the accident the yacht owner is richer than the fisherman by a margin that widely exceeds what the judge's sense of distributive justice can support. Or imagine a judge in one of those standard 'industrial revolution' cases of train sparks damaging a farmer's crops deciding for the railway company on account of the significance of railway

development for economic growth.[2] In these cases, even an idealist would have no trouble condemning the judge as an activist. Yet it is quite clear that within this model of adjudication the leeway of the judge is much greater than that which is afforded by the legalist view.

Moreover, idealism is patently problematic. Judges owe allegiance to legislation and other forms of positive law for far more pervasive and important reasons than their heuristic or persuasive excellences. Indeed, the latter are at least doubtful, as Bismarck flagged with the famous aphorism that statutes are like sausages in that it is better not to see them being made. Judges owe allegiance to legislation and other so-called sources of the law for a variety of fundamental reasons of certainty, legitimacy, equality and prudence that must be balanced against considerations of substantive justice. That is exactly what the third model that we shall consider—pluralism—stresses.

4.4 The Pluralist Model

According to the pluralist model judges are bound by a set of *prima facie* equally fundamental principles: justice, certainty, legitimacy, equality, and prudence. Justice requires giving to the parties to the dispute what a perfectly just legal system would provide. Certainty requires predictability in social life. Legitimacy requires deferring to the judgment of authorities holding the comparatively better title to settle controversial issues. Equality requires consistency with past decisions understood in terms of 'treating like cases alike'. Finally, prudence requires proper consideration of the consequences of a judgment for the long run realization of the law.

These are *principles* and they are *fundamental*. They are principles in the relatively technical sense in which the notion was developed by legal theorists in the late twentieth century (Dworkin 1978: 22–28; Sieckmann 1990: 52–87; Alexy 2002a, b: 44–68). They embody values that can be fulfilled in varying degrees and have varying weight depending on the circumstances; consequently, their application involves the mediation of a judgment balancing them against competing principles. They are fundamental, on the other hand, in the sense that they are the ultimate criteria of legal justification, the standards to which good legal argument ultimately harks back. In other words, they are the basic 'value facts' of the law (Greenberg 2004)—the deep source of valid legal reasons.[3] Let me examine each of them in somewhat greater detail.

[2]According to Morton Horwitz's controversial 'legal subsidization' hypothesis, American courts transformed the common law during the antebellum period in order 'to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development' (Horwitz 1977: 99–100).

[3]It is understandable why pluralism might be seen as a 'third way' in relation to legalism and idealism. However, it is certainly not a 'middle road' in relation to the views of law as social fact or as part of morality. The champion of such an intermediate view was, for a long time, Ronald

Justice. We expect courts to deliver justice rather than charity, piety, magnanimity, or paternal oversight. Justice is the only branch of morality that is ordinarily taken to justify the use of force that the judiciary is entitled to command. In other words, duties of justice are the only subset of moral duties that it is morally appropriate to enforce. That is why justice is usually regarded as the 'political' among the manifold moral virtues, and why duties of justice are said to constitute an independent domain of so-called 'political morality'.[4]

The association of coercion with justice is fairly intuitive (Hart 1955: 178). Most people believe that force may be legitimately deployed against a trespasser of private property or against a recalcitrant taxpayer, but that it should not be used against an uncharitable millionaire or to remedy someone's impoverished lifestyle. Why the difference? To a very large extent it lies in the special connection between justice and society: norms of justice concern the very structure of human coexistence in the finite world that we are fated to share. They determine our entitlements and burdens—what we owe each other—as participants in the joint venture of collective life. Securing them is thereby an unavoidably public concern (Waldron 1999: 105–6, 159–60).

There is of course a long way from justice considered in general to justice as it bears on a particular dispute brought before a court of law. A judge should not decide a torts dispute involving a wealthy driver and a poor pedestrian on the basis of their income sheets, even though his Ralwsian conception of justice may require large scale redistribution of income and wealth in the society in question. There are numerous other factors, including the wrongfulness of the defendant's conduct and the effects of the decision in future activity, that possibly should play a significant role in the fair assessment of the dispute; disregarding these other factors will yield the decision not just inadequate but unjust. Judges are bound by justice as it bears on the case before them, not as if they were supreme architects well positioned to implement large scale social reforms.

Certainty. Social life would be hopelessly unpredictable if the citizenry could not count on any guidance but that which is provided by trying to figure out individually what justice requires or by trying to predict future judicial rulings. This is true for two basic reasons. First, people disagree about the requirements of justice, meaning that two reasonable individuals are unlikely to come to the same conclusions as they engage with the plethora of issues of justice entangled in their

(Footnote 3 continued)

Dworkin (1978, 1986), who argued over his career for slightly different versions of the view of law as a normative domain straddled between the two realms. Dworkin appears to have evolved in his latest work towards a view of law as part of morality (Dworkin 2011: 400–15). That is also the view underlying the pluralist model of adjudication articulated in this section.

[4]This view is typically modern and can be traced back to Kant (1996), who distinguishes sharply between (duties of) right (*Recht*) and (duties of) virtue. An earlier conception, well represented by Aquinas (1947: II–I, q. 96, a. 2), was that morality is not divided into different 'departments' but embodies a *continuum* of obligation, with the range of enforceable duties determined by context-bound prudential judgments.

ordinary affairs (Waldron 1996: 1538–40). Moreover, the mental burden of unrestrained moral reflection about each and every issue of justice would prove exhausting even to the most resilient citizen. Second, there are numerous collective action or coordination problems that cannot be settled rationally but only through the *fiat* of some authority—say, decisions about whose vehicle should be given priority at an intersection, concerning the maximum time after a legally relevant event to initiate the corresponding proceedings, or to create administrative agencies devoted to the provision of public goods (Raz 1993: chs. 2–4).

The force of these reasons is the measure of the value of certainty and of its independent weight in judicial decision-making. Judges ought to defer to past decisions or practices because by doing so they provide conduct guidelines to the citizenry and enable the creation of coordination benefits. Such decisions and practices command greater deference, other things being equal, if they exhibit certain formal properties that improve their value as guides to conduct, namely the familiar 'rule of law' virtues of publicity, clarity, determinacy, prospectivity, and the like. What makes these distinctively 'legal' is that they are creatures of positive law, for certainty is a value yielded once norms of justice are embodied in such things as statutes, rulings, customs, and other conventional legal sources. But certainty is not merely a surplus yielded by the incorporation of justice into positive law; it has an independent value that justifies more or less significant judicial departure from the requirements of substantive justice.

Legitimacy. There are reasons of a different nature pulling judges towards deference to past decisions, particularly those issued by the elected branches. Such reasons fall into two basic categories. The first concerns the title or right to settle controversial issues of political morality. Citizens disagree about justice and they do so in good faith (Waldron 1999: 1–4, 10–16, 176–186, 306–312). The elected branches are typically endowed with a comparatively strong title to decide which among the rival conceptions of justice should be given preference because they possess good democratic credentials (Wollheim 1969). In most legal systems, judges are neither politically accountable nor representative of the ideological pluralism across the community. The elected branches, on the contrary, are chosen by the addressees of their power, the citizenry itself, acting as free and equal persons.

The second category comprises considerations of functional competence. Courts are comparatively ill-equipped to make certain types of judgment, namely empirical assessments involving complex prognoses—e.g., what are the effects of shifting from negligence to strict liability in the area of accidents caused by defective products?—and judgments of policy aimed at the public interest or general welfare—e.g., what goal should be given precedence in case of conflict, full employment or price stability? Judges have good reason to defer to the decisions of the elected branches on these issues because the latter are more likely to get things right. The expertise of the judiciary lies not in technical questions that implicate the deployment of instrumental rationality but in what Dworkin calls 'matters of principle' (Dworkin 1978: 82–84), which involve primarily normative judgments concerning the content and weight of competing claims over some disputed resource, opportunity or competence.

Equality. Yet another reason for deferring to past decisions flows from the requirement to 'treat like cases alike'. This is the principle underlying the central role played by analogy not only in legal argument but in ordinary moral reasoning as well. Formally speaking, it determines that two cases should be treated alike in the exact proportion of their relevant similarity—e.g., if A is sentenced to pay a fine x for committing offense y, B ought to be sentenced to pay a proportionately higher fine for committing offense $y + 1$.

Equality is a value as pervasive as it is mysterious, so we may profit from a down-to-earth illustration of its normative force. Imagine a parent that gives a certain amount of money to one of his teenage twin children on a given day, only to realize in a few hours that he should have been less profligate. On the next day he is approached by the other twin who, in similar circumstances, asks the same amount of money from him. He was wrong in his first decision, but does he not have a *prima facie* reason to repeat it on this occasion? I believe so. The second twin is likely to claim not only that he relied upon the past decision, but that her standing in the family requires from the parental authority equal treatment in relevantly similar circumstances.

Admittedly, there are various complications built into the idea of equality, notably the tension between what we might call bare consistency and consistency of principle (Dworkin 1986: 219–224). Does equality require that a past decision inconsistent with the principle(s) governing issues of a similar type (what the Roman jurists called *jus singulare*) be followed or, on the contrary, it requires principled decision-making, hence that the anomalous exception be abolished? The latter route is apparently more attractive from a normative standpoint and is quite congenial to the role that analogy ordinarily plays in legal reasoning. The issue is complicated, and cannot be pursued any further on this occasion.

Prudence. Courts might have good reason to depart from the best judgment according to the four preceding principles for reasons that we might describe as prudential. Their responsibility is not exhausted by the duty to deliver justice in the case at hand, comprising as well the institutional obligation of ensuring the basic conditions for the continuing realization of the law. What that requires from them is a permanent concern with the *consequences* of a ruling for the rule of law. The force of this point may be conveyed through an example.

The jurisdiction of the International Court of Justice to adjudicate a dispute between sovereign states depends on their consent, i.e. it is voluntary instead of compulsory. This is undoubtedly a major flaw of the international legal order, since it gives leeway for states to act as judges in their own cause. There are plenty of compelling arguments—to begin with, the principle of *nemo iudex in causa sua*—for the ICJ to claim compulsory jurisdiction over states. But the political backlash of such a decision, however correct as matter of principle, is likely to be of such character as to undermine instead of furthering the Court's effective authority to enforce international law. Powerful states would not take lightly what would amount to unconsented loss of sovereignty, ultimately challenging instead of submitting to the Court's unilateral claim to authority. At the end of the day, an imperfect legal order could very well degenerate into a state of nature subject to the ruthlessly unstable and unprincipled rule of naked power and self-interest.

Prudence is the basis of what Alexander Bickel called the 'passive virtues' of judicial power (Bickel 1961-62).[5] It reminds judges that they are not insulated from the real world, where decisions often have unintended consequences that require an openness to compromise grounded in the 'ethic of responsibility' (Weber 1991: 119–27).

4.5 Stare Decisis

Let me illustrate the interplay of these principles with a basic example: the doctrine of precedent. In its so-called historical as opposed to hierarchical dimension—involving past and future decisions of a superior court instead of decisions by higher and inferior courts—precedent is the doctrine according to which a court is bound by its past rulings on the issue to be decided. Now it is important to distinguish carefully the binding force of precedent from its persuasive value. No doubt judges deciding a case are likely to find in the records of past decisions a rich source of insight about the issues it raises and how to handle them properly. There are very good reasons of economy (saving time and energy) and method (learning from past experience) to use past cases as guidance to decide those of the present day, and there is every reason to adhere to previous rulings whenever these prove persuasive on the merits. But that is the spirit in which a judge might turn to the writings of Aristotle or to foreign case law in his search for the right answer to a challenging issue; it does not mean that the *Nicomachean Ethics* or the case law of the Canadian Supreme Court are law in Portugal or in South Africa. *Stare decisis* implies that precedent is binding even if the court is now persuaded that the issue was wrongly decided in the past.[6] Why should such an apparently odd doctrine be accepted? Should we not join Oliver Wendell Holmes when he complains that 'it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV' (Holmes 1997: 1001)?

Holmes' point is entirely sound from the standpoint of justice alone. If the duty of a judge were to decide each case according to what a perfectly just legal system would provide, the force of precedent would be exhausted by its substantive merit.

[5]For more on this subject, see the contribution of Luís Pereira Coutinho in this volume.

[6]To expand on the point above, the doctrine of precedent is (nearly) redundant when the present day court believes that the matter was correctly decided in the past. It might sound paradoxical, but *stare decisis* makes a greater difference in legal argument precisely when the judge of today believes that his predecessor made a mistake as to the law. This might be taken to be an argument against the 'declaratory theory' of precedent, the view that judges declare instead of making law. But the issue is usually ill-conceived (Zander 2004: 298–99). Judges do (should) not make law (understood, of course, in the non-legalistic or pluralistic sense advocated here) when they decide a case; their job is to settle the dispute according to the law as it stands. They cannot deliberately change the law, like legislatures regularly do. But in deciding a case as they ought to, by trying to figure out the law, they unintentionally change it by introducing a new element—the decision—in the body of relevant legal materials.

There would still be plenty of reason for judges to engage with the records of past decisions in their search for a just resolution to the dispute at hand, but they would not take themselves to be legally bound by anything decided by their predecessors on the job. If anything, justice is a principle that counts against *stare decisis*—it furnishes a *prima facie* reason to overrule incorrect or unjust precedents. If precedent has any legal force at all, then, it must be in virtue of other fundamental principles.

Certainty is surely one of them. Past decisions known to bind courts in the future encourage the reliance of persons acting in similar circumstances, and in so doing they increase the predictability of social life by improving the ability of the citizenry to foresee the consequences of a given course of action. This proposition might be doubtful if we take precedent to mean a single case, for 'standing alone [no case]… can give you…guidance as to how far it carries, as to how much of its language will hold water later' (Llewellyn 2008: 46). Can we infer any guiding principle regarding the scope of First Amendment (freedom of expression) rights exercised in someone else's property from a decision to disallow the use of trespassing laws to prevent the distribution of religious materials on a sidewalk of a privately owned company town?[7] Does the ruling imply anything for a case involving a shopping center owner barring union members from peacefully picketing in front of a store?[8] What about a case concerning the distribution of handbill invitations to a political meeting in a shopping mall?[9] The answer to these queries is obviously negative. Past judicial decisions offer guidance for the future when they form clusters or lines of cases, that is to say, when each case can be read against the background of a number of others lying in its vicinity (Llewellyn 2008: 46–54).

Are there grounds of legitimacy to follow precedent? That is hardly the case. Neither do past judges hold better credentials than those of the present day to settle controversial issues of political morality, nor do they exhibit any functional advantage over their identically positioned successors. On the contrary, there is reason to think that the current generation is more legitimate simply because it was appointed more recently. Whatever method of judicial appointment is adopted in a given jurisdiction, the most recent nominee to the bench is in theory, barring unusual circumstances of political systems degenerating over time, the most legitimate judge, since he benefits both from the fresher democratic legitimacy of whatever elected officials were involved directly or indirectly in his appointment and from the most up to date technical preparation for the job.

The connection between equality and precedent is more ambiguous. It is standard law talk that the principle 'treating like cases alike' is one of the foundations of the doctrine of precedent. That is certainly true. But the same principle is also the source of a deep tension within the doctrine between arguments for strict adherence to precedent and for distinguishing the case at hand from a line of previous cases or

[7] *Marsh v. Alabama*, 326 U.S. 501 (1946).

[8] *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968).

[9] *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

for abolishing unprincipled exceptions to general standards. Equality, as we saw earlier, may be taken to imply either bare consistency with the past or consistency of principle, and the choice between one and the other is far from inconsequential in this area. Consistency of principle pushes judges in the direction of forcing coherence upon the case law, either by abolishing unjustified exceptions or by introducing distinctions that might have been overlooked or even disallowed in the past. Bare consistency, on the other hand, requires strict adherence to the rules laid down, even if these do not add up to what Ronald Dworkin calls 'a coherent scheme of principle' (Dworkin 1986: 214).

Prudence, at last, should usually be counted as a reason for precedent. Courts, particularly the highest in a jurisdiction, are moral persons in the eyes of the public, not simply collections of individual judges belonging to this or that jurisprudential tendency or this or that generation. Much of their authority is based on the integrity of the case law they produce over time. Shifts of opinion are perfectly appropriate and often necessary but unless they take place against the background of reasoned engagement with the record of past decisions, the judiciary can be easily brought into disrepute. Accordingly, prudence places the burden of proof with the reformist.

It is an open question how to balance these rival considerations. Reflective and responsible judges will adhere to stricter or more flexible conceptions of precedent depending both on the relevant empirical circumstances of their legal system—say, whether there is a deep seated practice of precedent that encourages the reliance of the citizenry on past judgments—and the relative value they ascribe to the fundamental principles pulling them in opposite directions. Precedent, like all law, is riddled with tension and controversy. That explains why any mature legal culture where the doctrine is taken seriously recognizes not just *stare decisis* but also the countervailing technique of distinguishing and the power to overrule. The latter, for instance, is properly exercised in those circumstances where the standpoints of substantive justice and legitimacy take precedence over competing considerations of certainty, equality and prudence.

4.6 Varieties of Activism

The pluralist view is thus that law, understood as the appropriate ground of a judicial decision, is the outcome of the all-things-considered judgment balancing the fundamental principles of legal justification in the circumstances of the dispute. If this view is correct, it is quite silly to draw any sharp distinction between law and politics, or legal and personal judgment, or to adhere to Montesquieu's misleading account of the judiciary as a neutral or void power (Montesquieu 1955: 68). Proper judging—that is, according to law—is unavoidably political in two respects. First, it is political in the general sense of the term: law engages the judge's sense of justice in proportion to the role that the principle of justice plays in legal argument; and the judge's sense of justice obviously translates into his ideological commitments in a public culture characterized by the fact of reasonable pluralism (Rawls 2005:

36–39, 54–66). Second, it is political in a specific sense tied to legal argument: engagement with the fundamental principles implies balancing judgments which are inevitably complex and controversial, leading to genuine and reasonable disagreements among lawyers about the law (Dworkin 1986: 4–5, 112–113).

Does that mean we are left empty handed in our search for criteria to define judicial activism? Not at all. Even if we accept the jurisprudential conception embodied in the pluralist model, there are perfectly intelligible and appropriate deployments of the concept of judicial activism. Let me outline the main three, along a spectrum going from the most serious or blatant form of activism to the lighter and subtler.

First, there is judicial activism in the sense that even the idealist jurist recognizes. Judges are expected to settle cases: they owe justice to the parties. If they use their power to advance a broader policy agenda, such as redistribution of wealth or economic growth, of the sort illustrated previously, they usurp the authority of the legislature and compromise the separation between legislative and judicial power.

Second, judges who operate within an idealist conception of law are activists of two possible sorts: they may be 'outliers' acting as vigilantes unrestrained by anything but their sense of justice or 'rogues' who lack integrity in that they deploy legal arguments strategically. A 'rogue' in particular is a judge who is committed to idealism but pretends otherwise, mastering legalist or pluralist techniques in order to bolster or conserve his legitimacy. It is the sort of judge who will turn to this or that account of precedent or this or that theory of statutory interpretation depending on which one yields the outcome he favors (Kennedy 1986; Posner 1991), with the implication that his record of decision-making is a patchwork rather than a coherent narrative (Dworkin 1986: 228–232, 400–407).

Finally, there is activism as a notion within the realm of pluralist adjudication. It is the charge directed against a relatively liberal judge by a more conservative jurist (Dworkin 1986: 357–359) that he did not give sufficient weight to the principles that counsel restraint. 'Activist' in this sense is the judge who is more prone than the average to accord weight to justice vis-à-vis legitimacy, certainty, equality and prudence—the judge who is likely to deploy frequently doctrines such as teleological reduction and analogical extension in the field of statutory interpretation or distinguishing and overruling in the field of precedent. Or the judge who is prepared to, if push comes to shove, issue a straightforward *contra legem* ruling grounded in the doctrine of *lex injusta* (Radbruch 2006; Alexy 2002b: 40–68). Activism in this sense is part of the ordinary business of adjudication, an offspring of the inevitably political dimension of judicial power.

4.7 Judicial Review of Legislation

I have focused in the previous sections on ordinary adjudication of the type involved in any standard civil or criminal case, or for that matter in most instances of judicial review of executive action. It is by far the more general case in the theory

of adjudication. But I should like to make a few brief remarks by way of conclusion about the somewhat special case of judicial review *of legislation*, perhaps the field where the charge of judicial activism is laid with more frequency—and appropriately so, since it is the area where the temptation to derail from the path of the law is felt more intensely.

There is indeed an important difference between ordinary (let me use this label for the general case of adjudication) and constitutional adjudication. Not that 'the law' is something fundamentally different for judges deciding one and the other types of case; the pluralist model of adjudication, and specifically the five basic legal principles, hold all the same when judges are called to decide on the validity of legislation. The relevant differences concern the nature of the task and the very form of judicial power it entails. Put briefly, they can be reduced to the following three points:

Scope of Power. Ordinary adjudication concerns the resolution of disputes between particular (natural or moral) persons. The authority of the court is bound to the case, in the sense that the job of the judge(s) is to settle *that* one dispute. Constitutional adjudication, on the other hand, places courts in the position of what Hans Kelsen called a 'negative legislator', empowered to *strike down* legislation (Kelsen 2008). It is the nature of the beast itself that requires judges to cast a much wider net, so wide that it places the judiciary in a territory that has traditionally been regarded as the province of the legislature: general prescription (Gény 1919: 74–92).

Function Served. Ordinary adjudication serves a necessary function, in the sense that if a court refuses to settle a dispute the issue will remain disputed and will eventually have to be settled privately. That is why in any mature legal system judges cannot refuse to decide a case on account of the complexity, ambiguity or unclarity of the situation; such prohibition of so-called *non liquet* judgments is a fairly straightforward implication of the principle *nemo iudex in causa sua*. On the contrary, constitutional adjudication is a safeguard against legislative defects, and in that sense it plays a secondary role. Legal systems without judicial review of legislation are perfectly conceivable, and indeed a reality both historically and in some contemporary liberal democracies.[10]

Positive Constraints. Constitutions are far more open-textured than ordinary legal sources, namely statutes. Many constitutional provisions embody principles instead of rules, meaning that their application involves an ad hoc balancing judgment which is likely to be controversial. The leeway of a constitutional judge is hence, even where fundamental principles pull him towards the material of positive law, much greater than that which ordinary judges enjoy. No wonder that

[10]New Zealand is the contemporary example that I am acquainted with. Notice that the list is much longer if we decide to include in it all the systems which lack strong judicial review of legislation, i.e. in which courts can declare that a statute is unconstitutional but lack the power to strike it down. The most prominent example of this later type of system is the U.K. regime of 'declaration of incompatibility' under the Human Rights Act of 1998. For a fine summary of the differences between systems of strong and weak review, see Waldron (2006: 1554–57).

constitutional theory has been haunted for so many decades with what is misleadingly labeled the 'counter-majoritarian difficulty'.[11]

Legal theorists tend to overlook these differences, although they yield important consequences for the theory of constitutional adjudication.[12] I have argued elsewhere that the proper scope of constitutional justice in a liberal democracy is quite narrow (Ribeiro 2013, 2014). This is not the occasion to restate or to refine the argument. The point that I wish to stress here is that the differences listed above justify a much broader endorsement of the virtue of self-restraint in constitutional than in ordinary adjudication.

References

ALEXY, Robert. 2002a. *A Theory of Constitutional Rights*, translated by Julian Rivers. Oxford: Oxford University Press.

ALEXY, Robert. 2002b. *The Argument from Injustice*, translated by Bonnie L. Paulson and Stanley L. Paulson. Oxford: Oxford University Press.

AQUINAS, Thomas. 1947. *Summa Theologica*, translated by the Fathers of the English Dominican Province. URL: http://www.sacred-texts.com/chr/aquinas/summa/index.htm.

BICKEL, Alexander. 1961-62. The Supreme Court 1960 Term — Forward: The Passive Virtues. *Harvard Law Review* 75: 40.

BICKEL, Alexander. 1986. *The Least Dangerous Branch*. New Haven: Yale University Press.

BLACK, Henry and GARNER, Bryan. 2000. *Black's Law Dictionary.* St Paul: West Publishing Co.

DWORKIN, Ronald. 1978. *Taking Rights Seriously*. Cambridge, Mass.: Harvard University Press.

DWORKIN, Ronald. 1986. *Law's Empire.* Cambridge, Mass.: Belknap Press of Harvard University Press.

DWORKIN, Ronald. 2011. *Justice for Hedgehogs.* Cambridge, Mass.: Belknap Press of Harvard University Press.

FERRAJOLI, Luigi. 2009. *Garantismo*, translated by Andrea Greppi. Madrid: Editorial Trotta.

GARDNER, John. 2001. Legal Positivism: 5 1/2 Myths. *American Journal of Jurisprudence* 46: 199.

GENY, François. 1919. *Méthode d'Interprétation et Sources en Droit Privé Positif*, vol. II. Paris: Librairie Générale de Droit et de Jurisprudence.

GORDLEY, James. 1991. *The Philosophical Origins of Modern Contract Doctrine.* Oxford & New York: Oxford University Press.

GREEN, Craig. 2009a. An *Intellectual History of Judicial Activism*, Emory Law Journal 58: 1195.

[11]The term was coined by Alexander Bickel (1986: 16–23). It is misleading because, as Jeremy Waldron (2006: 1391–93) stresses, courts are majoritarian institutions as well. What they normally lack is electoral accountability and popular representativeness.

[12]Italian legal theorist Luigi Ferrajoli (2009: 96), for example, argues that the reason to have a majority of unelected judges second-guessing legislative judgments about controversial issues concerning the content and weight of fundamental rights is no different from the basic separation-of-powers reason for having unelected ordinary judges deciding hard cases. In addition to confusing the separation of powers with the democratic principle—the former prescribes that legislation and adjudication should be entrusted to different actors while the latter prescribes a particular method (free and open elections) for selecting officials—Ferrajoli overlooks all the important differences between ordinary and constitutional adjudication. His appeal to Montesquieu (*Id.*: 97), who believed in a neutral judiciary, is particularly misguided.

GREEN, Leslie. 2009b. Legal Positivism. *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, URL = http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/.
GREENBERG, Mark. 2004. How Facts Make Law. *Legal Theory* 10: 157.
GROSSI, Paolo. 1996. *L'Ordine Giuridico Medievale*. Roma: Editori Laterza.
GROTIUS, Hugo. 2005. *The Rights of War and Peace*, Book III, translated from the French of Jean Barbeyrac and edited by Richard Tuck. Indianapolis: Liberty Fund.
HART, H. L. A. 1955. Are There Any Natural Rights? *Philosophical Review* 64: 175.
HART, H. L. A. 1994. *The Concept of Law*. Oxford & New York: Oxford University Press.
HOLMES Jr., Oliver Wendell. 1997. The Path of the Law. *Harvard Law Review* 110: 991.
HESPANHA, António Manuel. 2003. *Cultura Jurídica Europeia: Síntese de um Milénio*. Lisboa: Europa-América.
HORWITZ, Morton. 1977. *The Transformation of American Law: 1780-1860*. Cambridge: Harvard University Press.
KANT, Immmanuel. 1996. *The Metaphysics of Morals*, translated by Mary Gregor. Cambridge & New York: Cambridge University Press.
KELSEN, Hans. 1978. *Pure Theory of Law*, translated by Max Knight. Berkeley: University of California Press.
KELSEN, Hans. 2008. *Wer soll der Huter der Verfassung sein?* Tübingen: Mohr Siebeck.
KENNEDY, Duncan. 1986. Freedom and Constraint in Adjudication: A Critical Phenomenology. *Journal of Legal Education* 36: 518.
LLEWELLYN, Karl. 2008. *The Bramble Bush*. Oxford: Oxford University Press.
MONTESQUIEU. 1955. *Œuvres Complètes*, *De L'Esprit des Lois*, t. II. Paris: Les Belles Lettres.
POSNER, Richard. 1991. What has Pragmatism to Offer Law? In *Pragmatism in Law & Society*, ed. Michael Brint and William Weaver. Boulder: Westview Press.
RADBRUCH, Gustav. 2006. Statutory Lawlessness and Supra-Statutory Law, translated by Bonnie L. Paulson and Stanley L. Paulson. *Oxford Journal of Legal Studies* 26: 1.
RAWLS, John. 2005. *Political Liberalism*. New York: Columbia University Press.
RAZ, Joseph. 1993. *The Morality of Freedom*. Oxford: Oxford University Press.
RAZ, Joseph. 2004. Incorporation by Law. *Legal Theory* 10: 1.
RIBEIRO, Gonçalo de Almeida. 2013. Judicial Activism Against Austerity in Portugal, *I-CONnect — Blog of the International Journal of Constitutional Law*. URL - http://www.iconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal/.
RIBEIRO, Gonçalo de Almeida. 2014. O Constitutionalismo dos Princípios. In *O Tribunal Constitutional e a Crise*, ed. Gonçalo de Almeida Ribeiro and Luís Pereira Coutinho. Coimbra: Almedina.
SIECKMANN, Jan-Reinard. 1990. *Regelmodelle und Prinzipienmodelle des Rechtssystems*. Baden-Baden: Nomos.
STEIN, Peter. 1993. Justinian's Compilation: Classical Legacy and Legal Source. *Tulane European & Civil Law Forum* 8: 1.
WALDRON, Jeremy. 1996. Kant's Legal Positivism. *Harvard Law Review* 109: 1535.
WALDRON, Jeremy. 1999. *Law and Disagreement*. Oxford & New York: Oxford University Press.
WALDRON, Jeremy. 2006. The Core of the Case Against Judicial Review. *The Yale Law Journal* 115: 1346.
WEBER, Max. 1978. *On Law in Economy and Society*, translated by Edward Shils & Max Rheinstein. New York: Simon and Schuster.
WEBER, Max. 1991. Politics as a Vocation. In *From Max Weber: Essays in Sociology*, ed. H. H. Gerth & C. Wright Mills. London: Routledge.
WIEACKER, Franz. 1995. *A History of Private Law in Europe, with Particular Reference to Germany*, translated by Tony Weir. Oxford & New York: Oxford University Press.
WOLLHEIM, Richard. 1969. A Paradox in the Theory of Democracy. In *Philosophy, Politics and Society*, ed. in Peter Laslett and W. G. Runciman. Oxford: Basil Blackwell.
ZANDER, Michael. 2004. *The Law-Making Process*. Cambridge: Cambridge University Press.