The Judicial Review of Legality

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Introduction

A growing body of literature describes a phenomenon of democratic erosion.[1] The emerging consensus in this scholarship is that since the end of the Cold War, the principal threat to democracy lies not in collapses into authoritarianism through coups or declarations of states of emergency, but in subtle processes whereby key elements of democracy, such as individual rights, competitive elections and executive accountability, are diminished.[2] The success (and danger) of this phenomenon resides in its maintenance of democratic institutions and rhetoric, together with the piecemeal nature of erosion, each change appearing innocuous when viewed in isolation.[3]

Legal techniques are key to this process of erosion. Through amendments to constitutions and ordinary legislation, term limits are extended or removed entirely,[4] government control of the media expands,[5] and the checks and balances provided by courts and other bodies are curtailed.[6] While rulers also use executive decisions, such as decisions to pack courts with judges sympathetic to the ruling party,[7] scholars note the salience of legal tools in the anti-democratic playbook, leading them to describe these tools as "abusive

[1] L. Diamond, 'Facing Up to the Democratic Recession', in L. Diamond and M.F. Plattner (eds), *Democracy in decline?* (Baltimore: John Hopkins University Press, 2015) 98, 102-104; M.F. Plattner, 'Is Democracy in Decline?' (2015) 26 *Journal of Democracy* 5.
[2] A.Z. Huq and T. Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 78-169; D. Landau, 'Abusive Constitutionalism' (2013) 47 *University of California Davis Law Review* 189-260; K.L. Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545-583, 547-548.
[3] *ibid*, Huq and Ginsburg, 82-84.
[4] Eg. Landau, n 2 above, 206.
[5] I*bid*, 209-210. W. Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding', (2018) *Sydney Law School Research Paper No. 18/01*, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491 (last visited 29 July 2020).
[6] In Hungary, legislation weakened courts and narrowed the jurisdiction of the Constitutional Court. Huq and Ginsburg, n 2 above, 126.
[7] This was done in Hungary (*ibid*, 126) and in Poland (Sadurski, n 5 above, 21-24).

constitutionalism" or "autocratic legalism".[8] Law is associated with rationality, democratic culture and majoritarianism, cloaking rulers' decisions with legitimacy.[9] For new democracies, the adoption of legal measures existing in established democracies is a particularly strong source of legitimacy, producing what Kim Scheppele calls the "Frankenstate": the stitching together of constitutional components from various democracies, components which are reasonable when viewed individually, but erode democracy when taken as a whole.[10]

In addition, legislation is often technical, its effects difficult to understand for the layperson, thus impeding criticism.[11] At the same time, law's expressive force allows rulers to make nationalist or illiberal statements pleasing to their supporters. In 2018, the Israeli Knesset enacted the Basic Law: Israel the Nation-State of the Jewish People ("Nation-State Law"); while that law's concrete effects are unclear, it contains ethno-nationalist messages.[12] Commentators similarly see a recent amendment to India's citizenship law, allowing to accelerate the naturalization of refugees from neighboring countries to the exclusion of Muslims, as a way for the ruling party to demonize Muslim citizens and gain Hindu votes.[13]

In our assessment, scholars overstate the novelty of contemporary techniques of democratic erosion.[14] Accounts of the Third Reich and of right-wing authoritarianism in the Cold War's Western block reveal the crucial part played by legal discourse and legal justifications to these regimes' legitimacy in the eyes of their supporters, whether among the

[8] Landau, n 2 above, and Scheppele, n 2 above, 545-583, respectively.
[9] T. Ginsburg and T. Moustafa, *Rule by Law: The Politics in Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008) 5-6.
[10] K.L. Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 4.
[11] See eg. Sadurski, n 5 above, 25.
[12] See text to n 118-124 below.
[13] J. Bajoria, 'Shoot the Traitors' (Human Rights Watch 2020), at https://www.hrw.org/report/2020/04/09/shoot-traitors/discrimination-against-muslims-under-indias-new-citizenship-policy# (last visited 29 July 2020); 'Citizenship Amendment Bill: India's new "anti-Muslim" law explained' (BBC News 2019) at https://www.bbc.com/news/world-asia-india-50670393 (last visited 29 July 2020).
[14] Landau, n 2 above.

citizenry or foreign allied states.[15] These antecedents suggest that the authoritarian use of law is not a passing trend, but a perennial threat to democracy in the modern era.

In the face of legislation eroding democracy, courts have at their disposal two principal models of judicial review. The first, and most common, is value-based review, whereby legislation is invalidated for violating a protected, typically liberal, value or principle. Under this model, legislative measures weakening the political opposition can be challenged for infringing the constitutional rights to free speech and association, while attempts to limit the independence of courts can be challenged for infringing institutional principles such as the separation of powers. Value-based review can also be applied to constitutional legislation, through the doctrine of 'unconstitutional constitutional amendment', which is no longer in the margins of constitutional doctrine.[16] This doctrine enables courts to strike down constitutional amendments when the constitution expressly provides for the unamendability of some of its clauses, or when democratic values basic to the constitutional system are threatened. Thus, in 2010, the Colombian constitutional court used the doctrine to prevent President Alvaro Uribe Velez from amending the constitution to run for a third consecutive term in office.[17]

The second model reviews not the substance of the challenged legislation, but the process through which it was elaborated.[18] Such procedural review can assess compliance with constitutionally-mandated technical requirements such as bicameral passage.[19] It can also delve

[15] D. Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Durham: Carolina Academic Press, 2005); E. Fraenkel and J. Meierhenrich, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford: University Press, 2018); N.R. Davidson, 'Toward a Self-Reflexive Law: Narrating Torture's Legality in Human Rights Litigation' (2017) 21 *Law Text Culture* 100; A.W. Pereira, 'Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile' in n 9 above, 23-57.
[16] Landau, n 2 above, 232. See also Colón-Ríos, Joel I. "A New Typology of Judicial Review of Legislation." *GlobCon* 3 (2014): 143 (adding a constitutional layer intersecting with the traditional distinction between strong and weak judicial review).
[17] Landau, n 2 above, 200-203.
[18] This model bears kinship with John Hart Ely's participatory theory of judicial review, though he focused on legislative outputs rather than on the process of legislating. J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), S. Gardbaum. 'Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa' (2019) 9 *Constitutional Court Review* 1.
[19] I. Bar-Siman-Tov, 'The Puzzling Resistance to Judicial Review of the Legislative Process' (2011) 91 *Boston University Law Review* 1922.

into the quality of the legislative process to ensure compliance with unwritten rules requiring due deliberation or participation.[20] Courts around the world have recently shed their traditional reluctance to invalidate legislation solely for failure to comply with such unwritten procedural requirements.[21] In 2003 in Colombia, and in 2017 in Israel, courts invalidated last minute amendments to tax legislation, pursuant to unwritten rules requiring giving legislators sufficient time to deliberate.[22] Like value-based review, procedural review can apply not only to ordinary legislation but also to constitutional amendments.[23]

However, the expansive use of these forms of judicial review is not sustainable. Process-based judicial review is extremely limited in the face of the legal practices of democratic erosion, as it cannot invalidate a blatantly undemocratic arrangement legislated with the support of the representatives of a majority of voters. That is the role of value-based judicial review, which, however, famously exposes courts to the charge of counter majoritarianism, criticism to which the doctrine of unconstitutional constitutional amendment is particularly vulnerable, as it removes the principal safety valve against judicial review - constitutional amendments.[24] Process-based review drawing on unwritten requirements relating to the democratic quality of the legislative process is also vulnerable to the critique of judicial interference in the political branches. Recent expansions of judicial review thus bolster the critique that judicial review constitutes an undemocratic rule of judges, a critique which, according to some commentators, feeds the populist backlash to liberal democracy.[25] In addition, the entrenchment of liberal values can eventually lead to the entrenchment of non-

[20] *ibid*.
[21] Traditionally courts have engaged in what Ittai Bar-Siman-Tov calls "semiprocedural review", whereby 'defects in the legislative process… may serve as a decisive consideration in the judicial decision to strike down legislation. However, these procedural requirements - and the judicial examination of the legislative process itself - are only triggered when the content of the legislation is allegedly unconstitutional.' n 19 above, 1915.
[22] With respect to Colombia, see Gardbaum, n 18 above, 6. With respect to Israel see *Kwantinski* v *The Knesset*, HCJ 10042/16 (2017). For further examples from Germany and South Africa, See Gardbaum, n 18 above, 5-11.
[23] See eg. Y. Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press, 2017) 198-200.
[24] Landau, n 2 above, 232-233.
[25] J.W. Muller, *What is Populism* (Pennsylvania: University of Pennsylvania Press, 2016) 138-141.

liberal ones.[26] For instance, in Hungary, the new fundamental law enacted in 2011 entrenches conservative interpretations of rights, such as an exclusion of sexual orientation from anti-discrimination protection.[27]

But what else can courts do? If they decline to invalidate primary legislation or constitutional amendments that infringe on rights and principles essential to democracy, do they not in effect enable the legal techniques of democratic erosion? It appears that courts are caught between collaborating with democratic erosion and trying to save democracy. While the first option is unappealing morally, the second might be counterproductive, and in any event raises concerns about democratic legitimacy.

Is there a role for courts that involves neither collaborating with authoritarianism nor seeking to rescue democracy? We do not refer here to the moral dilemmas facing the individual judge when confronted with institutionalized evil,[28] but to courts as institutions. While scholars of democratic erosion have pointed to the limitations and dangers of specific forms of judicial review,[29] the prolific literature on this phenomenon and on the possible legal responses thereto does not acknowledge the existence of such a general dilemma on the judicial role, let alone try to solve it. One path out of this impasse is for courts to invoke doctrines of non-justiciability, which avoid embroiling courts in evaluations of legislation.[30] While this solution may be appropriate in some instances, in this article we propose an alternative way for courts to avoid the collaborator/savior bind. We reconstruct a new type of judicial review we call "the judicial

[26] R. Dixon and D. Landau 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 *International Journal of Constitutional Law* 606, 608.
[27] A. Vincze and M. Varju, 'Hungary the New Fundamental Law' (2012) 18 *European Public Law* 437, 443-444.
[28] R.M. Cover, *Justice Accused: Antislavery and The Judicial Process* (Bloomsbury: Yale University Press, 1975).
[29] Eg. Dixon and Landau, n 26 above; M. Blauberger and R.D Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU' (2017) 24 *Journal of European Public Policy* 321-36.
[30] In this they follow Bickel's advice to find ways to avoid contentious issues for prudential reasons. A.M. Bickel, 'Foreword: The Passive Virtues' (1961) 75 *Harvard Law Review* 40, 49-51. For a survey of techniques of judicial avoidance, see E.F. Delaney, 'Analyzing Avoidance: Judicial Strategy in Comparative Perspective' (2016) 66 *Duke Law Journal*, 1-68.

review of legality". In this review, courts would more actively resist the democratic erosion than through resort to non-justiciability and other techniques of judicial avoidance, as they would actually analyse, and where relevant, invalidate challenged legislation, on the ground that its form does not comply with minimum requirements of legality. At the same time, because this form of review is narrowly focused on legal craftsmanship rather than on legislation's substantive policies or on the quality of the legislative process, courts would enjoy more normative legitimacy than when they expand value-based judicial review or process-based review to save democracy.

The legal techniques of democratic erosion pose the following challenge to courts: is there a meta-theory of law that enables courts to distinguish law deserving of the name (ie. law that respects the rule of law) from authoritarian uses of law, and to invalidate the latter? The two models of judicial review outlined above are inapt to meet this challenge, for they do not rely on such a meta-theory of law. Value-based judicial review examines the content of legislation in light of constitutional values, while process-based review reviews the democratic quality of the legislative process. In other words, contemporary judicial review is organized along a substance/process dichotomy, avoiding the question of whether there are inherent limitations in the forms of law, and drawing instead on moral or political values (liberalism, democracy, etc.). This focus on extra-legal values in the content and process of legislation does not only impede courts' ability to address the legal tools of democratic erosion; it also raises questions about courts' institutional competence. Indeed, it echoes the problematic character of natural law in modern times – the impossibility of finding universal grounds for the protected values, and the consequent suspicion that judicial rulings are undemocratic impositions of one particular set of values with universalist pretenses.[31] To adequately address the legal techniques

[31] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005) 79. This critique of natural law was famously expounded by Hobbes, in T. Hobbes, G.A.J. Rogers and K. Schuhmann, *Leviathan, A Critical Edition by G.A.J. Rogers and Karl Schuhmann* (London: Thoemmes Continuum, 2005) 109-110.

of democratic erosion and recenter judicial review on courts' area of expertise, we suggest developing a form of judicial review grounded in a meta-theory of law: what Lon Fuller called the internal morality of law.

To develop this argument, we draw on writing by Kristen Rundle and Jeremy Waldron recovering Fuller's jurisprudence and distinguishing him from the familiar school of natural law.[32] For Fuller, there is something unique about social ordering through the rule of law as opposed to the rule of men: legal subjects are not subserviently told what to do, but are constructed as responsible and autonomous agents. In this view, the very idea of the rule of law requires meaningful limitations on the lawgiver's power in favor of subjects' agency. These limitations are found neither in the content of the legislated norm, nor in the process through which the law was decided upon, but in the way law communicates its norms – ie. in the forms of law - through the principles of generality, promulgation, clarity, avoidance of contradiction and of impossibility, constancy through time, non-retroactivity, and the requirement that there be congruence between official action and declared rule. For Fuller, these requirements reflect the internal morality of law because they are not a set of values imposed on law from the outside, but something that flows from the distinctive character of law as a mode of social ordering respectful of legal subjects' agency.[33]

Consistent with Fuller's view that law is not a datum but an achievement towards which we must strive, he saw the question of whether legislation can be properly called "law" as a matter of degree, and did not offer a precise standard for determining legality. Instead, he

[32] K. Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart Publishing, 2012); J. Waldron, 'Why Law - Efficacy, Freedom, or Fidelity?' (1994) 13 *Law and Philosophy* 3. While we draw on Waldron's reading of Fuller, and share some of his concerns about the democratic legitimacy of value-based judicial review, we adopt neither his rejection of judicial review (J. Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal*, nor his literal approach to statutory interpretation (J. Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) 142-143; and J. Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 2008) 27). In line with Fuller's focus on the forms of law, we also set aside the value of majoritarian decision-making so central to Waldron's analysis of legislation ('Law and Disagreement', 'the Dignity of Legislation').

[33] Rundle, n 32 above, 2.

emphasized that the search for the morality of law must form part of the lawyer's ethos. He nevertheless offered examples of legislation that was so pathological that it clearly did not meet the standard for legal validity. Building on this analysis, this article develops a new model of judicial review. In clear-cut cases, courts would declare that primary or constitutional legislation lacks legal validity. In other cases, while declaring the legislation to be valid, courts would draw on their lawyerly ethos to comment on the law's weaknesses from the perspective of the internal morality of law, and advise the legislator to amend the law. While the judicial review of legality is normatively compelling with respect to legislation generally, we argue that it is particularly apt to address legal techniques of democratic erosion.

Some of the principles discussed by Fuller as comprising the internal morality of law, in particular generality, promulgation, and non-retroactivity, are already entrenched in constitutional law in some jurisdictions.[34] However, they have been recognized in piecemeal fashion rather than as reflective of a broader mode of judicial review. Moreover, to the extent that courts and constitutional theorists understand the failure to meet one of these requirements as invalidating legislation, it is on the ground that the legislation infringes fundamental values, or that it was the outcome of a faulty process. Thus, personal legislation has been invalidated in Israel for infringing equality[35] while in the United States the prohibition of bills of attainder (legislation declaring a person or group of persons guilty of a crime) is justified on grounds of the separation of powers.[36] Drawing on Hart's "rule of recognition", constitutional scholars Adler and Dorf conceptualize the lack of promulgation of legislation as a failure to meet constitutional "existence conditions" for legislation.[37] In other words, these requirements of legality have been analysed within the frameworks of value and process. As a result, the notion

[34] See text to n 91-93 below.
[35] M. Tamir, 'Personal Legislation – Selective Legislation?' (2018) 12 *Hukim Law Journal* 173, 188-193 (in Hebrew).
[36] *United States* v *Brown* [1965], 381 U.S. 437.
[37] M.D. Adler and M.C. Dorf, 'Constitutional Existence Conditions and Judicial Review' (2003) 89 *Virginia Law Review* 1105-1202.

that law's very form is the carrier of morality has receded from view, as have the possibilities presented by such an understanding of legality for the struggle against democratic erosion.

This is not to imply that the principles discussed by Fuller are ignored by lawyers. Writing in 1965, Fuller himself pointed out that to a large extent the requirements of legality are intuitively understood by lawyers in many jurisdictions,[38] and this statement is arguably still true today, though the ease with which law has been amenable to democratic erosion suggests that some government lawyers need to be reminded of these foundational understandings. Whether because the internal morality of law is so basic to the lawyerly ethos that it is left largely unspoken,[39] or because of the hegemony of the value/process dichotomy in the conceptualization of judicial review, constitutional theory lacks an explicit language to grapple with the internal morality of law. This article seeks to release the internal morality of law from the realm of tacit assumptions, and explicitly ground a new mode of judicial review on Fuller's linking of the forms of law to a particular relationship between government and governed.

To do so now is particularly urgent. Fuller's concept of legality, we argue, offers a language to target some of the key problematic aspects of the legal techniques of democratic erosion. What is more, this new mode of judicial review would allow courts to occupy a position that neither collaborates with democratic erosion, nor tries to save democracy. In effect, courts would be saying to the other branches: if you are going to use law for your purposes, you will have to comply with certain requirements implicit in the very idea of the rule of law. This imposition of standards will not bring democratic erosion to a halt; but it should make law a more difficult weapon for antidemocratic forces to wield. And because of its focus on courts' undisputable expertise, the legal craft, and away from questions of policy

[38] L.L Fuller, *The Morality of Law* (London: Yale University Press, 1969 Revised edition) 202-204.
[39] Seeking to explain why the internal morality of law has received insufficient attention from legal philosophers, Fuller writes that 'Men do not generally see any need to explain or to justify the obvious.' *Ibid*, 98.

and process, this form of judicial review is more legitimate than existing forms of judicial review.

To be clear, the argument is not that the judicial review of legality should replace other forms of review. We leave open the possibility that some degree of value-based judicial and procedural judicial review are legitimate checks on the legislature. Moreover, these existing forms of review target some of the problematic techniques of democratic erosion that the judicial review of legality cannot address: legislation promoting illiberal norms, or passed without democratic deliberation. However, the strength of the judicial review of legality lies precisely in its limitations. Contrary to contemporary proposals for weak or limited forms of unconstitutional constitutional amendment which draw on political and moral principles such as human rights and democracy,[40] the narrow legal grounds of our proposal recenter judicial review on the lawyer's craftsmanship and ethos, enabling courts to make strong moral statements while enjoying enhanced legitimacy.

This article proceeds as follows. Part I presents a reconstruction of Fuller's account of the internal morality of law. Part II argues that this account can ground a new model of judicial review, both conceptually and as evidenced by seeds of such an approach in comparative constitutional law. Drawing on the case of Israel, which has extensive experience with democratic erosion, Part III demonstrates that the judicial review of legality would address key legal techniques of such erosion.

I. The Internal Morality of Law

Since the mid-1990s, a number of legal philosophers have attempted to release Fuller from his peers' categorization of his writing as either promoting natural law or a primarily

[40] Eg., Dixon and Landau, above n. 26.

instrumental view of law as conduit for just outcomes.[41] In his famous debate with Hart, Fuller rejected positivism's separability thesis, according to which there is no necessary connection between law and morality. However, he did not adopt a maximalist natural law position emphasizing the morality embedded in the substantive content of legal norms (what Fuller termed the "external morality of law" [42]). Yet he sought to recover the "practical wisdom" in the natural law tradition, and drew attention to a more subtle manifestation of legal morality, embedded implicitly in the form of law. [43] Indeed, Fuller's interest lay in explaining what is distinctive about law as a mode of social ordering, as opposed to managerialism or brute force. For Fuller, to be considered law worthy of the legal subjects' fidelity, law must comply with certain formal characteristics: generality, promulgation, clarity, avoidance of contradiction and of impossibility, constancy through time, non-retroactivity, and congruence between official action and declared rule. These formal qualities of law lend it its inner morality, because only through these forms can law respect the individual as a responsible agent. Law, in this view, is distinctive in that its form provides a framework of positive freedom within which the individual can plan her affairs and become auto-nomos (i.e., legally bind herself).

This reclaiming of Fuller's position is best illustrated through a discussion of his debate with Hart, published in 1958, on the legality of Nazi legislation. The debate had been triggered by German legal philosopher Gustav Radbruch's claim that when law reaches a certain level of moral iniquity it should be refused the character of law. Hart took issue with Radbruch's position by referring to a case where a woman reported her husband to authorities for having made insulting remarks about Hitler in violation of statutes, for which he was imprisoned. After the war, the wife was prosecuted in a German court, under pre-Nazi criminal law which the

[41] Waldron, 'Why Law', n 32 above and Rundle, n 32 above.
[42] L.L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 4, 645.
[43] n 38 above, 241. Fuller identified in English seventeenth century legal thought, traditionally associated with the natural law tradition, a concern with legal form. *Ibid,* 100.

prosecution argued had remained in force throughout the Nazi years. The wife argued her acts were not illegal as she had denunciated her husband pursuant to a Nazi statute that was lawful at the time. The first instance court accepted her argument, but the court of appeals reversed the decision under the view that Nazi law was so immoral that it could not be considered law. Hart condemned this ruling for undermining the rule of law, understood in positivist terms: the wife had acted pursuant to validly enacted statutes. The preferable course of action in his view would have been to enact a retroactive statute declaring the Nazi legislation unlawful.[44]

In Fuller's response, he insisted that Radbruch's position was defensible. Yet he suggested that instead of invalidating the Nazi legislation because of its content (ie. the fact that it criminalized the expression of political opinions), he would have denied the Nazi legislation the status of law because of its form. The woman had acted pursuant to two statutes. One made it a special wartime criminal offence to seek 'to injure or destroy the will of the German people or an allied people to assert themselves stalwartly against their enemies'. The second criminalized 'spiteful or provocative' statements that disclosed 'a base disposition toward leading personalities' of the Nazi party, even if made in private, when the individual realized or should have realized the statements would reach the public. Moreover, broad discretion was given under the second statute to the minister of justice to determine the list of leading personalities for the purpose of the statute. Fuller pointed to the lack of congruence between the language of the first statute and the interpretation given to it by Nazi courts, which generally disregarded the statute's limitation to public utterances.[45] As to the second, it failed to qualify as law for, among other flaws, its application hinged on uncontrolled administrative discretion.[46]

[44] Hart, H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 4, 593-629, 619.
[45] n 42 above, 653-654.
[46] *ibid.*

In *The Morality of Law* (1963), Fuller developed more explicitly his conception of legality through the story of King Rex, a well-intentioned monarch who fails in eight ways to make law. His laws are not general, and his decisions with respect to the legislated rules not consistent. Some laws are secret while others are applied retroactively. His draftsmanship is insufficiently clear, leading to confusion, and his laws changed too frequently. As adjudicator, the decisions have little relation to the enacted laws on which they were allegedly based. This well-known parable has been read as providing a checklist of requirements of legality.[47] In contrast, Waldron and Rundle insist that this list is the expression of a particular conception of law as a distinctive mode of ordering.

To grasp Fuller's conception of legality it is useful to understand his rejection of positivism. Among Fuller's critiques of positivism was his rejection of the conception of law as a top-down mechanism of social control.[48] Informed by private law and sociological theories of interactionism,[49] Fuller envisioned the law as an arena of reciprocity and 'tacit cooperation between lawgiver and citizen'.[50] As he explained, 'Government says to the citizen in effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct." When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules'.[51] Hence, Waldron argues that the core of Fuller's jurisprudence is fidelity: 'Fidelity to law… is predicated on what law is, not just on what it is used for. Legal institutions therefore have an extra layer or dimension of allegiance in society that may be expected to sustain itself, even when people waver or weaken in their enthusiasm for the substantive goals that legal institutions are designed to achieve.'[52] While the analogy to contract is clear, Fuller

[47] Rundle, n 32 above, 92.
[48] Fuller n 38 above, 192.
[49] *Ibid*, 216-217.
[50] *ibid*, 192.
[51] *ibid*, 39-40.
[52] Waldron, n 32 above, 275-276.

insists that the interactional process of law operates tacitly, in a manner reminiscent of custom.[53]

If we understand the eight principles as expressions of a conception of law in which the legal subjects and lawgiver are in a relationship of reciprocity, we see that some of these principles are more important than others. Waldron and Rundle concur that generality is the 'foundational requirement from which all else… is generated'.[54] In Fuller's writing, generality implies the universal applicability of rules, to all those who satisfy certain conditions. This is also one of the most intuitively understood aspects of legality. As Fuller explains, '[w]hen a person in a position of authority is asked to make some concession in a particular case he will not infrequently insist on an understanding that his action shall not be taken "to set a precedent." What he dreads and seeks to escape is the commitment contained in the Rule of Law: to conform his actions toward those under his direction to general rules that he has explicitly or tacitly communicated to them. That the stipulation against setting a precedent often turns out in practice to be ineffective simply provides further evidence of the force of the commitment men tend to read into the acts of those having authority over them'.[55]

But by generality Fuller also refers to the formulation of rules in a way that does not provide overly specific directions, for social ordering through law implies that the legal subject 'be not told at each turn what to do; law furnishes baselines for self-directed action, not a detailed set of instructions for accomplishing specific objectives'.[56] Such a conception of generality bears the marks of private law and in particular contracts, for it envisions agency not in the negative, criminal law sense of being allowed to do what is not prohibited, but in the

[53] n 38 above, 217-218.
[54] Rundle, n 32 above, 129. In Waldron's reading of Fuller, this form of generality is necessary in order to secure fidelity. Waldron, n 32 above, 281.
[55] n 38 above, 218-219.
[56] *ibid*, 210.

positive sense of encouraging individuals to plan their interactions with one another.[57] This interactional understanding of generality in law is distinct from familiar accounts of equality before the law, such as the one offered by Ronald Dworkin.[58] As Rundle points out, while for Dworkin legality requires that 'government must govern under a set of principles applicable in principle to all',[59] this is a top-down experience of legality by citizens, who are equal if the law acts upon them equally.[60] For Fuller, the generality of law entails the recognition of agency from within the very form of law, by creating a relationship of reciprocity between government and governed, and enabling the formation of binding interactions among individuals.

At the same time, the law must not be so vague that it is unclear, subjecting the individual to the authorities' unfettered discretion, for then too it would fail to provide a baseline from which the individual can plan her life. The tension between generality and clarity is but one instance of possible tensions among the eight principles. Fuller discusses at length the complexity of evaluating retroactive laws, recognizing that in some instances they may serve the underlying idea of reciprocity between lawgiver and subject, by correcting a problem in the legal system.[61] Similarly, if the principle of infrequent changes in the law is followed too strictly, the law will become impossible to comply with under new circumstances.[62] In the face of such tensions, Fuller thus recommends pursuing 'a middle course which involves some impairment of both desiderata'.[63] Moreover, Fuller recognizes the need to balance the requirements of inner morality of law with considerations for the efficacy of legislation. We

[57] For the view that contract law confers upon individuals the powers necessary for their self-determination, given the importance of interpersonal relationship to autonomy, see H. Dagan and O. Somech, 'When Contract's Basic Assumptions Fail: From Rose 2d to COVID-19' (2020) (manuscript on file with authors).
[58] R. Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1, 29.
[59] *ibid*.
[60] Rundle, n 32 above, 181.
[61] n 38 above, 51-62.
[62] *ibid*, 45.
[63] *ibid*.

can now see why the "checklist" approach to the principles will not do. The principles cannot be applied mechanically, but require balancing in light of the underlying conception of law.

For the same reason, laws cannot be assessed in isolation. Fuller's analysis can certainly be applied to a specific law, as in his analysis of two Nazi statutes. But Fuller is primarily interested in the quality of the legal order as a whole. He repeatedly criticizes Hart for failing to inquire into 'how much of a legal system survived the general debasement and perversion of all forms of social order that occurred under the Nazi rule, and what moral implications this mutilated system had for the conscientious citizen forced to live under it'.[64] He describes the deterioration of law under Nazi rule in the following terms: the use of retroactive laws to cure past legal irregularities was so increased that the threat of law changing in the near future hung over the entire system; some laws were published, but others not; and Nazi-dominated courts easily disregarded statutes.[65] All three practices made it impossible for individuals to know exactly what is forbidden, and hence to organize and plan their life.

Nevertheless, Fuller points out that the degradation of law under the Nazis was more pronounced in public law than in private law, an observation reminiscent of Ernst Fraenkel's argument that the Third Reich was a "dual state".[66] Contrary to the thesis that the Third Reich was totalitarian (in the sense of rejecting all aspects of the rule of law), Fraenkel argued that it combined a normative state, according to which predictable laws were applicable to all, and a prerogative state, where arbitrariness and violence ruled; the Nazis' popularity derived in part from the preservation of the rule of law for a segment of the population. This duality can be understood in Fuller's terms as a grotesque violation of the principle of generality, but only if we examine, like Fuller, the Nazi legal system as a whole.

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[64] Fuller, n 42 above, 646, 633.
[65] *ibid*, 651-652.
[66] Fraenkel and Meierhenrich, n 15 above. For the view that Fraenkel's thesis of the Dual State requires Fuller's conception of the morality of law, see D. Dyzenhaus, 'Legal Theory and the Politics of Legal Space' (2020) at https://ssrn.com/abstract=3615175 or http://dx.doi.org/10.2139/ssrn.3615175 (last visited 14 August 2020).

A checklist approach is also ill-suited to Fuller's view that the existence of law is a matter of degree. Dworkin had claimed that '[s]ome concepts are almost always matters of degree (baldness is an example),' but law is not of that class. If we wish to talk about the existence and non-existence of law we must 'to some extent calibrate the concept of law' by establishing a kind of "threshold" that will mark the line between law and non-law. 'When, through a deterioration in governmental respect for legality, law passes that threshold it ceases all at once to exist; in other words, law does not just fade away, but goes out with a bang'.[67] Fuller responded that there is no reason why 'a man can be half-bald, but a country cannot be ruled by a system that is half-law'.[68] He pointed to the binary use of the words legality and illegality in ordinary language as a possible explanation for his critics' failure to accept that legality, like justice, can be a matter of degree. Thus, the evaluation of the generality or non-retroactivity of a legal system need not result in a "yes" or "no" answer.

This is because the inner morality of law lies more in the realm of aspiration than duty. Outside of the 'legal monstrosities'[69] of the sort displayed in Nazi Germany, there is no easy way to distinguish law from non-law. For Fuller, 'law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark'.[70] The inner morality of law is primarily an ethos that should animate legal craftsmanship.

Both the attractiveness and challenges of grounding judicial review in Fuller's conception of legality should begin to be clear. Before moving on to address them, it is helpful to clarify the relationship of the inner morality of law to the two principal foundations of judicial review under existing models: the substantive values advanced by law, and the democratic nature of the lawmaking process.

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[67] n 38 above, 198-199.
[68] ibid, 199. For further elaboration of the non-binary nature of legality, see Dyzenhaus, n 66 above.
[69] Fuller, n 42 above, 651.
[70] *ibid*, 632.

The inner morality of law is not grounded in values external to law, such as freedom,[71] though the concern for individual agency embedded in the form of law is certainly a liberal value. Nevertheless, Fuller suggested there is a correlation between the inner morality of a legislative act and its external morality. Influenced by early American pragmatists who challenged the means/end dichotomy, Fuller consistently drew connections between the form of a mode of ordering and the opportunities it gives for the expression of agency.[72] He thus expressed doubt that a law fully complying with the requirements of inner morality could allow slavery, and found a correlation between the immoral form and content of Nazi laws:

'[I]t was in those areas where the ends of law were most odious by ordinary standards of decency that the morality of law itself was most flagrantly disregarded. In other words, where one would have been most tempted to say, "This is so evil it cannot be a law," one could usually have said instead, "This thing is the product of a system so oblivious to the morality of law that it is not entitled to be called a law." I think there is something more than accident here, for the overlapping suggests that legal morality cannot live when it is severed from a striving toward justice and decency.'[73]

This does not mean that Fuller saw the eight criteria of legality merely as instrumental means for achieving certain outcomes. Contrary to Hart and Dworkin's readings of him as confusing morality and efficacy, Fuller valued legality for its own sake, as demonstrated by his insistence on the differences between law and management.[74] The implications for justice, in Fuller's account, were more subtle: 'I have nowhere said that respect for legal morality inhibits every kind of brutality; I have only argued that it impairs a government's choice of the kinds

[71] Waldron, 'Why Law', n 32 above.
[72] Rundle, n 32 above, 36-37, 41.
[73] Fuller, n 42 above, 661. For a critique of the view that legality is intrinsically valuable without regard to the content of law, see J.A. Sempill, J. A. 'Law, Dignity and the Elusive Promise of a Third Way' (2018) *Oxford Journal of Legal Studies*, *38*(2), 217-245.
[74] While acknowledging some overlap between management and law, Fuller insisted that generality, congruence between declared rule and action, and the principle against retrospectivity have no place in a managerial context, except as mere matters of expediency. N. 38 above, 208-209.

of brutalities it will impose and the ways it will impose them, and that this impairment serves the cause of justice and humanity.'[75]

Neither is the inner morality of law grounded in the democratic nature of the lawmaking process. Fuller contrasts his approach with the positivist focus on *who* writes the law. His interest lies in *what* law is, and in 'limitations contained in "the law job" itself.'[76] Hence Fuller's writing on the inner morality of law has conspicuous few references to democracy. In particular, King Rex's failure to make law is not explicitly linked in the parable to the monarchical character of his regime. Yet Fuller's conception of law, grounded in agency, is distinctly modern, and it is perhaps not coincidental that for the purposes of his parable, Fuller chose to describe a king and not an elected legislature. Indeed, he made clear that the idea of reciprocity between lawmaker and legal subject implies that the two collaborate in the creation and maintenance of law.[77] Similarly, in his writing on adjudication, Fuller draws a link between respect for agency and citizen participation.[78] Thus, while Fuller's conception of legality is distinct from maximalist natural law and positivism, it is compatible with both a natural law position that sees human dignity and rights as primordial, and with the view that participatory processes contribute to the construction of a legal order. Hence our proposed form of judicial review can be integrated without theoretical inconsistency in legal systems recognizing both value-based and process-based judicial review.

II The Judicial Review of Legality

This part moves from Fuller's conception of legality to the judicial review of legality. Under this form of judicial review, courts would presume the validity of law, including

[75] Rundle, n 32 above, 113.
[76] n 38 above, 192, borrowing a phrase from Karl Llewelyn.
[77] *ibid*, 193.
[78] L.L. Fuller and K. I. Winston. 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353-409.

constitutional legislation, that complies with the positivist requirements for its enactment. However, legislation that blatantly fails to 'provid[e] the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system'[79] would be denied the status of law. In less clear cases of failure to embody the inner morality of law, while declaring the legislation to be valid, courts would issue a warning as to the law's weaknesses, advising the legislator to amend the law.

More specifically, courts would assess whether the challenged legislation harms the relationship of reciprocity between lawgiver and legal subject by failing to meet one of the eight principles. In conducting this analysis, courts should examine individual legislation not only on its own terms but also as it interacts with other legislation within the legal system as a whole. Moreover, the principles should not be considered in isolation, but in relation to one another. As illustrated below, under this approach, extreme pathologies of the type enacted by the Third Reich are not required for a legislative act to be considered straightforwardly undeserving of the title "law".

The objective in this part is not to offer a detailed account of the judicial review of legality, but to demonstrate that the internal morality of law can generally ground such a form of judicial review. The argument in this part proceeds in two steps. First, we address two challenges that emerge from Fuller's writing. The first is the claim that due to its complex, non-mechanical character, Fuller's conception of legality is inapt to ground a standard of judicial review. The second relates to Fuller's focus on private and criminal law, whereas our proposal extends to constitutional legislation. Having countered these challenges theoretically, we show that seeds of the judicial review of legality exist in positive law in various jurisdictions

[79] n 38 above, 210.

and draw on concerns similar to Fuller's, suggesting that this approach to judicial review is conceptually sound as well as feasible.

Before delving into the argument, however, a word must be said about whether courts could engage in the judicial review of legality without explicit enabling legislation or constitutional amendment. While we are wary of making a normative argument purportedly applicable to any jurisdiction in the world, we recognize that especially in contexts of democratic erosion, where governments typically seek to curtail the judiciary's independence, it would be naïve to expect such enabling legislation to be enacted. If we accept, following Fuller, that the requirements of the inner morality of law are part of the lawyerly ethos, and are tacitly understood and assumed in modern legal systems as something akin to customary law,[80] then it is arguably within courts' jurisdiction to apply them. Indeed, below we give examples of the seeds of such judicial review in comparative law, in some instances without express enabling legislation.

The Theoretical Challenges

As seen in Part I, Fuller's approach to legality is complex and subtle. The eight principles cannot be applied mechanically, but require evaluating whether, in the context of the legal system as a whole, a clear baseline for citizens' actions is provided, and government meaningfully restrained. Can such an aspirational endeavor form the basis for judicial review?

Our answer is affirmative. Following Fuller's understanding of legality as a matter of degree, we propose reserving judgments of invalidity for pronounced cases, and the analysis of those cases can integrate the complexity of Fuller's account. As Fuller himself recognized, 'difficulties and nuances should not blind us to the fact that, while perfection is an elusive goal,

[80] *ibid*, 234.

it is not hard to recognize blatant indecencies.'[81] Accordingly, while Rundle clarifies that Fuller's writing does not yield a practical standard for determining when something is law, it does suggest that 'we can accept as valid law that which a source-based factual test for legal validity pronounces to be such, until and unless a point is reached when the legal order from which that law emanates is so plagued by formal pathologies that its output, exemplified by the particular law whose validity stands for determination, should be denied that status.'[82]

With respect to less pronounced cases, it should be recalled that judicial review need not be limited to binary assessments of validity or invalidity. Under various forms of "weak" judicial review, courts issue remedies that fall short of declaring legislation invalid, such as the declaration of incompatibility of a statute with human rights norms under the British Human Rights Act,[83] nullification notices concerning future legislation,[84] or comments in obiter dicta on the weaknesses of legislation.[85] Courts commenting to the legislator about the legal quality of legislation would in fact strengthen the reciprocity between lawmaker and legal subject, as the legal process opens an avenue for the individual citizen to participate in the evaluation and elaboration of law.

Because in the judicial review of legality, declarations of invalidity are reserved for blatant cases, our proposal is expected to limit the creation of uncertainty. We nevertheless acknowledge that in rejecting a checklist conception of the review of legality, our proposal

[81] *ibid*, 62.
[82] Rundle, n 32 above, 81.
[83]M. Tushnet, 'Weak-Form Judicial Review and Core Civil Liberties.' (2006), 41 *Harvard Civil Rights-Civil Liberties Law Review* 1-22. See also R. Dixon, & F. Uhlmann, F. 'The Swiss Constitution and a Weak-Form Unconstitutional Amendment Doctrine? (2018) *International Journal of Constitutional Law*, *16*(1), 54-74 proposing that in Switzerland the supreme court not invalidate popular amendments to the constitution but suspend their immediate applicability and send the question back to parliament.
[84] In the *Academic Center for Law and Business* (case discuss below, text to n 100-101), the Israeli High Court of Justice did not invalidate a temporary amendment to a basic law, but declared that a future identical amendment would be void. See Y. Roznai, 'Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset.' (2018) 51 *VRÜ Verfassung und Recht in Übersee* 428.
[85] Eg. *Am. Inst. for Intl Steel, Inc*. v *United States* [2019] 376 F. Supp. 3d 1335. On judicial recommendations to amend legislation in Israeli case law see L. Orgad and S. Lavie, 'Judicial Directive: Empirical and Normative Assessment.' (2011) 34 *Tel Aviv Law Review* 437 (categorizing such recommendations as a third category alongside ratio decidendi and obiter dicta) (in Hebrew).

promotes review based not on rules but on a standard requiring complex legal interpretation.[86] However, courts have extensive experience adjudicating on the basis on standards.[87] More fundamentally, Fuller saw the eight principles of legality not as absolute requirements but as desiderata reflecting a conception of law as constructing a relationship of reciprocity between governor and governed. As a result, he argued that some of the principles should be impaired where doing so better serves reciprocity, such as by enacting retroactive legislation to correct a failure to publish legislation.[88] Similarly, we suggest that a small increase in legal uncertainty is justified in order to protect the integrity of the legal system.

The second challenge relates to the mooring of Fuller's conception of legality to "ordinary", non-constitutional legislation. Fuller focused on individuals' autonomy vis-à-vis the lawgiver, drawing on examples from private law and criminal law. Moreover, he expressed doubts about the relevance of the morality of law to legislation that directly addressed modern administrative agencies, as other logics, such as wealth maximization, might guide those legislative areas.[89] The question thus arises as to how relevant Fuller's conception of legality is to constitutional rules.

Constitutional norms protecting and limiting civil rights certainly concern the relationship between lawmaker and legal subject, but they are notoriously and purposefully vague. The enunciation of a right to liberty and a generally-worded limitations clause in a constitution hardly establishes a baseline from which individuals can plan their life. Would evaluating such clauses through the lens of the inner morality of law not lead to their complete invalidity, or alternatively to the theory's irrelevance? Moreover, many constitutional rules manipulated as part of democratic erosion concern the relations among the branches of government, such as the relationship between the judiciary and the legislative. To what extent

[86] L. Kaplow, 'Rules versus Standards: An Economic Analysis.' (1992) 42 *Duke Law Journal* 562-563.
[87] *ibid.*
[88] See n 38 above.
[89] *ibid*, 25.

do the requirements of legality apply to a constitutional amendment extending presidential term limits, circumscribing judicial review, or weakening a legislature's ability to review the acts of the executive? Do these types of enactment have anything to do with citizens' agency and autonomy?

Precisely because Fuller's inner morality of law calls for a complex mode of analysis that examines individual laws in their broader context, the evaluation of constitutional rules can take into account their special characteristics while remaining within the endeavor to develop a legal system characterized by inner morality. Surely, what counts as clear law can be assessed differently depending on whether the examined law is a criminal statute imposing a sanction on individuals or a constitutional provision recognizing a right. In this analysis, much will depend on the status of constitutional norms within the legal system. Do they primarily serve as guidance to legislators, do they shape courts' interpretations of statutes, or do they create directly enforceable rights and duties on citizens? The more directly they affect individuals' lives, the closer they are to primary legislation, and hence the evaluation of their congruence with the inner morality of law will be similar to the evaluation of primary legislation.

Moreover, constitutional norms regulating inter-institutional relations are key to sustaining a legal system respecting laws' inner morality. The reciprocity at the heart of Fuller's conception of the inner morality of law draws our attention not only to citizens' agency, but to the way it is constituted by meaningful constraints on executive discretion and by the existence within government of avenues for individuals to participate in the making of law. Contrary to top-down approaches to agency, the conception here is one of mutual constitution between government and governed. Thus, in Fuller's words, the role of government is that of 'guardian of the integrity' [90] of the legal system. Constitutional rules that

[90] *ibid.*

allow the executive or legislative to easily override constitutionally-protected rights without providing clear standards for doing so, that remove significant constraints on executive discretion, or that impair judicial, parliamentary, and public review of legislation and regulations, damage the ability of the legal system to produce law worthy of that name, and of the individual citizen to plan her life, impairing the reciprocity between governor and governed that should be embedded in the legal system as a whole.

The Seeds in Positive Law

Many common law and civil law jurisdictions, as well as international human rights law, prohibit retroactive criminal legislation, and refer to the requirement that crimes and the punishments therefor be provided for in legislation as the "principle of legality."[91] Some jurisdictions strike down legislation under the "void for vagueness doctrine", according to which a criminal statute must clearly define the conduct it proscribes.[92] Outside the criminal context, the "principle of legality" refers in some jurisdictions to the principle that administrative action is subject to and limited by law,[93] a principle that aligns with Fuller's requirement of congruence between official action and declared rule. However, while these requirements are commonly understood to be manifestations of the rule of law, they are associated today with substantive constitutional values. Thus, doctrines invalidating criminal statutes are presented as deriving from the protection of individual rights to liberty and due process, while legality in the administrative context is understood as a reflection of the

[91] For the prohibition of personal laws, see the US Constitution 1787, art 10(1) and the Constitution of France 1958, art 6. For the prohibition of retroactive laws, see German Basic Law 1949, art 103(2); the Constitution of India 1950, art 20(1); the French Civil Code 1804, art 2; the Polish Civil Code 1964, art 3; the European Convention on Human Rights (adopted 4 November 1950, Rome, 4.XI.1950), art 7; the International Covenant on Civil and Political Rights 1976 (adopted 16 December 1966, 999 UNTS 171), art 2(2); and the American Convention on Human Rights 1967 (adopted 22 November 1969), art 7(2).

[92] For the United States, see C.B. Hessick, 'Vagueness Principles.' (2016) 48 *Arizona State Law Journal* 1137-1138. For South Africa, see *Affordable Medicines Trust and Others* v *Minister of Health and Another* [2006] (3) SA 247 (CC) at [73].

[93] For France, see N. Poulet-Gibot Leclerc, *Droit Administratif: Sources, Moyens, Contrôles* (Rosny-sous-Bois: Bréal, 3rd ed, 2007) 46.

separation of powers. In any event, the principle of legality in criminal and administrative contexts reflects a narrow conception of the rule of law as negative freedom for individuals. However, a number of constitutional debates and rulings envision denying validity to a legislative enactment in contexts beyond criminal law, including institutional aspects of constitutional law, drawing on Fullerian concerns for individuals' positive agency to plan their lives and interactions – and sometimes even referring to Fuller explicitly.

For the US Supreme Court in 1965, the prohibition of bills of attainders - legislation declaring an individual or group guilty of a crime - reflects the principle of the separation of powers, in that it prevents the legislature from infringing on the judiciary's functions.[94] However, the text of the U.S. constitution itself suggests that an understanding of legality close to Fuller's is at the root of the prohibition. Article 10 section 1 of the US constitution, like many state constitutions, prohibits states from enacting bills of attainder, ex post facto legislation, and "laws impairing the obligations of contract". Placed in the same clause, these guarantees were understood by the drafters of the U.S. constitution to derive from the same principle. James Madison explained that

'Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and, to every principle of sound legislation… The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is

[94] See n 36 above.

wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.'[95]

In 1827, the US Supreme Court interpreted the contracts part of that Article - which has come to be known as the "Contracts Clause" - as being directed only at laws which retroactively interfere with contracts,[96] further suggesting that what underlies the clause is not an attempt to hamper regulation of the market, but to ensure that law provides a stable platform within which citizens can interact. The inclusion of contracts in the clause, and Madison's joint justification for the three guarantees, undermine the notion that the prohibition of bills of attainder and ex post facto laws are grounded in the separation of powers.

In 1798, in *Calder v Bull*, the US Supreme Court ruled that a resolution of the Connecticut legislature granting a new hearing in a civil, probate trial did not violate the prohibition of ex post facto legislation, as that prohibition concerned only laws imposing retroactive punishment. In a noted opinion, Justice Chase wrote that beyond express constitutional limits on power, the powers of legislatures are limited by fundamental, implicit principles. Chase has been interpreted as advancing a natural law position whereby courts could enforce unwritten norms. [97] Yet mixed with his appeal to substantive justice and to the particular republican form of government, are some of the intuitions about legality explored by Fuller:

'A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law

[95] J. Madison, J. Jay and A. Hamilton, *The Federalist* (Indianapolis: Liberty Fund, 2001) 297, cited in W. B. Hunting, *The Obligation of Contracts Clause of the United States Constitution* (Baltimore: Johns Hopkins Press, 1919) 112; n 38 above, 80.
[96] *Ogden* v. *Saunders* [1827] 25 U.S. 213. In the second half of the nineteenth century federal and state courts declared invalid many laws that impaired private contractual arrangements. J. W. Ely Jr., 'Whatever Happened to the Contract Clause.' (2009) 4 *Charleston Law Review* 376-386.
[97] K. L. Hall, J. W. Ely Jr. and J. B. Grossman 'Calder v. Bull' in K.L. Hall (eds), *The Oxford Companion to the Supreme Court of the United States* (Oxford: Oxford University Press, 2nd ed, 2005).

that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.'[98]

Similar intuitions about the existence of limitations on the forms of law were recently expressed by justices on the Israeli Supreme Court, sitting as High Court of Justice, in statements that a law could be invalidated on the sole ground that it is personal, even without legislation enabling such judicial review. In 2016, in a petition against legislation reorganizing the public electricity sector and terminating the employment of public office holders who had objected to the government's controversial gas extraction policy, Justice Hayut was willing to assume that legislation drafted to personally target specific individuals could be invalidated for infringing the 'basic values of the system'. [99] However, she was not persuaded that the evidence in the case was sufficient to displace the presumption of the legislation's validity. In 2017, the court relied on the doctrine of "misuse of constituent power" to warn the Knesset that should it prolong its practice of enacting temporary amendments to the Basic Law: State Economy such that the constitutional requirement to have the budget approved annually is relaxed in favor of a biannual budget, such temporary basic law would be invalid.[100] In a concurring opinion, Justice Neal Hendel noted that an additional ground of invalidity is the personal character of the challenged legislation, which due to its temporary character would apply only to the Knesset legislating it (the Knesset enacts both ordinary and constitutional legislation). Hendel explained that such personal legislation infringed on the requirement of generality necessary to ensure the 'internal morality of law', referring to Fuller.[101]

A few months earlier, the Constitutional Court of Indonesia had also invoked Fuller's concept of the internal morality of law to justify invalidating a section of the public information

[98] *Calder v. Bull*, 3 U.S. 386 [1798] at [387-388].
[99] *Movement for Quality Government in Israel* v. *Speaker of the Knesset* [2016] HCJ 8612/15 at [16].
[100] *Academic Center of Law and Business* v. *The Knesset* [2017] HCJ 8260/16.
[101] *ibid*, opinion of Justice Handel at [6].

transparency law which provided that members of the regional commissions established to apply the law could be reappointed once. As the law did not detail the process of reappointment, some – but not all - regions interpreted it as enabling regional officials to re-appoint the commission member by decree, rather than allowing the member to compete in the open selection process. While the court explained that this practice violated citizens' right to equally access government positions, it insisted that the law's central flaw was the legal uncertainty and inconsistency it created, contrary to the Constitution which guaranteed every person 'equitable legal certainty'[102] and to Fuller's requirements of internal morality, including clarity, non-contradiction, and congruence with implementation. The court concluded that the challenged article had no binding legal force to the extent it was not interpreted as requiring re-election through the same selection process as is applicable to all.[103]

III The Internal Morality of Law and Democratic Erosion: Examples from Israel

It should come as no surprise that in countries as different as Indonesia and Israel, Fuller's requirements of legality were invoked to challenge arrangements concerning the tenure of public servants. These cases reflect one of the well-documented elements of the current democratic erosion: the politicizing of executive power.[104] In each case, there was an attempt to shrink bureaucratic autonomy, whether by removing independent public servants (Israel) or reappointing office holders without a public tender (Indonesia). The legislative means employed to achieve this politicization may have granted the step an aura of legitimacy, as the abstract wording of legislation makes the concentration of power less visible than, say, a simple decree. Yet this form of legislation also offends lawyerly intuitions

[102] *Foundation for the Strengthening of Initiative Participation and Partnership of the Indonesian Society* v *The Republic of Indonesia* [2016] 77/PUU-XIV/2016 at [56], referring to Article 28D section (1) of 1945 Constitution.
[103] *ibid* at [57].
[104] Huq and Ginsburg, n 2 above, 127-130.

about the formal requirements of legality: in the Israeli case, that law be generally applicable (though in this case the court was not convinced), and in the Indonesian case, that law be sufficiently clear and certain, so as to avoid inconsistencies in administrative implementation.

The suitability of Fuller's requirements of legality for challenging practices of democratic erosion is not coincidental. Rulers eroding democracy seek to obtain extensive executive discretion, and to corrupt democratic institutions for short-term gains.[105] Both of these objectives are fundamentally incompatible with the concern for subjects' agency which stands at the heart of the internal morality of law, as that concern requires meaningful constraints on government and a legal system constituting a stable framework within which citizens can plan their lives and interact. In addition, drawing on Fuller's interest in the quality of the legal system, our proposed judicial review of legality considers individual laws in the context of a legal system as a whole. It is therefore particularly apt to address the incrementalism characteristic of democratic erosion, and in particular the practice of "stitching" together legal institutions from other democracies in a democracy-averse way. Moreover, contrary to value-based review or the review of unconstitutional constitutional amendments which require glaring immorality in legislation's content, this form of judicial review can address the more subtle corruption of law characteristic of much anti-democratic legalism.

In what follows we demonstrate these claims more concretely. Drawing on examples from Israel, we show that the judicial review of legality targets much of what is problematic with the law promulgated by anti-democratic forces, at the same time as it avoids some of the weaknesses of other forms of judicial review. Israel has gained extensive experience in the past decade with legal attempts at democratic erosion, offering illustrations of some of the practices

[105] S. Issacharoff 'The Corruption of Popular Sovereignty.' (2019) (manuscript on file with authors).

found elsewhere.[106] Israel's parliamentary democracy, where the government is formed from among parliamentary coalitions, facilitates abuses of legislation for antidemocratic purposes, as governments encounter few parliamentary constraints in implementing their legislative plans. Moreover, the Knesset's functioning as both legislative and constituent assembly, which incrementally enacts constitutional norms in basic laws through the ordinary legislative procedure, enables ruling coalitions to frequently amend constitutional norms. To these structural factors must be added two longstanding, problematic uses of law: the occupation of Palestinian territories has been heavily legalized,[107] while within Israel's borders, since the founding of the state, a state of emergency has been declared pursuant to legislation, allowing the executive to enact regulations overriding the Knesset.[108] Israel therefore offers a window onto the possibilities provided by the judicial review of legality for confronting a broad range of undemocratic practices.

At the same time, in the absence of a written constitution, the Israeli Supreme Court developed since the 1950s a rich jurisprudence on the rule of law when reviewing administrative action.[109] Following the enactment of basic laws concerning human rights in 1992, the court declared a "constitutional revolution" and expanded value-based and process-based judicial review of legislation. This has made the court an easy target of criticism by the government and illiberal groups, creating a particularly sharp dilemma for the court in the face of democratic erosion.[110] For these reasons, the Israeli Supreme Court offers fertile ground for

[106] For a survey of the debate regarding the extent to which Israel is experiencing democratic erosion, see T. Hostovsky Brandes 'Basic Law: Israel as the Nation State of the Jewish People: Implications for Equality, Self-Determination, and Social Solidarity.' (2018) 29 *Minnesota Journal of International Law* 65, 71-74.
[107] R. Alexandrowicz 'The Law of These Parts' (The Law Film, 2012) at https://www.thelawfilm.com/eng#!/the-film (last visited 9 August 2020).
[108] L. Margalit 'State of Emergency in Israel: Is It Really Necessary?' (The Israel Democracy Institute, 2019) at https://en.idi.org.il/articles/27032 (last visited 8 August 2020); Basic Law Israel: Government, art 39(c).
[109] I. Zamir 'The Administrative Authority' (1992) 1 *Law in The Changing World* 73-83 (in Hebrew).
[110] N. Mordechay, and Y. Roznai, 'A Jewish and (Declining) Democratic State: Constitutional Retrogression in Israel.' (2017) 77 *Maryland Law Review* 244, 248-251.

the adoption of a Fullerian perspective on legislation. We discuss four types of legislation proposed and/or enacted by the Knesset in recent years.

First, the ruling coalition has proposed and at times enacted legislation aiming to *grant Prime Minister Netanyahu personal advantages*. One advantage that has become particularly relevant given the multiple corruption charges filed against Netanyahu is immunity from prosecution.[111] In recent years members of Netanyahu's Likud party and other right-wing parties have proposed bills granting immunity to prime ministers from criminal prosecution for the duration of their tenure, but to date none of these have passed in the face of public criticism. One of the recurring defenses of these proposals is the argument that in other democracies heads of state enjoy such immunity. Proponents have so often invoked the French provision granting sitting presidents immunity from prosecution, that it has become common in Israel to refer to proposed legislation granting the prime minister immunity as the "French law".[112] This constitutes a clear example of "stitching" legal components from other democracies into a Frankenstate,[113] for contrary to the French presidential system, in Israel there are no term limits on the office of prime minister. Incorporating immunity into Israel's parliamentary system would thus potentially enable prime ministers to escape criminal responsibility for extensive periods of time.

These proposals do not mention Netanyahu's name, nor are they limited to his tenure. On the face of it, the legislation is of general application. Yet there are strong reasons to believe that the intent behind these proposals is not to generally alter the legal framework surrounding the position of prime minister but to protect Netanyahu from the prosecution of specific pending charges. Thus, from the perspective of legislative intent, these proposals are arguably

[111] Prime ministers enjoy immunity from prosecution in their capacity as members of Knesset, however this immunity is not automatic; it must be requested by the member of Knesset, and granted by a Knesset vote based on a limited set of grounds. Knesset Members Immunity Law 1995, art. 4.
[112] R. Kahn 'Everyone is Talking about the "French Law" - What does it really mean?' (Calcalist, 2017) at https://www.calcalist.co.il/local/articles/0,7340,L-3723502,00.html (last visited on 8 August 2020) (in Hebrew).
[113] Scheppele, n 10 above.

personal. They infringe generality, as they exclude the most powerful member of the executive from the rules applicable to all. When examined together with the lack of term limits, they weaken the legal system's integrity by removing a meaningful constraint on the prime minister from engaging in corruption and other crimes, exposing ordinary citizens to these potential crimes. Examining these proposals in isolation would miss the stitching together of individually legitimate legal elements. Fuller's call to consider legislation in the context of other rules (here immunity together with the lack of term limits) allows to grasp the blatant immorality embedded in the proposed legislation.

A second practice eroding democracy in Israel involves the executive *enjoying the legitimacy granted by law, without being subject to the accountability and limitations provided by law*. This is achieved through two techniques. The first is the establishment of a general rule, and the enactment of temporary legislation suspending the rule, such as was done with the biannual budget.[114] The second consists of establishing sets of contradictory provisions in basic laws (constitutional legislation that is hierarchically superior to ordinary legislation): on the one hand, provisions declaring principles, and on the other hand provisions granting the executive extensive discretion to violate those principles. For instance, Article 4 of the Basic Law: the Government establishes the principle of ministerial accountability before the prime minister and of joint accountability of the government towards the Knesset. In January 2018, this Basic Law was amended to allow the prime minister serving as head of a ministry to delegate his authorities to a deputy minister. This amendment allowed Member of Knesset Yaakov Litsman, an ultra-orthodox rabbi, to head the Ministry of Health without serving as minister in the government, and hence to escape joint accountability for the government's decision to allow railroad repair works on Saturdays, the religious day of rest.

[114] See text to n 100-101 above.

A similar practice can be found in the Basic Law: Freedom of Occupation, which in addition to a standard limitations clause contains since 1994 an override clause allowing the Knesset to violate the human right to engage in the occupation of one's choice. This override clause was, like the delegation of authority to deputy ministers, legislated to accommodate the concerns of ultra-orthodox parties, wishing in this case to deflect claims that limitations on the importation of non-Kosher meat unduly infringed meat importers' freedom of occupation. The precedent set by this override clause is now invoked by the proponents of a general override clause applicable to a broader set of human rights protected by the Basic Law: Human Dignity and Liberty.[115] Such a clause would allow the legislative and executive branches to enjoy both the legitimacy of being constrained, in principle, by constitutional rights, and the ability to release themselves from any such limitations. The proponents of such an override clause invoke Section 33 of the Canadian Charter of Rights and Freedoms which allows the Parliament of Canada or a provincial legislature to declare that some part of its legislation applies temporarily notwithstanding contrary rights protections in the Charter.[116] They fail to mention, however, that contrary to current proposals in Israel, the Canadian "notwithstanding clause" does not apply to all rights, leaving political ("democratic"), language and mobility rights out, and that it was conceived in a federal context, with the primary purpose of safeguarding the powers of provincial legislatures.[117]

Such declarations of constitutional principle while providing for its suspension should be distinguished from the familiar practice of entrenching a principle while establishing exceptions thereto, whether explicitly or through a limitations clause. The exceptions to a constitutional principle must, in theory, be grounded in a normative justification, and be

[115] A. Harel 'The Israeli Override Clause and the Future of Israeli Democracy' (VerfBlog, 2018) at https://verfassungsblog.de/the-israeli-override-clause-and-the-future-of-israeli-democracy/ (last visited 8 August 2020).
[116] M. A. Roy and L. Brosseau, *The Notwithstanding Clause of the Charter* (Ottawa: Library of Parliament, 2018) 6-8.
[117] *ibid*, 8.

tailored to that justification, typically through proportionality or other balancing doctrines. The practice outlined above involves no such tailoring; instead, the principle, be it ministerial accountability, or the protection of a human right, is entirely set aside, and this simply because the deciding body – prime minister or legislature– so decides.

In our view, this practice infringes the principle of non-contradiction of the law, which ensures that power is clearly and meaningfully limited. This is because not only do these laws create blatant contradictions that are potentially confusing to citizens; they also do so with respect to norms constraining the government's power. By enabling ministries to be headed, in effect, by individuals not subject to the government's collective responsibility, the amendment to the Basic Law: the Government invites unaccountable exercises of executive power. The override clauses for their part allow the legislative branch to temporarily remove fundamental limits on executive and legislative power, all the while appearing to be constrained by such limits.

Our third example relates to the *constitutional entrenchment of ethnic hierarchies* embodied in the Nation-State Law. This basic law, enacted in July 2018, declares among other things that the State of Israel is the nation state of the Jewish People, and specifies that this exercise of self-determination in the State of Israel is unique to the Jewish People. It demotes Arabic, previously an official language alongside Hebrew, to a language with a "special status." It constitutionally entrenches the right of Jews to immigrate to Israel, and declares the importance of relations with the Jewish diaspora. It further provides that the state will strive for the safety not only of its citizens, but of Jewish people around the world. It declares that 'The State views the development of Jewish settlement as a national value, and shall act to encourage and promote its establishment and strengthening.'[118]

[118] Israel Basic Law: The Nation State of The Jewish People 2018, art 7 (Unofficial translation by Dr. S.H. Rolef) at https://knesset.gov.il/laws/special/eng/BasicLawNationState.pdf (last visited 13 August 2020).

The critics of this law denounce it as racist, while its proponents argue that it constitutionally entrenches the Jewish people's right to self-determination, correcting what they view as the imbalance between individual rights and collective Jewish values that resulted from the Supreme Court's entrenchment of the right to equality since the 2000s.[119] Commentators critical of the law offer three principal explanations for its enactment: populist politics, whereby the ruling coalition deflects calls for economic solidarity by performing intra-Jewish solidarity;[120] the delegitimization of competing political speech based on universalist values;[121] and preparation for the eventual annexation of the Occupied Palestinian Territories ("OPT"), by constitutionally entrenching Jewish dominance for the day when Jews will no longer constitute a majority of the state's population.[122]

Whatever the explanation, it has proven difficult for critics of the law to express through available legal doctrine the intuition that the Nation-State Law offends legal morality. Let us take Adalah, the leading legal organization in Israel advocating for the rights of Palestinian citizens. In its petition against the law, it argued *inter alia* that the law establishes Jewish superiority and control over the Arab minority as a constitutional value, and this in blatant contradiction of the democratic principle of self-rule and of the international right to self-determination.[123] In advocacy material Adalah also claims that the law is a form of oppression

[119] A. Bakshi 'Does the Nation State Law Deny the Right to Equality?' (iCon blog in Hebrew, 2018) at https://israeliconstitutionalism.wordpress.com/2018/10/21/%D7%A1%D7%99%D7%9E%D7%A4%D7%95%D7%96%D7%99%D7%95%D7%9F-%D7%91%D7%A0%D7%95%D7%A9%D7%90-%D7%97%D7%95%D7%A7-%D7%99%D7%A1%D7%95%D7%93-%D7%94%D7%9C%D7%90%D7%95%D7%9D-%D7%95%D7%A4%D7%A1%D7%A7%D7%AA-%D7%94-5/ (last visited 8 August 2020).
[120] D. Lustig and E. Benvenisti 'The Nationalism Potion' (iCon blog in Hebrew, 2018) at https://israeliconstitutionalism.wordpress.com/2018/10/24/%d7%a1%d7%99%d7%9e%d7%a4%d7%95%d7%96%d7%99%d7%95%d7%9f-%d7%91%d7%a0%d7%95%d7%a9%d7%90-%d7%97%d7%95%d7%a7-%d7%99%d7%a1%d7%95%d7%93-%d7%94%d7%9c%d7%90%d7%95%d7%9d-%d7%95%d7%a4%d7%a1%d7%a7%d7%aa-%d7%94-6/ (last visited 8 August 2020).
[121] Hostovsky Brandes, n 106 above, 74.
[122] Lustig and Benvenisti, n 120 above.
[123] Adalah, 'Petition to HCJ 5866/18' (Adalah, 2018) [22-46] at https://www.adalah.org/uploads/uploads/Jewish_Nation_State_Law_Petition_Final_07082018.pdf (last visited 8 August 2020), (in Hebrew).

as it 'imposes a constitutional identity on the Arabs without their consent.'[124] This oppression is not well captured by the framework of process, through arguments of a violation of the principle of participation in lawmaking. The law was passed by a majority of the Knesset, a Knesset in which there were non-Jewish representatives, elected by an electorate composed of all ethnic groups. [125] Neither does the law remove non-Jewish citizens' rights to vote and stand for election. Because process-based judicial review focuses on who creates law, it cannot speak to the way the Nation-State Law communicates with citizens, declaring only one set of citizens sovereign.

Substantive judicial review is more apt to analyse the lack of morality of this law. Indeed, Adalah (and other petitioners) also invoke a violation of the rights to equality and dignity, triggering the doctrine of unconstitutional constitutional amendment.[126] Yet, pinpointing exactly how equality is violated is not an easy matter, for the law on its own does not clearly violate individual rights.[127] While the equal enjoyment of collective rights to language and self-determination seems more relevant, Arabic's special status in the law may be invoked to argue that the law does not impair the ability of Palestinian citizens of Israel to use their language, and in international law, the right to self-determination within the framework of independent states has been interpreted primarily as a right to participate in political structures,[128] returning us to the process paradigm of which the weaknesses are discussed above. More fundamentally, the right to equality does not speak to the failure to construct a relationship of reciprocity between the state and all of its citizens.

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[124] Adalah, 'Proposed Basic Law: Israel - The Nation State of the Jewish People' (Adalah, 2018) at https://www.adalah.org/uploads/uploads/Adalah%20Position%20Paper%20-%20Basic%20Law%20Jewish%20Nation%20State%20-%20ENGLISH%20-%2015072018%20-%20FINAL.pdf (last visited 8 August 2020).

[125] Non-zionist parties are limited however in their political platforms, under defensive democracy doctrines that have been interpreted to prohibit challenges to the Jewish character of the state.

[126] n 123 above; Association for Civil Rights in Israel, 'Petition to HCJ: Repeal the Nation-State Law' (2018) at https://www.english.acri.org.il/post/ 40 (last visited 8 August 2020).

[127] It may be invoked to justify violations of individual rights, for instance discrimination against non-Jews seeking to live in a "Jewish settlement", but does not itself prohibit non-Jews from living anywhere.

[128] M. Shaw, *International Law* (Cambridge: Cambridge University Press, 8th ed, 2017) 225.

Indeed, we submit that Adalah's claim of oppression is best understood in Fullerian terms, as a claim that the Nation-State Law constructs a relationship of reciprocity only between the State and those citizens who are Jewish. By excluding non-Jewish citizens from the definition of the sovereign, this Basic law infringes the principle of generality not only of this particular enactment but of the legal system as a whole, given this law's constitutional status affecting the interpretation of ordinary legislation. The basic law constitutes a firm step in the direction of a "dual-state" in Fraenkel's sense of a legal system where one group is subject to the rule of law, taking part in the law's elaboration and enjoying constitutional commitments by the state to protect its interests and identity, while the other group (here non-Jews) not only enjoys a more limited set of collective rights but experiences the law as something imposed from above. While equality and generality may overlap in highlighting that the law makes an unjustified distinction, only generality in its Fullerian sense expresses the underlying concern to create a relationship of reciprocity between state and all citizens. Moreover, invoking equality plays into the law's defenders' argument that what is at stake is a rebalancing of universalist liberal values by ethno-national values - that is, that what is at stake is a clash of worldviews, majoritarian politics having decided in favor of ethno-nationalism. In contrast, the framework of generality of law – interpreted in light of reciprocity- firmly places the analysis in the realm of legality as opposed to external values.

For the same reasons, the generality of law is also infringed *by the "Regularization Law,"* legislation passed by the Knesset in 2017 to "regularise" (i.e., legalize) illegal Israeli settlements in the OPT over the property rights of Palestinian owners, where the illegal construction was done in good faith or with "state consent" as defined in the law. In 2020, the High Court of Justice, by a majority of eight out of nine justices, invalidated this law for violating Palestinians' rights to property and equality under Israeli constitutional law, itself

interpreted in light of international humanitarian law.[129] In the leading opinion, Justice Hayut set aside the question of authority to legislate over the OPT, and determined that even if the Knesset had such authority, when legislating it was subject to the constitutional limitations deriving from the basic laws.[130] When analysing the violation of the constitutional rights entrenched in Israeli basic laws, Hayut made frequent references to the rule of law:

"[T]he rule of law is a basic principle of our legal system and it calls us to hold that all are equal before the law, whereas the retroactive regularization and recognition of illegal building offends the rule of law and encourages criminality….the Regularization Law creates a situation in which those who engage in illegal building in the [area defined by the law] enjoy a different and preferential treatment in comparison with Palestinians who engage in illegal building as well as with individuals doing so within Israel itself.[131]

To determine that the violation was not justified under the limitations clause of the basic law, Hayut further determined that the purposes of the Regularization Law were not legitimate, taking into account the fact that the violation of the right to property in this case constituted a violation of the rule of law.[132] She emphasized that

'[T]he Regularization Law does not address situations where the identity of the private actors who will benefit from the expropriation is unknown, or will be determined after the expropriation…and not even cases where the expropriation will benefit the entire population in the area, including those whose rights were infringed. In other words, this is not a governmental taking where each group in the population suffers its share of the expropriation,

[129] HCJ 1308/17, *Silwad Municipality, et al. v. The Knesset, et. al.*
[130] For a sharp critique of the court's failure to address the question of whether the Knesset's legislation can apply to Palestinians who do not elect members of the Knesset, see M. Mautner, 'The Surrealism of the HCJ' (Haaretz in Hebrew, 2020) at https://www.haaretz.co.il/opinions/.premium-1.8914436 (last visited 8 August 2020).
[131] *Silwad* at [54].
[132] *ibid* at [79].

but is expected to benefit from the public goods for which the same expropriation was carried out.'[133]

In these statements, Hayut echoed the court's longstanding practice of referring to the rule of law to legitimate its intervention.[134] Under our approach, instead of appealing to the rule of law as a rhetorical device or as an interpretative aid to understand the content of the right to equality, Hayut should have explicitly analysed the illegality of the Regularization Law in terms of the inner morality of law. Specifically, she should have pointed to the infringement of the principles of generality and non-retroactivity. Such a framework would not only have captured more precisely the intuition that a retroactive legalization of land grabbing, solely for the benefit of a defined group, does not deserve the title "law". The court would have also avoided imposing Israeli constitutional norms on Palestinians, and thereby reproducing the hierarchy and lack of reciprocity between lawgiver and legal subject embedded in the Regularization Law.

Conclusion

As Dyzenhaus notes, "An authoritarian ruler is one who wishes to rule by legally unlimited diktat... If he wishes for whatever prudential reasons to rule by law he will find, as Fuller famously argued in his parable of King Rex, his rule constrained in ways that make it hard for his say-so to prevail… He will have to abuse legality while seeking to garner the legitimacy that accrues to rule in accordance with the rule of law."[135] In this article, we have tried to show that Fuller's concept of the internal morality of law offers courts a meta-theory of legality that is apt to address the legal techniques of democratic erosion. Making explicit

[133] *ibid* at [74].
[134] I. Porat, 'The Administration of Constitutional Law' (2016) 37 *Tel Aviv University Law Review* 713, 731 (in Hebrew).
[135] Dyzenhaus, n 66 above, at 32.

deep-seated lawyerly intuitions as to what can meaningfully be called "law," courts can clarify to rulers that if they want to enjoy the legitimacy afforded by law, they will have to be subject to the limitations inherent to legality.

The judicial review of legality cannot on its own save democracy. As Rundle makes clear, Fuller's claim is not that the internal morality of law is incompatible with iniquity. Rather, it is that 'respect for the internal morality of law [is] incompatible with certain ways of pursuing iniquity'.[136] Through the judicial review of legality, courts would draw on the distinctive morality embedded in the rule of law to reduce the availability of legislation as a tool of democratic erosion.

Many questions remain about the theoretical justifications for the judicial review of legality across jurisdictions, and how to implement it in practice. We leave these questions for future work, in the hope of having demonstrated that this mode of judicial review offers a distinctive and normatively appealing way for courts to act in troubling times.

[136] Rundle, n 32 above, at 113.