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THE LEGAL FACE OF POPULISM: FROM THE CLASSROOM TO THE COURTROOM

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**THE LEGAL FACE OF POPULISM:
From the Classroom to the Courtroom**

*Myriam Hunter-Henin**

ABSTRACT

This article examines the normative-conceptual contrast between populism and radical democracy against the specific backdrop of two case-studies – the Fundamental British Values discourse in the UK and the French *burqa* ban. The goals of the article are twofold. First, to enrich the understanding of populism by analysing the interactions between populism, democracy and legal reasoning. Secondly, to offer ways of resisting a populist turn in legal reasoning. I will argue that law’s response to populism should embrace the ideals of radical democracy, namely deliberation and inclusiveness. In order to enhance deliberation and ensure its inclusiveness, I will submit that law should both retreat (from the classroom) and actively riposte against populism (in the courtroom).

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Donald Trump's victory in the US and the Brexit referendum in the UK have been praised or criticised as a populist turn. Both expressed the voices of those who feel let down by the so-called elites and think that the solution is an authoritarian figure strong enough not to care what a biased establishment thinks about him.¹

Flamboyant and extreme, populism has attracted the attention of many scholars. For most,² populism can best be approached in relation to what it rejects: populism has thus been described as anti-elitist,³ anti-constitutionalist,⁴ anti-institutional, anti-representative⁵ and anti-democratic.⁶ A debate has ensued as to whether this hostile stance is inherently harmful⁷ or can act as a corrective to democracy,⁸ or at least as a useful barometer of democracy's (ill) health.⁹ Despite the great divergence of approaches to capture populism, most scholars converge on one point: namely that populism is short-lived in its individual manifestations. Even if it is inherently hostile to democracy,¹⁰ its damaging effects should not therefore, the argument goes, be exaggerated. Once in power, populist leaders would not be likely to change institutions¹¹

¹ Tony Blair, "Against Populism, the Center must Hold", *The New York Times*, 3 March 2017.

² See however, for a definition of populism as a political strategy: Kurt Weyland, "Clarifying a Contested Concept. Populism in the Study of Latin American Politics", *Comparative Politics* 34(1) (2001), 1-22; as an ideology, Cas Mudde, "The Populist Zeitgeist", *Government & Opposition* 39(4) (2004), 541-63; Cristóbal Rovira Kaltwasser, "The Ambivalence of Populism: threat and corrective for democracy", *Democratization* 19(2) (2012), 184-208; or a form of identity politics, Jan-Werner Müller, *What is Populism?* (University of Pennsylvania Press, 2016).

³ Jack Hayward, "The Populist Challenge to Elitist Democracy in Europe", in Jack Hayward (ed), *Elitism, Populism and European Politics* (Oxford Clarendon Press, 1996), 10-33; Paul Taggart, *Populism* (Open University Press, 2000).

⁴ Yves Mény and Yves Surel, *Par le Peuple, Pour le Peuple* (Fayard, 2000).

⁵ See Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge University Press, 2008), 266.

⁶ Gianfranco Pasquino, "Populism and Democracy" in Daniele Albertazzi and Duncan McDonnell (eds), *Twenty-First Century Populism. The Spectre of Western Democracies* (Palgrave MacMillan, 2008), 15-29, at 16.

⁷ See for example, Koen Abts and Stefan Rummens, "Populism versus Democracy", *Political Studies* 55(2) (2007), 405-24.

⁸ See for example, Marc F Plattner, "Populism, Pluralism and Liberal Democracy", *Journal of Democracy* 21(1) (2010), 81-92.

⁹ Paul Taggart, "Populism and the Pathology of Representative Politics", in Yves Mény and Yves Surel (eds), *Democracies and the Populist Challenge* (Palgrave, 2002), 62-80, at 78.

¹⁰ Contra, a minority trend has argued that populism, in its hostility towards representative politics, is the purest form of democratic expression, Torbjörn Tännsjö, *Populist Democracy: A Defence* (Routledge, 1992); Ernesto Laclau, *On Populist Reason* (Verso, 2005), 154; Margaret Canovan, "Trust the People! Populism and the Two Faces of Democracy", *Political Studies* 47(1) (1999), 2-16.

¹¹ See however the institutional changes implemented in Hungary for example, Renáta Uitz, "Can You Tell an Illiberal Democracy in the Making? An appeal to comparative constitutional scholarship from Hungary", in *International Journal of Constitutional Law* 13 (2015), 279-300.

and their policies would not outlive the populist leader.¹² Moreover populist leaders, once in power, may struggle more than others to maintain their popularity.¹³ Amongst these reassuring authors, a notable exception is Jan-Werner Müller, whose work has demonstrated how populist leaders and parties may use the language of democratic values to deform democracy.¹⁴

However, little attention has been paid thus far to the full implications of populism on law. Most recent scholarship has revealed that populism cannot be properly understood as a (mere) reaction against representative democracy and institutional constitutionalism. It is more positively an ideology which seeks to curtail pluralist political debate. Yet the broader definition of populism as an ideology, rather than as an anti-institutional stance, has so far had little impact on how the consequences of populism are assessed. The consequences of populism are still too often measured in light of their relative low impact on representative mechanisms and institutions. But if populism is, beyond representative politics, about conveying a monolithic discourse and muffling the voices of those who are characterized as “outsiders”, its consequences as I will argue, cannot merely be measured in institutional and representative terms. The assessment must include, more broadly, considerations of how populism might undermine access to and freedom of the political debate.¹⁵ As this article will demonstrate, the concept of populism (as well as its implications) is therefore best understood by contrast to a radical conception of democracy, which goes beyond majority rules and aggregation of interests, to include broader conditions of participation and deliberation.¹⁶ Against this background of radical democracy, it will be argued that if individual instances of populism can be short-lived, their implications are nevertheless likely to have long-lasting and damaging effects, both on law and

¹² See for example, Paul Taggart, “Populism and Representative Politics in Contemporary Europe”, *Journal of Political Ideologies* 9(3) (2004), 269-88, at 276.

¹³ Paul Taggart, *ibid.*, 276: “The appeal of the populist to their constituencies is usually on the basis of their unusualness and therefore as they become institutionalised into politics, they inevitably lose a major part of their popular appeal”.

¹⁴ Jan-Werner Müller, *op. cit.*, fn 3.

¹⁵ Cristóbal Rovira Kaltwasser, *op. cit.*, fn 3, at 200, who hints, as a line of enquiry for further research, that populism seems to be negative with regard to public contestation but can be positive in terms of fostering inclusiveness.

¹⁶ Joshua Cohen, *Philosophy, Politics, Democracy. Selected Essays* (Harvard University Press, 2009). These two elements also feature in Robert Dahl’s *Polyarchy. Participation and Opposition* (Yale University Press, 1971).

democracy. By restraining its deliberative and inclusive characters, populism threatens both the very core of democracy and legal reasoning itself.

The main aims of the article are twofold. First, it will seek to enrich the understanding of populism by analysing the interactions between populism, legal reasoning and democracy. Secondly, having identified the full facets of populism, it will suggest ways of resistance. Scholarship thus far has paid little attention to the issue, either because populism has been seen as part of democracy itself¹⁷ or because fighting populism would paradoxically seem to be anti-democratic. When remedies have been sought, the focus has been on reforms to the electoral system.¹⁸ However, it will be argued that as populism manifests itself in a myriad of ways, well beyond issues of representation, a much broader reaction is required. A deliberative conception of democracy will be used to offer ways of reacting against populism and ensure that civil society and courts are more protective of the inclusiveness of the political landscape.

The article will be structured as follows. In a first part, I will select two recent legal manifestations of populism in two distinct European countries: the rhetoric of “Fundamental British Values” in the UK and the French 2010 legislative ban on the full covering of the face in the public sphere.¹⁹ These examples have been selected because they deal with areas which are not immediately associated with populism: they do not relate to issues of political representativeness nor do they directly embody the anti-immigration agenda which has become symptomatic of populism in Europe. The Fundamental British Value (FBV) discourse indirectly relates to anti-terrorism (which the fight against extreme ideologies, through the teaching of FBV is supposed to bolster)²⁰ and education (as schools, universities and nurseries are now under a duty to actively promote FBV).²¹ The French ban on the full covering of the face deals with

¹⁷ *Supra* fn 11.

¹⁸ See Jan-Werner Müller, *op. cit.*, fn 3, who has focused on building more inclusive majorities within the political system.

¹⁹ Loi n. 2010-1192 interdisant la dissimulation du visage dans l'espace public of 11 October 2010, *JO* 12 October 2010.

²⁰ *Advice on Promoting Fundamental British Values in Schools*, Department of Education, Ref: DFE-00174-2015, June 2015, available at <https://www.gov.uk/government/publications/protecting-children-from-radicalisation-the-prevent-duty>.

²¹ The duty was implemented in 2014, see <https://www.gov.uk/government/publications/promoting-fundamental-british-values-through-smssc>.

religious freedom and an extensive conception of secularism.²² Through the broad spectrum of areas that they touch upon, and the distinct legal cultures and constitutional orders that they emanate from, these examples illustrate that populism can take many forms, across legal disciplines.

Having identified how these two examples can be characterized as instances of a populist turn of law and analysed their implications for law and democracy, I will then, in a second part, suggest ways of resistance, building on theories of deliberative democracy.

I Identifying Populism in Legal Reasoning: “Fundamental British Values” and “burqa ban” as case-studies

As Jan-Werner Müller has shown, populism may be defined as a moral and final claim of representation of “the people as a whole”.²³ Several key features follow from this definition. Populists will rely on an idealised construction of “the people” and reject those who do not comply with that mythical construction or do not recognise the “common good” which “the people”, by contrast, can discern intuitively and all endorse willingly. Against this idealised and moral conception, deliberation and dialogue amongst citizens are not essential. On the contrary, dissent will be seen as harmful if it goes against the ways of “the people”. All of these features can be identified in two recent legal phenomena in Europe: the FBV discourse in the UK and the French ban on the full covering of the face, known as the French *burqa* ban.²⁴

In the UK, schools have been since September 2014 under a duty to promote FBV. In the state-maintained sector, FBV feature in the context of social, moral, spiritual and cultural (SMSC) development²⁵ and appear in the Teachers standards,

²² Albeit a distorted version of *laïcité*, see my article, “Why the French Don’t Like the Burqa: *Laïcité*, National Identity and Religious Freedom”, *International Comparative and Law Quarterly* 61 (2012), 1–27.

²³ Jan-Werner Müller, “‘The People Must be Extracted from Within the People’: Reflections on Populism”, *Constellations* 24 (2014), 483-93.

²⁴ The term ‘*burqa*’ will be used in a broad sense to include any forms of Islamic veils covering the face that is, the *burqa* in a strict sense as well as the *niqab*.

²⁵ The Department for Education published guidance on promoting fundamental British values in the context of social, moral, spiritual and cultural (SMSC) development: Department for Education, *Promoting fundamental British values as part of SMSC in schools* (November 2014).

which apply to the training, appraisal and discipline of teachers.²⁶ The duty to respect FBV extends to the independent sector with equal weight.²⁷ Non-compliance with the duty to promote FBV carries heavy consequences for schools,²⁸ such as possible closure²⁹ or withdrawal of government funding.³⁰ Moreover, schools, universities and nurseries have since September 2015 been subject to a duty to have due regard to the need to prevent people from being drawn into terrorism (the Prevent duty).³¹ The accompanying statutory guidance suggests two ways for schools to comply with their Prevent duty: referral, and education, through the promotion of FBV.³² It is argued that the new emphasis on FBV in the English legal regime of education may be characterized as an instance of a populist turn in law. On 11 April 2011, the French ban on the *burqa* came into force.³³ Despite efforts at portraying the ban as an embodiment of French legal traditions, and notably of French secularism (*laïcité*),³⁴ I will argue that the ban also amounts to a populist turn in public law.

Just like populism has been said to be born out of a reaction to a sense of crisis,³⁵ the FBV discourse has gained momentum as the terrorist threat in the UK has increased. Moreover, the 2014 FBV curriculum Guidance for English schools was drafted as a direct consequence of the so-called “Trojan plot” scandal, after a number of English state schools in the Birmingham area were reported to allegedly have been overtaken by

²⁶ *Teachers’ Standards*, Department for Education, July 2011, which have had statutory force since 2012: SI 2012/115, reg. 6; SI 2012/560, reg. 4; Education Act 2002, s. 78.

²⁷ Education (Independent School Standards) (England) (Amendment) Regulations 2014/2374.

²⁸ The duty to actively promote FBV has become part of the areas assessed by the schools’ inspectorate body, OFSTED: *OFSTED School Inspection Handbook*, September 2014, at 133 and 152.

²⁹ Academies may be closed down by the Secretary of State if they fail to demonstrate a commitment to FBV amongst their governors.

³⁰ Local Authority (Duty to Secure early Years Provision Free of Charge) Regulations 2014/2147, Reg 2(2)(b).

³¹ Section 26 of the Counter-Terrorism and Security 2015 Act.

³² Section 26 is to be read in conjunction with the statutory guidance issued by the Home Secretary under section 29 of the Act, namely: *The Prevent Duty Guidance for England and Wales*, 12th March 2015, revised on 16th July 2015, available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445977/3799_Revised_Prevent_Duty_Guidance__England_Wales_V2-Interactive.pdf and the specific *Guidance for Higher and Further Education Institutions* 16 July 2015, available at www.gov.uk/government/Prevent_Duty_Guidance_For_Further_Education_England_Wales_Interactive.pdf.

³³ Op. cit. fn 20.

³⁴ Op. cit. fn. 23.

³⁵ Paul Taggart, op. cit., fn 13, at 282.

Islamist groups.³⁶ Just like populism has been said to be lacking core values,³⁷ FBV—paradoxically – are elusive. The advice delivered by the Department of Education lists, amongst FBV very broad concepts such as: “democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs”.³⁸ The advice fails to explain how the insertion of the concept of FBV is to reinforce democracy. It is doubtful that the push for FBV will indeed increase tolerance towards a diversity of values and life-styles.³⁹ On the contrary, the emphasis on a British way is likely to render all culturally-deviant practices suspect. Given that the concept of FBV itself has emerged in reaction to a fear of Islamist terrorism and extremism, it is difficult not to share Spalek’s scepticism and conclude that the insistence on FBV stems not “from the foundation of equality, non-discrimination and respect for human dignity, but rather from fear, suspicion and prejudice”.⁴⁰

Moreover, I would submit that the vagueness surrounding the notion of FBV is deliberate. The insertion of the concept of FBV would not seek to add any clarity or specific liberties to existing human rights nor does it strive to improve the pedagogy of human rights in the classroom.⁴¹ By grounding democracy onto vague FBV, there is a suggestion that “true British subjects” will know which practices are democratically-worthy and which ones are not. The FBV discourse conveys the idea that there is a shared implicit knowledge about the content of fundamental values. The concept of FBV thus throws over liberal guarantees a gloss of nationalism, a diffuse sense of belonging, the sparkle of an idealised heartland. The concept of FBV, in that sense, shares the populist “diffuse conception, the romantic and profoundly ahistorical conception, but no less powerful for that, of a heartland”.⁴² Through the link it then makes between this

³⁶ James Arthur, “Extremism and Neo-Liberal Education Policy: A Contextual Critique of the Trojan Horse Affair in Birmingham Schools”, *British Journal of Educational Studies* 63 (2015), 311.

³⁷ Ben Stanley, “The Thin Ideology of Populism”, *Journal of Political Ideologies* 13(1) (2008), 95-110.

³⁸ *Op. cit.*, fn 21.

³⁹ See Robin Richardson, “British Values and British Identity: muddles, mixtures, and ways ahead”, *London Review of Education* 13(2), 37-48.

⁴⁰ Basia Spalek, *Terror Crime Prevention with Communities*, (Bloomsbury, 2013), Chapter 4, quoted by Alison EC Struthers, “Teaching British Values in Our Schools: But why not Human Rights Values?”, *Social & Legal Studies* 26(1) (2017), 89-110, who, more generally, explores the relationships between FBV and Human Rights.

⁴¹ Stjin Sieckelink, Femke Kaulingfreks and Micha De Winter, “Neither Villains Nor Victims: Towards an Educational Perspective on Radicalisation”, *British Journal of Educational Studies*, 63(2015), 329.

⁴² Paul Taggart, *op. cit.*, fn 13, 274.

diffuse national entity, on the one hand, and democracy and the rule of law on the other, the concept of FBV adopts a populist dichotomous view of “us” (who know and agree on common democratic values) and “them” (who do not). Naturally, this mythical unified notion of “Britishness” can only exist if its contours remain blurred and fuzzy. Any attempt at a more precise definition would lead to disagreements and debates which, in a populist outlook, are disruptive forces, to be fought.

Indeed the FBV discourse has already had a chilling effect on freedom of speech. The guidance on the Prevent Duty⁴³ and advice on FBV⁴⁴ explicitly encourage conventional thinking.⁴⁵ Through the connection they make between non-violent extremism and terrorism, the guidance and advice opt for a content-based assessment of democratically-worthy speech which restricts debate in the classroom, and more generally, in the public sphere. Such suspicion towards divergent views is here again characteristic of populist ideologies, which are inherently anti-pluralistic. Likewise, the slippery-slope contained in the guidance and advice from “non-violent extremism” to “terrorism”, despite the wealth of scholarship refuting the connection,⁴⁶ is also typical of a populist simplistic discourse and of populists’ disregard for any expert analysis and empirical evidence which might contradict their claim.

The same populist features characterize the French *burqa* ban. Rather than relying on the French Council of State’s expert legal opinion⁴⁷ or on well-established interpretations of legal concepts, the French *burqa* ban was justified in light of an elusive appeal to the fundamental values of the French Republic⁴⁸ and upheld on the

⁴³ Supra fn 33.

⁴⁴ Supra fn 21.

⁴⁵ Despite Section 31 of the 2015 Act highlighting the importance of free speech.

⁴⁶ See references in Jamie Bartlett, Jonathan Birdwell and Michael King, *The Edge of Violence* (Demos, 2010).

⁴⁷ Conseil d’Etat, *Rapport sur les solutions juridiques d’interdiction du port du voile intégral* 25 March 2010, *JCP* 2010, act. 406.

⁴⁸ The special Committee set up to study the ‘practice of the wearing of the full veil on French national territory’ concluded firmly that the burqa was incompatible with the fundamental values of the French Republic but was evasive as to the appropriate legal response. *Mission d’information sur la pratique du port du voile intégral sur le territoire national*, Report submitted to the President of the National Assembly on 26th January 2010, *JCP* 2010, act. 142. See also, the French parliamentary resolution adopted on 11 May 2010 (Ass Nat XIII législature, TA no 459) in which the full veil is described as a radical practice that is contrary to the values of the French Republic.

basis of social norms: “the minimum requirements of living together”.⁴⁹ Rather than encouraging debate and diverse views, the French ban calls upon an implicit shared understanding of “living together”, in order to dismiss a form of religious expression, which is perceived – irrefragably and despite evidence to the contrary, as oppressive and extreme.

In turn, this legal populism has contributed to and reinforced populist ideology, which has then further strengthened populist streaks in legal reasoning. The FBV discourse in the UK thus echoed the Conservatives’ calls for a British Bill of Rights, in lieu of the protection offered by the European Convention on Human Rights, under the Human Rights Act.⁵⁰ Strikingly, the debates on British values and Britishness also played a significant role in the UK referendum vote to leave the European Union. After the French ban on the *burqa* came into force, several extensions of *laïcité* and religious neutrality duties were proposed in France, some of which then made their way into legislation or court decisions.⁵¹ On 20 March 2016, a new political movement was even launched—le printemps républicain—whose aim was to reaffirm the centrality of *laïcité*. Unsurprisingly, manifestations of populism in party politics and in legal reasoning thus feed on and encourage one another. My aim here is not to determine which one comes first,⁵² but to underline that even when populism subsides in party politics,⁵³ the populist turn of legal reasoning remains. To resist populism fully, one must therefore rely on more than success at electoral decisions or reform of party politics. In the following part, more effective ways of resistance, based on deliberative theories of democracy, will therefore be suggested.

⁴⁹ Conseil Constitutionnel 7 October 2010, *JO* 12 October 2010, 18345.

⁵⁰ See Geoffrey Robertson QC, “The Case for a Bill of Rights”, *The Independent* 31 May 2010, <http://www.independent.co.uk/voices/commentators/the-case-for-a-bill-of-rights-1987913.html>.

⁵¹ See for example, extending obligations of religious neutrality upon a mother taking part in a school visit, TA Montreuil 22 November 2011, *Droit Administratif* (2012), 163; for the extension of religious neutrality duties in the workplace, see Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, *JORF* n°0184, 9 August 2016.

⁵² The burqa ban is said for example to have originated from a comment from Sarkozy: Cf. Angelique Chrisafis, “Nicolas Sarkozy says Islamic veils are not welcome in France”, *The Guardian* 23 June 2009, <http://www.guardian.co.uk/world/2009/jun/22/islamic-veils-sarkozy-speech-france>.

⁵³ The plan for a British Bill of Rights has thus (for now) been put on hold in the UK and an anti-populist President, Emmanuel Macron, was elected in France in May 2017.

II Resisting Populism: the value of deliberative democracy

The promoters of FBV and the French *burqa* ban have shed a lot of energy to demonstrate that their initiatives were compatible with – indeed were a deeper and truer expression of – liberal democracy. The first line of resistance against these populist manifestations must therefore first be to refute this (false) ideological claim. The main strategy of FBV and *burqa* ban promoters was to claim an attachment to the liberal tradition in its “negative side”, namely its concept of negative liberties, whereby religious liberties are essentially seen as belonging to the private realm, where they can be shielded from state interference. However I will demonstrate that FBV and the French *burqa* ban are both profoundly illiberal, even in this “negative” conception.

Stephen Holmes famously defended a negative liberal conception of religious freedom.⁵⁴ According to Holmes, on controversial questions, notably questions of religious beliefs, politics of omission or “Gag Rules” are advisable.⁵⁵ This policy of avoidance is designed to reinforce public debate, by clearing it from divisive issues. It is also a way of protecting religious freedom itself, by shielding it from politically-driven agenda. The theory thus rests on a division between the private and public spheres, with religion strictly belonging to the former. Interestingly both the FBV discourse and the debates around the *burqa* ban have claimed to reconnect with fading liberal values by re-drawing the blurred distinction between the private and public spheres. David Cameron thus declared, in the wake of the FBV rhetoric, that Britain needed a more muscular liberalism.⁵⁶ Similarly, in France, the *burqa* ban was depicted in the media as protecting a secular public sphere in jeopardy.⁵⁷ In both instances, it was thought that alongside the diversity of individual values pertaining to the private sphere, a meaningful public sphere required a clear(er) commitment to common values and/or a restraint of religious sectarian views. FBV and the *burqa* ban thus (superficially) adopt the language of negative liberty and share its reluctance towards the inclusion of

⁵⁴ Stephen Holmes, *Passions and Constraints. On the Theory of Liberal Democracy* (The University of Chicago Press, 1995).

⁵⁵ *Ibid*, Chapter 7.

⁵⁶ Speech delivered on 5th February 2011, <https://www.gov.uk/government/speeches/pms-speech-at-munich-security-conference>.

⁵⁷ On the emergence of the French *burqa* ban, see my article, *op. cit.*, fn 23.

(extreme) (religious) controversial views in the public forum. On closer look, however, neither FBV or the burqa ban actually embrace liberal values. Negative liberties (freedom from politics), explains Holmes, are vital to positive liberties (participation in politics). The relegation of religious views to the private sphere is thus designed to free the public space from controversies, in order to *stimulate* public debate, because the “*de-politicization* of primordial loyalties can increase the chances for rational compromise in a divided society”.⁵⁸ By contrast, the FBV or *burqa* ban seek to *muffle* public debate by *politicizing* religion. In France, in the months that preceded the legislative ban, the wearing of the *burqa* was gradually constructed as a “political issue”, a threat to national identity, secularism and feminism. Relayed unanimously by the mainstream political and intellectual elite,⁵⁹ this unilateral depiction of *burqa* wearers then precluded any real investigation of the complexities of meanings behind the veil.⁶⁰ By politicising the issue, and bringing religion into the public sphere, the *burqa* ban did not encourage public debate but imposed a unilateral view of what amounts to acceptable garbs. Moreover, the restrictions imposed in the name of FBV or French Republican values gag individuals. On the contrary, Holmes is adamant that the gag rule primarily applies to the government (and its representatives)⁶¹ and serves to build a neutral public territory – “such as a schoolroom where children of all sects are debarred from stigmatising others as un-American”.⁶² As abovementioned, the *burqa* ban and FBV discourse have had the exact opposite effect: they purport to identify true British subjects and true French citizens and have exacerbated divisions in the classroom and in the streets.

I argue that to resist such anti-illiberal populist shifts effectively, the values of deliberation and participation should be restored, as captured by the ideal of radical democracy and materialised by deliberative democracy theories. I will hereby outline in what sense populism is antithetic to the ideal of radical democracy, before suggesting in

⁵⁸ Stephen Holmes, *op. cit.*, fn 55, at 211.

⁵⁹ John R Bowen, *Why the French Don't Like Headscarves, Islam, The State and Public Place* (Princeton University Press, 2008).

⁶⁰ Ralph Grillo and Prakash Shah, “Reasons to Ban? The Anti-Burqa Movement in Western Europe”, *MMG Working Paper 12-05*, Germany: Max Planck Institute for the Study of Religious and Ethnic Diversity (2012).

⁶¹ Stephen Holmes, *op. cit.*, fn 55, at 222.

⁶² *Ibid.*, at 224.

the following section possible concrete ways of countering legal manifestations of populism. The French *burqa* ban has had strong parliamentary support.⁶³ However, under a demanding conception of democracy, a given policy may fail to be characterized as “democratic” even if it passes the institutional test. Under deliberative democracy theories, a policy will only be democratic if it derives from an open-ended *reason-giving* process of deliberation,⁶⁴ in which the actors and the objects of deliberation are both open-ended. At the heart of deliberative democratic theories lies uncertainty: uncertainty as to the outcome of discussions as well as to the contours of the community who takes part in these discussions. Deliberative democracy theories and radical democracy emphasise self-revision.⁶⁵

By contrast, FBV and the *burqa* ban seek, at the outset, to foreclose the debate. They purport to seal the issue of extremism and exclude the most interested parties –the *burqa* wearer or the holder of non-violent extremist views– from the discussion. In addition, as the contours of national identity are accessible intuitively by common sense, reason-giving appears futile. This reference to a common sense knowledge of social conventions falls foul of the deliberative democratic reason-giving requirement. Far from achieving the Habermasian threshold of the better argument,⁶⁶ it fails to amount to an argument at all. As John Rawls explained, “the idea of public reason is not a view about specific political institutions or policies” but, rather, “it is a view about the kind of reasons on which citizens are to rest their political cases in making their political justifications to one another when they support laws and policies that invoke the coercive powers of government concerning fundamental political questions”.⁶⁷ In other words, public reasons put forward by citizens, and *a fortiori* by public bodies, are reasons which others can reasonably be expected to acknowledge as an argument. I would submit that the existence of a social norm not to cover one’s face in the public sphere does not satisfy the public reason requirement. An exploration of the reasons

⁶³ The French 2010 Law was voted by an overwhelming 335/1 majority before the Lower House of the French Parliament and a 246/1 majority before the Upper House.

⁶⁴ See Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?*, (Princeton University Press, 2004), at 3.

⁶⁵ See Roberto M Unger, *The Religion of the Future*, (Harvard University Press, 2014), at 304. Adde, Joshua Cohen op. cit., fn 17, at 335.

⁶⁶ Jürgen Habermas, *Legitimation Crisis*, trans Thomas McCarthy, (Beacon Press, 1973), at 108.

⁶⁷ John Rawls, *The Law of Peoples* (Harvard University Press, 1999), at 139.

behind the social norm in question is indispensable.⁶⁸ My argument should not be understood to imply that social or ethical norms⁶⁹ never have any legitimate place in law or that social considerations should somehow be purged from legal analysis, at the risk, underlined by Ronald Dworkin, of leading to an undue erosion and impoverishment of public discourse.⁷⁰ However, if social considerations and practices are relevant to legal reasoning, they can never *per se* legitimize coercive laws. Only a case-by-case approach could determine whether these social considerations, in light of their underlying rationale, could amount, in the circumstances, to Rawlsian public reasons.⁷¹ The *burqa* ban therefore falls short of the deliberation requirement contained in the ideal of radical democracy because the crucial investigation as to *why* the social norms of uncovering the face in public should be backed by law in the whole of the public sphere is lacking.⁷²

Apart from this reason-giving requirement, radical democracy demands that legal solutions also be attentive to justice and equality. Indeed, not only must a reason be put forward to justify the coercive law at hand, such reason must also be compatible with principles of equality between citizens, since “I can have no obligation to a community that treats me as a second-class citizen....”.⁷³ This goal of equality necessarily instils some content-based scrutiny of the reasons advanced to justify particular coercive laws.⁷⁴ FBV and the *burqa* ban might possibly reflect social norms which, in turn, might well crystallise public opinion but, as Tim Scanlon has argued,⁷⁵ law’s legitimacy cannot be ascertained exclusively on the basis of public opinion. “The legitimacy of the constitutional order depends in part on the opinions of those whom it applied; (but) the dependence of legitimacy on opinion has its limits. The support of opinion does not render any constitutional order legitimate”. A substantive goal for justice must also

⁶⁸ Eric A Posner, *Law and Social Norms* (Harvard University Press, 2002), at 58.

⁶⁹ Further distinctions can be drawn between social and ethical norms. See for example, Sylvie Delacroix, “Law and Habits”, *OJLS*, 37(3) (2017), 660–86. However, they do not have any bearing on my present argumentation. I am grateful to Dr Ming-Sung Kuo for raising this point.

⁷⁰ Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2005) at 252.

⁷¹ Wojciech Sadurski, “Public Reason and Constitutional Law”, *Jean Monnet Working Papers* 26/14 [ISSN 2161-0320], at 5.

⁷² For this argument, see my article, “Living Together in an Age of Religious Diversity”, *OJLR* 4(1) (2015), 94–118.

⁷³ Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press, 2006), at 96–7.

⁷⁴ For a demonstration that these substantive considerations are in line with deliberative democracy theories, see Amy Gutmann and Dennis Thompson, *op. cit.*, fn 65.

⁷⁵ Tim M Scanlon, “Provocation. Everyone is a Philosopher”, *Harvard Law Review Forum* 125 (2012), 228–35, at 233.

guide law-makers. The absolute indifference of the FBV rhetoric and *burqa* ban towards the rights of religious minorities falls short of this justice requirement. For our purposes, this goal of equality, inherent in the ideal of radical democracy, is therefore another argument against the *burqa* ban and FBV discourse and a shared characteristic with the exclusionary agenda of populists.

Moreover, relying on social norms to set legal standards, as the FBV and *burqa* ban do, attempts to ossify current social practices. Far from a celebration of the social dimension of law, it is often an attempt to protect society from undesired trends and steer discussion and behaviour in the public forum in a certain direction. Ironically, the *burqa* ban claims to protect communication (which the wearing of face-covering garments hinders), just as the FBV discourse allegedly purports to liberate public debate from dangerous extremist narratives. However, deliberation is only conducive to democracy if it is carried out freely.⁷⁶ The more the State will intervene to dictate the conditions of who is to deliberate, how and when, the least meaningful will the deliberative process be.⁷⁷ Besides, such intrusion of the State also distorts legal reasoning. Priority is no longer to protect individual freedoms, save where a threat to security or other conflicting rights are present but to ensure that socially common fundamental standards are complied with.⁷⁸ The balanced equilibrium between public policy and human rights, at the heart of legal reasoning, is thus profoundly disrupted. Legal reasoning then becomes a vehicle for a monolithic majoritarian vision and shares populists' aversion for pluralism.

To counter such populist turn, I submit that the value of democracy, its deliberative and inclusive nature, must guide legal solutions.

III Legal resistance to populism: restraint and riposte

Law has an essential role to play in countering populism. In this section, I will argue that law's response to populism should embrace the ideals of radical democracy,

⁷⁶ See John Dryzek, *Deliberative Democracy and Beyond* (Oxford University Press, 2004), at 8.

⁷⁷ See Roberto Unger's plea for an institutional minimalism, *op. cit.*, fn 66, at 310.

⁷⁸ *Op. cit.*, fn 23, at 20-1.

namely deliberation and inclusiveness. In order to enhance deliberation and ensure its inclusiveness, I will submit that law should both retreat (from the classroom) and actively riposte against populism (in the courtroom). As abovementioned, populism can only be effectively resisted if the value of democracy is entrenched in society. As Robert Post puts it, “the value of democracy does not depend merely upon choice and consent but upon its continuous socialization into the personalities of our citizens, which is why “democratic education” is essential for the maintenance of democracy”.⁷⁹ The FBV discourse precisely claims to enhance democratic education at schools. The ability of schools to promote (and to prove that they promote) FBV has now become an essential criteria for the overall school grading. However, increasing the stakes for schools does not necessarily enhance democratic education. On the contrary, I would argue that democratic education stems from the experience of deliberation in a free and inclusive environment. This free environment first implies that schools and teachers are afforded a sufficient degree of autonomy. If their freedom is too confined, schools may be tempted to adopt tick-boxing strategies which will have little benefit for democracy. It is thus unlikely that power-point presentations on British stereotypes, from the chimes of Big Ben to the supposed national fondness for tea, rain and the Queen will thus truly reinvigorate democratic debates in school. More deeply, there is an inherent contradiction in a closely state-monitored liberal education. By requiring teachers to demonstrate that their teaching abides by FBV, the body of school inspectors in England (Ofsted) might prompt teachers to draw detailed teaching plans which ironically leave very little room for spontaneous debates.⁸⁰ A bureaucratic, top-down and police-state approach to education is not, in other words, conducive to building a democratic liberal culture. The constant monitoring of classroom debates damages the relationship of trust between students and their teachers: “If education is not seen as a space that invites open dialogue and free speech, students will not engage and they will not open up to the kinds of transformation and questioning that the pedagogical encounter can bring in its

⁷⁹ Robert Post, “Participatory Democracy as a Theory of Free Speech: A reply”, *Virginia Law Review* 97(3) (2011), 617-32, at 624.

⁸⁰ See however stating that such plans would not need to be produced on inspection, <https://www.gov.uk/government/publications/school-inspection-handbook-from-september-2015/ofsted-inspections-mythbusting>. The onus of show-casing the school’s efforts to promote FBV still rests on the school however.

wake”.⁸¹ The very necessity to prove that teaching is free will introduce bureaucratic restrictions and hamper deliberation. Controlled debate, in the vein of the FBV discourse, does not correspond to notions of deliberation and participation under deliberative democracy theories.

Where participation and deliberation under deliberative democracy theories empower stakeholders,⁸² the FBV discourse signals an administrative shift in classroom discussions, which strengthens the role of state officials. As illustrated by democratic experimentalism, the engagement of stakeholders, under deliberative democracy theories, allows the most affected and knowledgeable parties to have the most influential say.⁸³ By contrast, in the FBV scheme, stakeholders are to be the prolongation of the voice of the State. Consequently, where deliberative democracy theories favours free speech even when it does not contribute to agreement, the FBV discourse silences dissenting views. As deliberation goes hand in hand with inclusive participation, freedom of speech matters, under deliberative democracy theories, independently of content. Expression of deviant views serves the “expressive interest” of their holders.⁸⁴ More profoundly, dissent is enriching to radical democracy as it encourages constant self-revision.⁸⁵ In this respect, the top-down involvement of the State in local debates risks being counter-productive to democracy.⁸⁶ The intensity of the discussions on values, which the FBV initiative has generated in schools, may seem at first glance to have reinvigorated local democratic engagement. However, on closer analysis, and despite legislative provisions reiterating the commitment to freedom of speech,⁸⁷ it has in fact led to a participatory disempowerment, in which minority voices have been silenced by the official endorsement of majority views. Consequently the best

⁸¹ Aislinn O’Donnell, “Securitisation, Counterterrorism and the Silencing of Dissent: The Educational Implications of Prevent”, *British Journal of Educational Studies* 64(1) (2016), 53-76.

⁸² For an argument in favour of greater involvement of local players under deliberative democracy theories, Joshua Cohen and Charles Sabel, “Directly-Deliberative Polyarchy”, *European Law Journal* 3(4) (1997), 313-42.

⁸³ Charles F Sabel and William H Simon, “Destabilization Rights: How Public Law Litigation Succeeds”, 117 *Harvard Law Review* 1015 (2004); Michael C. Dorf and Charles Sabel, “A Constitution of Democratic Experimentalism”, 98 *Columbia Law Review*, 267 (1998).

⁸⁴ Joshua Cohen, op. cit., fn 17, Chapter 7.

⁸⁵ See Roberto Unger’s principle of apostasy, op. cit., fn 66, at 303.

⁸⁶ See, highlighting similar risks in relation to the practice of local consultations, John Morris, “Citizen Participation: A Critical Look at the Democracy Adequacy of Government Consultations”, *OJLS* (2017), 1-24, at 22.

⁸⁷ Op. cit., fn 46.

way for the State to enhance democratic values at school would be to retreat from the classroom. On the other hand, I will argue below that judges should not shy away from enforcing democratic values in the courtroom.

Under theories of deliberative democracy, a decision is democratic not only because it satisfies the reason-giving requirement but because it is right. But how is the rightness of outcomes to be assessed, given the diversity of views and uncertainty on which deliberative democracy theories is based? What settles the rightness question according to Frank Michelman can only be “intellectual competence”.⁸⁸ Under accounts of deliberative democracy theories, justice is not to be taken in a metaphysical sense but in a substantive sense of giving a role to all interested parties.⁸⁹ I would argue that courts are in a unique position in that respect. To enforce the value of democracy and avoid a populist turn of public law, I submit that judges should: resist simplistic and abstract accounts of factual situations; require that any infringements of individual liberties rely on justification and, finally, insist on a strict proportionality between these justifications and the extent of the infringements incurred for their sake. Each of these requirements oppose key populist features: they refute the simplistic narrative, which populists favour; they challenge the populist claim that common values should prevail over individual rights and they curb the populist harshness towards dissenters. Each of these requirements, moreover, coincide with demands of deliberative democracy theories: that legal decisions flow from deliberation; that decisions rely on reasons “which citizens may reasonably be expected to endorse”⁹⁰ and that decisions reflect a genuine concern for justice and individual rights.

In light of the three abovementioned conditions of context, justification and proportionality, the ECtHR, in the *SAS v France* case relating to the French *burqa* ban, probably did not go far enough.⁹¹ The decision can be praised for meeting the first condition of contextual accounts of the facts. Thanks to the *SAS* ruling,⁹² Member States will no longer be allowed to ascribe unilateral abstract meanings to religious symbols.

⁸⁸ Frank I Michelman, “Human Rights and the Limits of Constitutional Theory”, 13 *Ratio Juris* 63 (2000), 67.

⁸⁹ Robert Post, “Provocation”, *Harvard Law Review Forum* 125 (2012), 218-27.

⁹⁰ John Rawls, *Political Liberalism* (Columbia University Press, 1996, latest ed., 2005), at 217.

⁹¹ ECtHR 1 July 2014 *SAS v France* App. No 43835/112014; Adde, ECtHR 11 July 2017 *Belcacemi & Oussar v. Belgium*, App. 37798/13, upholding the Belgium burqa ban.

⁹² *op. cit.*, fn 92, para 32.

Religious symbols will from now on need to be interpreted in context, in light of the wearer's particular motivations. The Court thus remarked that, contrary to majority perceptions there is no evidence that 'women who wear the full-face veil (...) seek to offend against the dignity of others' (para 120). The *burqa* wearers' voices, muffled during the parliamentary and national debates preceding the *burqa* ban, were thus finally given a forum. The Court in that sense broadened the concept of equality. By putting the point of view of the most interested parties to the forefront, the Court's intervention addressed the deficit inherent in the concept of arithmetic equality (one person/one vote) on which representative democracy rests. It redressed the crudeness of traditional democracy by taking into account the variation, amongst citizens, in knowledge and interest.⁹³ More positively, by allowing the voice of the aggrieved to be heard, the Court embraced the inclusive approach at the heart of deliberative democracy theories and counter-acted the populist's monolithic official narrative.

The ECtHR, in *SAS*, moreover underlined the need for the State to provide rational justification for restrictive measures and warned against the risks of passing legislation for the sake of responding to majority feelings of discomfort (para 149), thus seemingly responding to the second abovementioned condition of justification and rejecting the populist common sense intuitive approach. Yet, ultimately the ECtHR upheld the French law for elusive reasons, retreating behind the margin of appreciation granted to Member States. Moreover, because of the light sanctions provided for⁹⁴ (para 152) and the limited focus of the ban on fully-face covering garments (para 151), the ECtHR concluded that the restrictions caused to religious freedoms were proportionate. I would argue that the level of the sanctions should have been irrelevant. The lightness of the punishment does not remove the wrongfulness of an undeserved punishment. Light penalties are no guarantee that the prohibition itself is in the first place a proportionate response. The second reason put forward by the Court in its finding of proportionality is no more convincing. The allegedly moderate ambit of the restriction

⁹³ William H Simon, "Justice and Accountability: Activist Judging in the Light of Popular Constitutionalism and Democratic Experimentalism", *Columbia Public Law Research Paper No. 14-516* (2016); and more generally, Robert Dahl, *A Preface to Democratic Theory* (University of Chicago Press, 1956).

⁹⁴ A maximum fine of 150 Euros or/and the obligation to attend a citizenship course. This consideration did not apply in respect of the Belgium burqa ban, which contains possible prison sentences. Yet the Belgium Law was also held to be proportionate, *op cit.*, fn 92, at para 61.

proves nothing as to its inherent legitimacy. In the end, the decision can therefore only be justified by the Court's deference to the "choice of society" made by France (para 153).

Many would support such restraint. Such calls on judicial restraint are influenced by representative views of democracy, whereby courts structurally stand outside democracy - vested in elected representatives. Under that view, even if courts might at times enhance the democratic process, they would remain structurally apart from it.⁹⁵ Judicial activism, if welcome at times, would thus seem particularly problematic in the context of sensitive issues, on which no consensus is discernible. Courts would then be encouraged to defer to Parliamentary choices extensively.⁹⁶ Even authors who favour representative democracy in that way⁹⁷ might still abide by "a culture of justification" and not be satisfied by the *SAS* decision, in which a mere majoritarian desire not to respect the right of religious freedom, born out of a populist ideology, was, in the end, allowed to determine the judicial outcome. A requirement of justification for state action can fit in with a traditional representative view of democracy. Legitimacy of law-making would still primarily lie with an elected Parliament but to avoid the risk of "majority factions",⁹⁸ that is the risk that representatives act in their own self-interest, checks and balances ought to be put in place. The requirement of providing justification could fulfil such role and act as a safeguard against majority abuse. Ultimately, it would thus reinforce the legitimacy of parliamentary decisions, by establishing them as reasonable.⁹⁹ The same could be said of the third condition, of proportionality, which can be seen as extending the requirement of justification from the goal pursued to the

⁹⁵ Mattias Kumm, "Democracy is not Enough: Rights, Proportionality and the Point of Judicial Review", in M Klatt (ed), *The Legal Philosophy of Robert Alexy* (Oxford University Press, 2009).

⁹⁶ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980); Jeremy Waldron, "The Core of the Case Against Judicial Review", 115 *Yale Law Journal* 1346 (2006); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997).

⁹⁷ Stephen Gardbaum, "Proportionality and Democratic Constitutionalism", in Grant Huscroft, Bradley Miller, Grégoire Webber (eds), *Proportionality and the Rule of Law; The New Commonwealth Model of Constitutionalism Theory and Practice* (Cambridge University Press, 2014).

⁹⁸ James Madison, *Federalist*, Number 10, 56.

⁹⁹ Moshe Cohen-Eliga and Iddo Porat, "Proportionality and the Culture of Justification", 59 *American Journal of Comparative Law* (2011), 463.

means chosen to pursue it.¹⁰⁰ Nevertheless, I would argue that a deliberative democracy theories approach would offer a far more reliable basis for these conditions of justification and hence a far more efficient protection against populism.

Under a deliberative democracy approach, courts would no longer feel inhibited to react against populist legislations because their legitimacy as democratic actors and protectors of individual rights would be fully recognised. Under deliberative democracy theories, courts are not placed in a subordinate position: “deliberative democracy theory favours neither the courts or parliament but whatever forum is the more likely to resolve moral disagreements in a way that can be justifiable to the people.”¹⁰¹ Courts may at times even be better placed, as they can involve the most interested parties in the debate and thus ensure greater engagement with civil society. As Oliver Gerstenberg puts it, “courts can provide a platform or forum which requires that problem-solvers themselves make policy with regard to both constitutional and relevant policy reasons”.¹⁰² As judicial intervention is considered under deliberative democracy theories in a fluid way, the courts moreover escape the paralysing dilemma of having to either approve or reject a given statute. In a dialogical approach, judicial decisions (whatever the outcome) offer opportunities for continued and refined deliberation on contested issues. “The exercise of judicial power is more provisional and contingent” than the critics allow.¹⁰³ The fear that a decision against France by the ECtHR would have irretrievably imposed a certain judicial understanding of religious freedom over its domestic parliamentary interpretation is not realistic. Whether judicial review takes a weak or strong form,¹⁰⁴ it always depends on acceptance in the long run. Crucially, as such acceptance can be given after the court’s decision, consensus need not pre-exist judicial decisions. As courts can contribute to the emergence of consensus, through the deliberation and

¹⁰⁰ Mattias Kumm, “The Idea of Socratic Contestation and the Right to Justification. The Point of Rights-Based Proportionality Review”, 4(2) *Law & Ethics of Human Rights* (2010), 142-75.

¹⁰¹ Amy Gutmann and Dennis Thomson, *Democracy and Disagreement* (Belknap Press, 1996), 47. Glenn Staszewski, “Obergefell and Democracy”, *Boston University Law Review*, 97 (2017), 31.

¹⁰² “Negative/Positive Constitutionalism, ‘Fair Balance’ and the Problem of Justiciability”, 10 *International Journal of Constitutional Law* (2012), 904-25, at 914.

¹⁰³ *Op cit.*, fn 94.

¹⁰⁴ A weak judicial review will give the last word to Parliament on a given issue whereas a strong form of judicial review will allow the courts to strike down statutes. See Mark V Tushnet, “New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries”, 38 *Wake Forest Law Rev* (2003), 813-38.

debate that their decisions provoke,¹⁰⁵ there are, therefore, no obstacles to judicial activism in hard cases, under deliberative democracy theories.

That the courts would be more legitimately empowered to act, under deliberative democracy theories, does not guarantee that they would strike down populist turns of public law. It is however submitted that the strong emphasis under deliberative democracy theories on inclusion and deliberation would likely foster anti-populist judicial outcomes. Under deliberative democracy theories, not just the process of reasoning but also the content of the reasons themselves must reflect a democratic conception of persons as equals. Had the Court followed this approach in *SAS*, it would have reached the conclusion that the exclusion of a fraction of Muslim women from the public sphere to suit majority preferences falls foul of an inclusive civil society, in which dialogue is to be fostered and rights to religious freedom to be embraced, as a positive manifestation of diversity.

CONCLUSION

Through two recent legal phenomena in two different European countries – the FBV discourse in the UK and the French *burqa* ban – this article has revealed the diversity of ways in which populism can affect law. FBV and the *burqa* ban present all the key features of populism: they invoke an idealised and unified heartland, through British values or a Republican “vivre ensemble”; they deliberately lack any precise content but rely instead on elusive values which would supposedly be intuitively accessible; they generate a dichotomous narrative between “us” (who abide by shared values) and “them” (the “extremists”, who reject them); they rely on a slippery-slope approach whereby terrorism, for example, is assumed to derive from non-violent extremist views or the wearing of full-face covering garments is assumed to denote a refusal to integrate; they spread a monolithic discourse and dismiss any evidence which might challenge the dominant view and finally, they discourage debate and contestation, in order to actively promote an official position.

¹⁰⁵ Op. cit., fn 94.

Such populist turn in law has, it has been argued, potentially long-lasting and damaging effects both upon democracy and law itself. Individual rights no longer feature as essential, albeit not necessarily absolute, claims within the legal framework but as concessions, dependent on the majority's willingness. Legal reasoning then dissolves into social norms. The FBV discourse and burqa ban thus appear like perverted populist forms of majoritarianism which threaten democracy's very core and disrupt legal reasoning.

It has been argued that in order to resist such legal populism effectively, law should embrace the ideals of radical democracy, namely deliberation and inclusion. First, law should support deliberative sites in civil society. Contrary to the top-down involvement of the State in local debates on FBV, the law should empower stakeholders - schools, inspectors, pupils, teachers and parents- and ensure that minority voices are not muffled by the official endorsement of majority views. Secondly, courts should fully endorse their role as democratic actors.

Courts should not therefore, out of principle, take a subordinate role or systematically refrain from encroaching onto Parliamentary choices, be it on sensitive issues. As deliberative democracy theories have shown, Parliament can only convey a reductive, purely arithmetic, conception of equality and has no claim to neutrality. In the absence of uncontroversial neutral answers, courts become vital democratic fora, in which contested issues can be further debated and excluded voices can be heard.

“To require loyalty to rules or other impersonal norms is to invade the inner sanctum of the personality and to commit an act of idolatry”.¹⁰⁶ Judges should not, therefore, retreat from examining the merits of a case. Unlike populism, which stirs emotions and fears to “justify” outcomes, deliberative democracy theories requires “intellectual competence”. If fear, rather than “intellectual competence”, were to guide legal reasoning, populist tactics would have truly won.

¹⁰⁶ Op. cit. fn 94, 305.