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Date of deposit	08 April 2022
Document version	Author's accepted manuscript
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Citation for published version	Harris, J. A. (2022). Some people and the people. <i>Dialogue: A Journal of Religion and Philosophy</i> , (58), 23-28.
Link to published version	https://www.dialogue.org.uk/

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Some People and The People

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In November 2016 three judges sitting on the High Court of England and Wales ruled that the UK government needed to obtain the consent of Parliament before it could take the country out of the European Union following the Brexit referendum held the previous summer. The government had been hoping that it could use prerogative powers vested in the Crown to leave the EU without having to get parliamentary approval. The next day the Daily Mail, a pro-Brexit newspaper, ran a front-page headline describing the judges as "enemies of the people". There was "fury", the paper claimed, that they had "defied 17.4m Brexit voters". Those 17.4 million Yes votes constituted 51.9% of votes cast. 46.5 million people had been eligible to vote, out of a total population of 65.6 million. Just over a quarter of the population, then, and just over a third of the electorate, and just over a half of those who voted, counted as "the people". Neither the law nor a democratically elected parliament was entitled to stand in their way.

The UK is, of course, not the only country where in recent years "the people" have been set against constitutional procedures and the rule of law. All around Europe, in Latin America, and in the USA, the claim has been made that politics as usual excludes and silences the people, leaving them with no option but to assert their will in ways that circumvent institutional and legal structures supposedly captured by elites who are deaf to the concerns of ordinary citizens. In all of these countries there are "populist" politicians and parties keen to present themselves as spokespersons for the people. They claim that their only goal is to serve the people in their struggle against systems designed to further the interests of everyone but them.

A claim that a particular policy or constitutional amendment is the *will of the people* sounds important. Most countries in the world today describe themselves as democracies. Originally, in ancient Greece, democracy meant that the people governed itself. Now it is more likely to mean that government is done in the name of the people and on the people's behalf, and that those in government are chosen by the people, such that they can be relieved of their power when the people decide that others would govern better. Jean-Jacques Rousseau gave this idea hugely influential expression when, in *Of the Social Contract* (1762), he argued that the sovereign will of the people is inalienable, indivisible, and necessarily right. Government, on Rousseau's view, does not *represent* the people, because sovereign power cannot be exercised by someone on another's behalf. Laws, especially fundamental constitutional laws, are and can only be direct expressions of the people's sovereign will. Government is to be thought of as an "agent" of the people, and as the means by which the people's will is executed. Government has no powers that the people does not give it, and that the people could not take away.

A situation in which government is at odds with the will of the people can, then, only be a situation in which something has gone badly wrong. But, we might want to ask, what exactly is *the people*? Who is a member of the people, and why? And how can we tell what the will of people is? How does a people express its will? What enables us to say that a particular policy or

law is the will of the people, rather than the will of a class or party or faction? When is something the will of *the* people rather than the will of *some* people?

There is no single way of defining "the people". In different times and places, different definitions have been used. The people has been distinguished from "the rabble", what the 17th-century anti-Royalist writer James Tyrell called "the vulgar or mixt multitude". On this definition, the people properly so called were those with sufficient property to count as electors of Members of Parliament. The people has also been distinguished from the aristocracy, and from the bourgeoisie. What in English we call "the people" is often in French called "the nation". The French revolutionary (but anti-Jacobin) Emmanuel Joseph Sieyès claimed that the "third estate", "all the citizens who belong to the common order", *was* the nation. There was no place in the nation as he understood it for the nobility or the clergy. As noted above, it is common now for "the people" to be distinguished from the "elite", for example when Donald Trump at his presidential inauguration claimed to be taking power from "Washington, D.C." and giving it "back to you, the people".

All of these definitions of the people are in tension with the idea of fundamental political equality. In their various ways they divide society up into those who should have a share in political power, and those who should not. They claim that one or other social group, or class, does not *deserve* to count as a member of the people, because it has interests which place it *at odds* with the people's interests. Tyrell's "multitude" was a threat to the people from below. To Sieyès, the aristocracy, like the elites of populist political discourse today, was a threat to the people from above. Modern democracy, however, embodies a commitment to universal equality. It allows no "below" and no "above". And so when a distinction is made now between "the people" and other members of society, a question is immediately raised about how to understand the political status of those others. If they are not part of the people, then what is their place? Is the claim being made that in fact they *have* no place in the society in question? Some uses of the language of "the people" do, unfortunately, have this implication. They are premised on the assumption that a people is by definition a culturally or ethnically homogeneous body with a single will that expresses the interests of, precisely, a particular culture or ethnicity. A culturally and ethnically diverse society, on this view is really a collection of peoples, not a single people at all.

If we want to avoid this kind of fragmentation of society into different and potentially conflicting peoples, perhaps we should say that in a democracy, the people is, simply, *everyone*. The 18th-century radical Thomas Paine, adopting the French tendency to use "the nation" as a synonym for "the people", claimed that "A nation, in a collective sense, comprehends all the individuals of whatever age, from just born to just dying". But if the people is the sovereign body that ultimately rules in a democracy, then this cannot be quite right. For children are not part of the people in this sense -- they do not vote, and cannot stand for public office -- and nor are the mentally disadvantaged, along with (in some countries) people in prison, and resident aliens. Even in a democracy, popular sovereignty is one group of people's power over another group of people, and there is always the question of what gives the former group the power that it lays claim to. This question is not unanswerable, but answers are inherently contentious: 17 year olds, for example, might well feel that it is purely arbitrary that they can't vote while 18 year olds can.

Also, if the people is everyone, then the consequence is bound to be that, as a matter of fact, the people has several wills. This is because it is vanishingly unlikely that there is any one thing that is literally everyone's will. Rousseau called the sovereign will of the people "the general will", but, on one reading at least, he admitted at the same time that that generality was a fiction. The general will was different and distinct from "the will of all". It was what everyone *would* will if they were sufficiently rational and sufficiently informed about the country's real interests. In the real world, elections and referendums tend to show that the people is of at least two minds.

So perhaps the right thing to say is that the will of the people is the will of the majority. "In the United States", Alexis de Tocqueville observed in *Democracy in America* (1835-40), "as in any country ruled by the people, the majority governs in the name of the people". It is certainly true that when a hard decision has to be made, and where a population is divided, it makes sense to solve the problem by letting the majority have its way. In the absence of any other decision procedure, this seems a good one. The minority might reasonably be expected to accept that this was the best means of resolving the issue, even while they disagree with the outcome. It is also arguable that it is in the nature of a majority's point of view that it is likely to be a closer approximation to the truth of the matter than a minority's point of view. But the claim that the will of the people is the will of the majority requires the minority to accept the will of the majority as *their* will, and it is hard to see why the minority should look at things that way. They are more likely to be, as Edmund Burke put it in 1791, "exasperated and soured by the previous contention, and mortified by the conclusive defeat". They seem entitled to say that the view that prevails is the view of some people, and that their view is the view of some other people, and that neither is the view of *the* people.

Furthermore, just as there is reason to doubt that anything is ever the will of everyone, so there is reason to doubt that any one policy is clearly the will of a majority. Even in a referendum with a simple choice between two options, there might be various reasons why those in majority made the choice that they did, such that there is a number of possibly conflicting ways of describing what the majority's will actually was. The Brexit referendum is a case in point. Brexit didn't simply mean Brexit, as Teresa May once claimed it did. There were several interpretations of it, and while some Brexit voters recognised their will in one interpretation, others recognised their will in another.

It might seem that we are heading toward the conclusion that it is never possible to call a policy or preference *the will of the people*. There is, we might be tempted to think, too much disagreement in any given population for anything to deserve to be described in that way. In fact, we might be tempted to think, the very idea of *the people* is a myth. A population, we might want to say, always comprises a number of different sub-groups and factions, and never really acts with a single will or speaks with a single voice.

The problem with this line of thought is that in a democracy, the state's authority -- its ability to issue laws that we are all under an obligation to obey -- rests on our being able to see its actions as in some sense *our* actions, or at least as actions performed on *our* behalf. The state's actions need to be willed by all of us, not just by some of us, so that in obeying the law, we are all, in the final analysis, obeying nobody but ourselves.

How the state might be able to portray itself as the embodiment of the will of everyone was the overriding concern of the political philosophy of Thomas Hobbes. It was obvious to

Hobbes that there was no unity of purpose among the governed. The role of government was to represent the governed *as if* they had a single will and a single voice. In other words, the role of government was to represent the disunited multitude *as if* it was a people. The people, on Hobbes's view, existed only in the actions of the person who was able to act and speak for everyone else. The person best able to do this was, according to Hobbes, a king. The famous image on the titlepage of his book *Leviathan* (1651) was meant to make this crystal clear. But in principle the people could also exist in the will of a chamber of representatives. In every effective form of government, Hobbes claimed, the people ruled.

A form of government's claim to legitimacy, on Hobbes's view, rested solely on the fact that every single member of the governed could be supposed to have consented to its rule. Every member of the multitude, in other words, had given their voice to the government, and authorised it to act on their behalf. It was crucial that this consent was given by individuals, not by the people. The people -- a unified political body with a single will -- was the *product* of the original contract that brought government into existence, not a party to that contract.

Hobbes welcomed the counter-intuitive consequence that no course of action undertaken by a collection of subjects, no matter how large, could be described as an action on the part of *the people*. No rebellion against government, in other words, could call itself an act of the people. It could only be an act of *some people* -- "[f]or a commonwealth which is one person, cannot take up arms against itself". It follows from Hobbes's position that we cannot say what we might want to be able to say about acts of political resistance. It was not "we the people" who rejected British tyranny in the American Declaration of Independence. "Wir sind das Volk", the claim of discontented East German protestors in 1989, was, on this way of thinking about the people, rhetorically powerful but, properly speaking, untrue.

It is natural to think that there is in truth something deeply *undemocratic* about denying, as Hobbes did, that government is beholden to a people that exists prior to and independent of the institutions of politics and law. This, however, is misconception. It is possible to see the Hobbesian position as in fact the only way of maintaining democracy in circumstances where the population is fragmented and divided against itself. This was the view of the German jurist Hans Kelsen in *On the Essence and Value of Democracy* (1929), a seminal contribution to political debate in the fraught circumstances of the collapse of the Weimar Republic. In reply to the claim of Carl Schmitt (a future Nazi) that popular rule could only be secured by an all-powerful president directly connected with the common will of the people, Kelsen argued that as a matter of sociological fact there was no such common will, and that the people's unity could only be supposed to exist in a *normative* sense, in the form of the state's legal order. The essence of democracy, according to Kelsen, was disagreement between political parties. A common will had to be a matter of compromise and negotiation. "Organization of the people in political parties", he wrote, "means, in reality, creating the organizational conditions for such compromises, the possibility of moving the common will towards a median." The formation of parties "release[s] for the first time social forces that can somehow be described as 'the people'".

As Kelsen saw things, "parliamentarism" -- the clash of parties in a legislative chamber -- was the sole hope for democracy in modern conditions. In parliamentary debate and voting, something deserving the name of "the will of the people" came into existence for the first time. Some political theorists disagree. They believe that there are moments in history -- moments of

crisis -- when the voice of the people can be heard outside parliament. The French political scientist Bernard Manin, for example, has claimed that "When individuals as a group give instructions to their representatives, when a crowd gathers in the street, when petitions are delivered, or when polls point to a clear trend, the people reveal themselves as a political entity capable of speaking apart from those who govern." But Manin does not explain why such things reveal *the* people rather than the views *some* people.

In Scotland, where I live, it is sometimes said that independence from the rest of the UK is the settled will of the people. The basis for this claim is, presumably, opinion polls which show a majority in favour of independence. Suppose that in the future referendum which such polls are supposed to mandate, a very large majority -- 80%, say -- vote in favour of independence. Would that make the claim that independence is the will of the people unanswerable? I don't think so. All it would tell us is that some people -- in this case, a lot of people, 80% of those who voted -- are in favour of independence.

To call Scottish independence is the will of the people is like calling Scottish independence is the will of God. It seeks to bolster the case for independence by making an assertion that can neither be proved nor disproved. Moreover, the case for independence should not need to be made in terms of a claim about the will of the people. If 80% vote in favour of independence, and the vote is fair and turn out is high, that makes the case for independence strong enough. The claim that independence is the will of the people adds nothing to it. On the other hand, if the vote for independence is 51%, like the vote for Brexit, then the claim that independence is the will of the people would be brutally coercive in exactly the same way as was the Daily Mail's "enemies of the people" headline. It would also be deeply divisive. A very large part of the population would find itself described as being at odds with the will of the people. That would hardly be conducive to the forging of a spirit of unity in a newly independent country. In fact, in the wake of a constitutional change of that magnitude, "the Scottish people" would have to be constructed anew. Those in such a situation, Burke warned, "little know how many a weary step is to be taken before they can form themselves into a mass, which has a true, politic personality".