

Divine Right and Parliamentary Immunity: A Symbiotic Relationship

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Abstract

This article aims to investigate the transfer of sovereignty from the *body politic* of the monarch onto the people, in order to explain—in an interdisciplinary manner—the legal, political, theological and philosophical nature of parliamentary immunity. It explores the interdependence between the mechanisms of power and the principles of the divine right doctrine demonstrating the degree of sanctity attached to parliamentary immunity. Based on (but not limited to) Kantorowicz's theory of *the king's two bodies*, this study explores the embodiment of the sacredness and inviolability of the monarch's body politic in the political power relations of the Parliament. The article goes above and beyond the previous attempts at investigating this subject, and seeks to uncover to what extent parliamentary immunity stems from, or embodies, the foundation of the divine right of the monarch.

Keywords

Divine Right, Immunity, Parliament, Executive, Monarch

1. Introduction and Research Gap

Parliamentary immunity remains both a controversial and an under-researched topic in scholarly literature. So far, there have been several academic attempts to provide scientific knowledge and legal understanding of the limits and practices of this concept in our contemporary democratic societies, however almost all of them are limited to an institutional dimension.

Some political science scholars, along with legal practitioners, have emphasized its normative considerations and interpretations in different political regimes and liberal representative democracies (McGee, 2001; Guérin-Bargues, 2011; Hardt, 2013). The analyses of immunity stemmed from the limits, the purpose and characteristics of just two models of parliamentary immunity: the

Westminster tradition of parliamentary privilege, and the French continental model of immunity (Campbell, 2003; Crespo Allen, 1999; Griffith, 1997, 2007, 2009; Wigley, 2003, 2009; Koçan & Wigley, 2005). Other scholars delve into the historical predicament of immunity, mapping its use and its juridical implications from Middle Ages to modern times (May, 1883; McIlwain, 1910; Drew, 1962), and analyzing the power relations established between the monarch and the particular categories of individuals that enjoyed immunity. As a continuation of the Roman public law, immunity in this period involved exemptions from particular public duties, burdens and taxation, and a legal system preventing the king's official to enter an immune land or institution (Davies & Fouracre, 1995).

Parliamentary immunity represents a cornerstone institution for every democratic and political system. It is present in almost all constitutional arrangements and through its two-layer system of non-accountability and inviolability, it protects the members of the legislative body from any misuse or abuse of the law. Under its provisions, deputies and senators can question the actions of the government without fearing its reprisal or arbitrary arrests.

Nonetheless, when analyzing the birth or sources of power attached to parliamentary immunity, the academic literature is modest or downright absent. It seems that scholars and legal experts have investigated only the general dimension of parliamentary immunity in their works, ignoring or neglecting the above-mentioned aspect and its critical evaluation. It is unclear why this is the case, though perhaps it can be attributed to a focus on the limits and practical application of parliamentary immunity while the philosophical aspects of its origin were considered of lesser importance. Thus, an important question remains unasked: what is the origin of the power of parliamentary immunity?

Research Hypothesis and Motivation

Kantorowicz's theory of *the king's two bodies* (1997) separates the political body, or *body politic* (invisible and immutable) from the natural (mortal, imperfect) body of a monarch, but also expresses the sanctification of power and the angelic, holy dimension of the monarch's person. The two bodies of the king form an indivisible unit, in which the political body is situated in a relationship of superiority as it reflects the status and royal dignity (Kantorowicz, 1997: pp. 7-9). The "incarnation" of the king's political body in the natural body eliminates the imperfections specific to the human condition and gives the latter "immortality": the king never dies (Kantorowicz, 1997: pp. 10-13). The perpetuation of the superior political body and the divine quality of its holder have generated practical difficulties in summoning, prosecuting and sanctioning the succession of the head of a legal person in the field of law and legal procedure (Kantorowicz, 1997: p. 314).

The existing literature tackles only the superficial aspect of the transfer of the sacred and inviolable body politic of the monarch into the political power relations of the Parliament. Kantorowicz (1997) suggests that the execution of King

Charles I of England in 1649 reaffirmed and reconfirmed the power of Parliament in taking over the will of the political king against the will of the natural king. The sentencing and execution of the monarch marked the transfer of sovereignty from the old body politic to the new one, which acquired its sacredness and inviolability. From the same perspective, [Manow \(2010\)](#) points to the fact that the two bodies of the king, both present within a single person and separable only by death, were taken over by two other bodies. The people became the “new sovereign”, with a sacred and immortal body, and the people’s representatives the second, inviolable, body. Consequently, this process highlights the political sacredness of the Parliament and the inviolability (in other words, immunity) of its members.

Taking into consideration all these dimensions, the research hypothesis is the following: if parliamentary immunity has a degree of sanctity attached to it, then the body politic of the people in its capacity as legislator benefits also from a certain degree of inviolability previously enjoyed by the monarch, thus transferring—and at the same time altering—the mechanism of political power.

Explore the interdependence between the sources of power and the principles of the divine right doctrine in order to demonstrate the degree of sanctity that adheres to parliamentary immunity presents, from an academic standpoint, at least two important advantages over other studies. The first major element of this article is its originality, and the considerable complexity and diversity of its theoretical framework. In many regards, it brings new knowledge to the interpretations of parliamentary immunity. The second outcome of this study is its contribution to the scholarship across contemporary political, philosophical and legal scientific domains. It is important to understand all the dimensions of parliamentary immunity, not least because of its increasing presence in the media, in major national and European reports ([Crespo Allen, 1993](#); [Raffaelli & Sy, 2014](#); [Venice Commission, 2014](#)), and finally in parliamentary debates.

2. Theoretical Framework: The Divine Right and Parliamentary Immunity

2.1. The Origins of the Divine Right: The Immune and Inviolable Body of the Monarch

Natural law represented the basic doctrine according to which all forms of social life were interpreted and legitimized. It was articulated in its social, political, as well as religious context—an aspect which initially gave the doctrine strong theological connotations. Moral and political principles were derived from the definition of human nature and its relationship with divinity ([Porter, 1955: pp. 16-17](#)) as a result of extensive interpretation of the divine law mentioned in the Old and New Testaments, that is “any law the authority of which is rooted in God” ([Budziszewski, 2021: p. 4](#)). The theological representation of paradise as a heavenly kingdom of happiness was exploited to justify the nature of the papal monarchy and the king ([Pufendorf, 2002: p. 38](#)); the reference to the kingship of

Christ was used to sacralize royal power and sanctify the king's body within secular power, in order to separate it from the vicarious system used by ecclesiastical power (Deploige & Deneckere, 2006: p. 31).

This incarnation of God in the person of the monarch gave the latter the anthropological and political representation as a divine ruler, bearer of the holy aura of justice (Murray, 1954: p. 13). Faith in the king's divinity was necessary to counterbalance the growing power of the church, the main stake being the king's subordination only to God and not to an ecclesiastical leader (Murray, 1954: p. 16). An eloquent example of this is Henry VIII's move to proclaim himself the Supreme Head of the Church of England, in order to symbolically highlight the liberation of the British kingdom from papal rule and from the imposition of doctrines on the king's divinity (Murray, 1954: p. 16). King James I proposed that, as the bearer of the divine word and its incarnation, from the moment of his coronation the anointed king was "accountable to none but God only" (Rhodes & Richards, 2017). Seated on the throne of God, by virtue of his divine attributes, the king exercises god-like power within the kingdom (Murray, 1954: pp. 19, 22-23).

The symbiosis between the monarch's inviolability and sacredness was illustrated, from a theological perspective, by an overturned representation of divinity as "the King of Kings and Lord of Lords, by whom Kings reign", "the great Lord and great King over all gods" (Aquino, 2005: p. 9). In the view of Thomas Aquinas, the king is an expression of the "light of reason given by the divine will" insofar as it relates to the common good (Aquino, 2005: p. 28). If he abuses royal power, the cruel heart of the tyrant is, as Solomon said, "in the hand of the Lord," the only authority that can sanction the king's behavior (Aquino, 2005: p. 45). A servant of God and a servant in the holy kingdom, the king imitates God when he expresses the greatness of the virtue of royal rule (Aquino, 2005: pp. 55, 67).

According to the theological vision, the king cannot be sanctioned for the way he governs by those who are governed, as this would place them above the royal power or on the same level, and the royal function would be rendered void. Unlike the governed, the one who governs has the power to establish the order, the laws and the manner of governing. Above every ruler, no matter the form of government, there is one God, and between royal power and divinity there is no other authority. In the absence of this hierarchy the rule of law would be replaced by anarchy, and both the royal power and especially the divine power would be nullified, as the hierarchy emphasizes the nature of royal power, and reflects the inviolability of divine power. In other words, justice and its administration are an expression of the will and reason of the royal power, and cannot be applied against it.

What is more, the monarch also cannot punish himself or limit his own royal power, as his (arbitrary) prerogative is to punish and forgive those under his rule. He is accountable only to God as the "executor of His government" and subject only to god's judgment—"according to the dignity of the office received"

(Aquino, 2005: p. 83)—which could be expressed by the violent replacement of the monarch. The king’s exposure to any other judgment indirectly implies the possibility of challenging the divine will, whose “wisdom cannot be measured” (Augustin, 2018: p. 49). From the theological perspective, royal inviolability, immunity and sacredness are a necessary requirement to keep the representation of the divinity intact.

Naturally, this refers also to sanctions against the natural body of the monarch, as it is inseparable from the political body and any sanction would be applied to both bodies simultaneously. In order to put a king before the court of law, his two bodies would have to be separated by the judge and the political body removed; however, as the political body is not under the control of the courts, this is impossibility. In practice, the natural body cannot be sanctioned for its actions and decisions as it constitutes an indivisible unit with the superior political body.

The indissoluble political and religious unity of the king’s two bodies was accentuated by “Christomimesis (imitation of Christ), an autonomous Christlike sacerdotal function” (Bertelli, 2001: p. 6), which resulted in the cult of royalty as a sacred entity. Represented as “the shadow of heaven upon earth”, the divinity of royalty was integrated into a complex political and religious system (Roheim, 1972: p. 204) in which the sovereign was the father, the source of law, and the personification of law (Bertelli, 2001: p. 10).

2.2. Taming the King: Immunity as an Institutional Guarantee of the Guidance and Control of the Executive

The religious absolutism conferred on the royal power, mystified by the rituals of coronation and burial of the monarch, became dependent on the extent and evolution of religious schisms. In order to overthrow the Anglican Church, King Charles I was executed on the scaffold, after being tried and convicted by the ordinance for the trial of the king—created especially for this occasion—according to which his divine powers were taken away for violating the coronation oath (Bertelli, 2001: pp. 255-256). This regicide has been compared to the crucifixion of Christ, in the sense that it aimed to preserve the cult of royalty. However, the preservation or restoration of the sacred and inviolable character was no longer possible in the new political, social, ideological and cultural context animated by the French Revolution (Bertelli, 2001: p. 264). The sacred character of the crown was transferred to the “spirit of the nation”; as a result, the sovereignty of the whole nation became inalienable (Bertelli, 2001: p. 264).

The social contract established the “supreme leadership of the general will”: a principle based on the emergence of a new “moral and collective body” and an expression of inalienable and indivisible sovereignty (Rousseau, 2007: pp. 33-41). The figure of the sovereign was now attributed to a “collective being”, while holders of the office acquired the status of representatives of the general will, retained their status as members of the state, but were no longer placed above the

law (Rousseau, 2007: pp. 41, 52). The impunity previously enjoyed by royal power is conferred to the collective being, through the right to legislate, exercise justice and yield the sword of war, and is universal in nature under the social contract (Hobbes, 2005: pp. 174, 241). This absolute right of sovereign power is a specific mark of the political body. Should it become corrupt and violate the terms of the social contract, this would make it invalid and its right to hold power would cease. However, as long as the social contract is respected and applied, the sovereign power is recognized as the achievement of the purpose for which it was established, and as the confirmation of the social contract's validity. Therefore, the impunity of sovereign power has a double meaning: on the one hand, there is no other authority above sovereign power entitled to judge and sanction the way in which sovereignty is exercised. On the other hand, it reconfirms the persistence of the transfer of rights to the entire political body.

While the divine cult of royalty was characterized by the personalization of the sovereign power's impunity in the figures of the king and of God, the contractualist view drew a line between the natural body and the body politic, between the sovereign and the sovereign power. By exercising sovereign power, its representatives are not conflated with it, but perform the will of the political body during the exercise of their duties in accordance with the social contract's provisions. The representatives have the attribute of impunity, because they cannot simultaneously substitute themselves for both the power that punishes and the person who is punished. However, the sanction can be applied after renouncing the entry into the political body, and only for acts imputed to the person, not to the position held.

The sacredness and perfection of the king, strongly contested in the context of the French Revolution, was replaced by the modern representation of human nature defined in relation to the natural state prior to the establishment of the social contract: "homo homini lupus est" ("man is a wolf to another man") (Hobbes, 1962), and the ruler himself was represented as "an animal of prey stronger than the rest", the "king of the vultures" who may be "bent upon preying on the flock" (Mill, 2005: p. 44). The representation of human nature in relation to the natural state stressed the importance of the existence of mechanisms of prevention, control and sanction applied to the person of the sovereign. On the basis of this representation, the sovereign is released from its bond with God, instead of being chosen under the provisions of the social contract.

3. Parliamentarization of the Divine Right: Parliamentary Immunity as Embodiment of the Sacredness of the Monarch

The theory of political representation was based on the unity of the unique royal will and that of the people, where the king's political body reflected the general will of the people (Manow, 2010: p. 1). Replacing the symbolic link between the king and the divinity with the social contract triggered the emergence of a new political body located in the sacred space previously attributed to God (Raiu,

2012: p. 84). If before the French Revolution of 1789 the citizens were mere subjects of the monarch by divine right, in its aftermath the new ideal of representative democracies reversed this relationship, transforming the citizens into the new sovereign (Raiu, 2014: p. 320).

On the one hand, the king's political body remained intact and inviolable so that it could still serve the purpose of the government. The king's political body continued to be sacred, which was represented by his placement between the absolute power, superior to the monarch and exercised by the coronation and removal from power, and those governed by the will of the king. On the other hand, god's place and role were attributed to the general will that became sovereign in the political hierarchy established by the social contract. Even though sovereignty was transferred (conditionally) to those who governed, regardless of their number, the general will not be deprived of the morphic force of transitioning from nature to civil status.

The representation of the new political body by the sovereign was defined on the basis of the function of "representation of the kingdom" (Manow, 2010: p. 1). The notion of the king as a people, illustrated by Hobbes with the phrase "rex est populus", was operationalized in the wake of the English Revolution through a constitutional compromise: the eminent function of representation was attributed to both the king and the House of Lords. Meanwhile, in the context of the French Revolution, the exclusively parliamentary representation of the sovereign political body prevailed, expressing the popular will manifested and enshrined as a political unit. In the post-revolutionary democratic imagination, the dominant idea was that of parliamentary representation of the sovereign people. Nevertheless, in both representations, the concept of sovereignty was defined in relation to its source (that is, the general will of the people), and the power exercised by the new political body was established by the social contract. Freeing the citizens from the authoritarian rule of the monarch eliminated the earlier arrangements and autonomous spaces that stood between them and the arbitrary political power of the old-fashioned liberal society (Raiu, 2012: p. 84).

The disappearance of the king's institution after the French Revolution did not cancel the function of monarchical representation and sovereignty: it was taken over by the Parliament in order to preserve the edifice of the political body, its semantic meaning reformulated within the democratic regime by extending the representation from particular interests ("*representatio singulariter*") to that of the general will ("*representatio in toto*") (Manow, 2010: p. 3). The transfer of sovereignty from the people to those who govern and the image of the political body were initially caricatured during the period of the French Revolution, illustrating the relation between the concept of representation and the new social structure and political order specific to the New Regime (De Baecque, 1997: p. 3). The revolutionary moment was confronted "with the danger of dissipating the symbolic meaning of a word that ends up hiding as much as it reveals" (De Baecque, 1997: pp. 4-5).

The omnipresent representation of the body politic in the narrative of the French Revolution marks the continuity of previously articulated political mythology surrounding the king's political body (Manow, 2010: p. 5). The social and political body of the modern state is an expression of political force and order (Protevi, 2001: p. 3; Miller, 2022: p. 26), a narrative necessary to legitimize political and institutional organization and hierarchy. The (sacred) political body of democratic governance is located in the space of parliamentary deliberation, an image recomposed by means of rituals and symbols used in democratic practice (Manow, 2010: pp. 10-13).

Members of the Parliament have specific attributes of belonging to the political body, periodically reconfirmed by recognizing and validating their status as representatives of the people. The transition from the uniqueness of the monarch to the plurality of parliamentarians has resulted in the multiplication of the body politic, present in each of its components. It is the sum of all its parts, and—unlike the immortal character of the king's political body—it belongs to the edifice of political power within a limited timeframe, in accordance with the relevant legal and constitutional provisions. The expansion and restriction of the political body does not change the representation of the edifice of the legislative power, but it serves to measure and evaluate the belonging of the components to the whole.

The sacredness and inviolability of the king was transferred to the representatives of the legislative; it was the leitmotif of the narrative legitimizing the dual nature of those who exercise power. The symbiosis between human and political nature was invoked in order to confer institutional stability and preserve the political body, newly regenerated, phoenix-like, following the revolutionary juncture of 1789. Political rituals were used to highlight that the representatives of the general will belong to the political body, as they took the oath of allegiance at the start of their term in office. By denouncing the tyrannical behavior of the king, the revolution impregnated modern philosophy and political thought with a new representation of human nature. After breaking with the influence of theology, representing human nature as based on the impulse to follow God in order to achieve salvation at the Last Judgment, the modern era was founded on the writings of Hobbes, Rousseau, Locke, and Mill, for whom human nature manifests as an animal instinct of force and vulnerability. This instinct is preserved even after the establishment of the social contract, as the ruler himself can become a danger to the governed.

Unlike the violent practice employed to oust a monarch from power, often by killing the mortal body in order to liberate the body politic, democratic regimes needed new tools to separate the two bodies. An emphasis was placed on the autonomy of the political body in relation to its components, which is why the ties could be broken only as a result of the will of the legislature. The kingdom could not deny a king, because the will of the king's political body was one and the same as the personal will of the one who wore the crown. By contrast, the will of

the Parliament is superior to, and often different from, the individual wills of those who form it, and importance is given to the temporariness of their belonging to the sacred, inviolable body politic.

4. Conclusion

The symbolic body of sovereignty represents a metaphor whose regeneration and constant reinterpretation we find in political thought and practice. It translates the abstract concept of governance into the actual, concrete plan according to which the basic unit of every political, philosophical and theological system was conceptualized: human nature.

Within the framework of political philosophy, the prevalent narrative has centered on the archetype of a sovereign figure, which has been both part of the whole and a representation of the entire collective it governs. The body politic has been constantly (re)invented to serve as the (invisible) “vehicle” legitimizing the narrative of exercising power in the name of sovereignty. The symbiosis of the human and political body has been integrated into the political mechanisms and rituals which preserve the inviolable, sacred dimension of the exercise of power. To overcome the dilemma of opposites, inherent in the union of the two bodies endowed with antinomian characteristics, the main approach in the space of political reflection and practice has been to place them within a hierarchy and define their boundaries.

This representation has dominated political (and theological) discourse and imagination throughout time, and has been used both to illustrate and to legitimize the nature of this complex unit of analysis; it has elicited constant interest and generated multiple interpretations. The historical context, political and religious influences and disputes, along with the changes in the forms of government, legitimized various incarnations of the sovereign body politic as a result of manifesting the higher will of each individual, recognized and accepted at that time within society. From the divine will, miraculously exerted on the mortal body of the king, to the manifestation of the general will based on a social contract as well as democratic procedures and mechanisms of the legislator: what the rituals and mythology dedicated to the embodiment of the body politic have had in common is the sacred and inviolable nature of sovereignty. Even the often violent and dark descriptions of the political bestiary have not tarnished the character of the body politic, in order not to deprive it of content, and not to devalue the idea of representation, which has been a constant necessity. In the face of opprobrium, the body politic has never been placed on the scaffold or in the dock; it has been necessary to separate the two bodies in order to exercise justice towards the mortal, imperfect, profane body. For this reason, immunity has constituted an expression of the (temporary) symbiosis of the natural, mortal body with the sacred, inviolable and immortal body politic.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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