

# RESOLVING THE ‘PARADOX OF CONSTITUENT POWER AND CONSTITUTIONAL FORM’ FROM A SCHMITTIAN ACCOUNT OF SOVEREIGNTY: ITS RELEVANCE TO THE UNDERSTANDING OF ‘CONSTITUENT POWER’ AND ‘AMENDING POWER’

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*Power to amend the constitution is distinct from the power to amend any other legislative instrument in view of the fact that the former is a power to alter the most significant instrument in the polity. The apex court of the country has also recognized this distinction while equating the power to amend the constitution with constituent power. In our opinion, this position needs to be reviewed since there is significant difference between the concept of constituent power and the power to amend the constitution. For a clear exposition of the nature and limits of the power to amend the constitution, a proper understanding of its distinction from the concept of constituent power is imperative and providing that is the intended objective of the present paper. We conclude that the power to amend the constitution is an aspect of governmental power, distinct from sovereign power, which is fettered by the constitutional form. The constituent power, on the other hand, is an attribute of the sovereign unfettered by any constitutional limits.*

## I. INTRODUCTION

There have been a number of significant litigations in this country assailing constitutional amendments and asserting limitations to the power to amend the Constitution. The obvious counter initially was that the power to amend the constitution is a power with no limitation. Since constitutional amendments are amendments to an instrument as significant as the constitution, there is a strong argument that ‘constitutional amendment’ as a concept is of different import than that of the ordinary concept of amendment. This is explicit in the fact that in a number of decisions by the apex court this power of constitutional amendment is

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equated with ‘constituent power’ almost unequivocally. However, such an equation is problematic as ‘constituent power’ as a concept is an attribute of sovereignty, a power without any limitations whatsoever.<sup>1</sup> In our opinion this position needs a thorough review based on the understanding of the concept of constituent power and its distinction with the concept of amendment. So, for an exposition of the nature of the power of constitutional amendment, a thorough understanding of the concept of constituent power and legislative power is essential.

The word ‘constituent’ means something that constitutes another, that helps make up or complete a unit or a whole.<sup>2</sup> It is therefore a natural corollary that ‘constituent power’ signifies power to constitute or construct something. In constitutional jurisprudence this term is associated with the power of making a new constitution or any instrument in the nature of a constitution. In the aforementioned context, an exposition of the nature of ‘constituent power’ becomes particularly important in certain socio-political situations which necessitate the framing of a new constitution. A dearth of significant socio-political events necessitating the framing of a new constitution in the last few decades resulted in a rather extended sabbatical for any scholarly discussion on the subject of constitution making and ‘constituent power’. It is only recently, after years of neglect, that the topics of constitution making and ‘constituent power’ have come to the forefront of political agenda. This is largely the consequence of the intense period of constitution-making that occurred during the 1990s as countries (especially in Central and Eastern Europe, but also in South Africa and South and Central America) made the transition from authoritarian forms of government to forms of democracy.<sup>3</sup> Besides bringing to the forefront the aspect of constitution making, which evidently requires an understanding of the nature of ‘constituent power’, these movements have also questioned the nature, structure and functions of constitutions. This, in turn, necessitated re-examination of some of the most basic precepts of modern constitutionalism including the nature of constituent power.<sup>4</sup>

Indisputably, any appraisal of the nature, structure and function of a constitution requires a clear understanding of the concept of ‘constituent power’ Since we are undertaking the task of understanding the amending power given by the Indian Constitution, it is imperative that we arrive at a concrete understanding

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<sup>1</sup> In our submission, the approach of the court in equating power to amend the Constitution with constituent power and then exploring the scope of limitations on the power to amend the Constitution is contradictory. *See generally* Kesavanand Bharati v. State of Kerala, AIR 1973 SC 1461.

<sup>2</sup> *See* BLACK’S LAW DICTIONARY (2004), constituent. (constituent, *adj.* 1. (Of a component) that helps make up or complete a unit or a whole <a constituent element of the criminal offense>. 2. (Of an assembly) able to frame or amend a constitution <a constituent council>).

<sup>3</sup> Symposium, *Constituent Power and Constitutional Form*, available at <http://www.iue.it/LAW/Events/NWandMLConstituentPowerWorkshop2006.pdf> (European University Institute, Florence Villa Schifanoia, Friday 24 March - Saturday 25 March 2006, Organised by: Neil Walker (European University Institute) and Martin Loughlin (London School of Economics) (Last visited on January 6, 2008).

<sup>4</sup> *Id.*

of the concept of ‘constituent power’. It becomes all the more crucial since our judiciary has consistently equated the power to amend the constitution under Article 368 to ‘constituent power’.<sup>5</sup> But such an equation has to be scrutinized very carefully as a blanket equation with the concept of ‘constituent power’ will have significant ramifications on the power to amend the constitution as given under Article 368. So, a complete understanding of the term ‘constituent power’ is necessary, which in turn demands a detailed understanding of that paradox, which some scholars contend as forming the core of modern constitutionalism: the paradox of constituent power and constitutional form.<sup>6</sup> The endeavour of the present paper will be to provide a possible functional solution to the paradox and by such solution bring forth the structural distinction between the concepts of constituent power and the power to amend the constitution. Such a distinction shall be brought forth with the help of the concept of sovereignty with special emphasis on political theologies of Carl Schmitt and Ernst Kantorowicz, explaining the concept of sovereignty. Part II of the present paper shall briefly discuss the jurisprudential understanding of the Schmittian account of immanent sovereign, with the basic objective of discovering the character of Schmitt’s immanent sovereign. Part III of the paper shall introduce the ‘Paradox of Constitutional Form and Constituent Power’ and thereafter propose a possible solution to the paradox. The central enquiry of this portion shall be to discover the distinction between the concepts of ‘Constituent Power’ and ‘Power to Amend the Constitution’ in light of the possible solution espoused by us. Thereafter the concluding remarks shall follow.

We also seek to clarify and acknowledge that the descriptive position regarding the understanding of Carl Schmitt’s account of immanent sovereign has been derived from Lior Barshak’s article titled ‘*Constituent Power as Body: Outline of a Constitutional Theology*’ published in the University of Toronto Law Journal in 2006. It is the exposition of the descriptive position regarding understanding of the Schmittian sovereign that has been relied on from the aforementioned source. Application of the same to the end of providing a solution to the paradox however, is our own.

## II. UNDERSTANDING THE SCHMITTIAN ACCOUNT OF IMMANENT SOVEREIGN

Political theology as a discipline is concerned with the nature of the ‘civic god’, the ‘sovereign’, and the object of political theology is to understand its natural institutional set up in constitutional discourse.<sup>7</sup> Political theology as a model, shaping and explaining constitutional discourse was eclipsed till its resurgence in the early twentieth century with Carl Schmitt’s writings.<sup>8</sup>

<sup>5</sup> See generally Shankari Prasad Singh v. Union of India, AIR 1951 SC 458; Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

<sup>6</sup> See *Constituent Power and Constitutional Form*, supra note 3.

<sup>7</sup> See Lior Barshak, *Constituent Power as Body: Outline of a Constitutional Theology*, 56 U. TORONTO L. J. 185 (2006).

<sup>8</sup> *Id.*

It is submitted that in constitutional law parlance, understanding of concepts like ‘sovereign’ and ‘constituent power’ call for an application of theology<sup>9</sup> as a discipline for a comprehensive exposition of the aforementioned concepts. It is surprising that the theological approach to constitutional discourse was rejected for quite a long time because certain concepts which form the base of constitutional law discourse are essentially political concepts, and as such are concepts *extra legal*. According to us, without theological or a semi-theological approach, a proper exposition of these concepts is essentially impossible. So, there is a strong case for application of theological or semi-theological arguments for understanding basic concepts of constitutional discourse such as constituent power.<sup>10</sup> It is a fact that contemporary constitutional scholars like Bruce Ackerman and Antonio Negri do not approach the question of constituent power from the standpoint of political theology<sup>11</sup>, but that in itself perhaps cannot take away the success of a political theological approach to constitutional discourse in explaining sovereignty and constituent power. After all, the understanding of concepts of sovereignty and constituent power essentially is a quest to understand supreme power.

Carl Schmitt’s account of sovereignty is an immanent account of sovereignty.<sup>12</sup> As per the immanent account of sovereignty and constituent power,<sup>13</sup> sovereignty vests in ‘*living members of the body politic*’. An immanent sovereign can be an individual or a group of individuals who ‘perpetually validates the constitution’ rather than being empowered by it and who is therefore ‘*unfettered*

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<sup>9</sup> Theological approach refers to a quest of understanding superior or supreme power and obtaining knowledge about the supreme power. ‘Theology’ is a Greek word, *theos*, ‘God’, + *logos*, ‘rational discourse’, ‘knowledge’. So theology refers to knowledge of superior/supreme power. See *Theology*, available at <http://www.merriam-webster.com/dictionary/theology> (Last visited on January 6, 2008). Application of theological approach to political discourse would result in a political theology discourse, that is, application of theological approach to understand the power structure.

<sup>10</sup> See Barshack, *supra* note 7. Also see generally Andreas Kalyvas, *Carl Schmitt and the Three Moments of Democracy*, 21 CARDOZO L. REV. 1525 (2000).

<sup>11</sup> See Barshack, *supra* note 7. Antonio Negri in *Empire* is of the opinion that the globalization and informatization of world markets since the late 1960s have led to a progressive decline in the sovereignty of nation-states and the emergence of “a new form of sovereignty composed of a series of national and supranational organisms united under a single logic of rule.” The authors call this new, global reconfiguration of sovereignty Empire: see generally ANTONIO NEGRI & MICHAEL HARDT, *EMPIRE XI* (2000) available at <http://www.infoshop.org/texts/empire.pdf> (Last visited on January 6, 2008).

<sup>12</sup> See Barshack, *supra* note 7.

<sup>13</sup> Constituent power is considered to be a direct attribute of immanent sovereignty, and hence any reference to sovereignty will imply a reference to constituent power. Throughout constitutional law discourse, the term constituent power is understood to be a direct implication of sovereignty, e.g. “I will use the terms *sovereignty* and *constituent power* interchangeably to designate the power of the group as an absolute unity, a single collective body, to author and breach the constitution” as stated in Barshack, *supra* note 7. It is a major criticism of Schmitt’s theory that he at times distinguishes the two terms. We submit that there is no such distinction in *Die Diktatur*, and we base our analysis exclusively on the articulation of the concept of sovereignty provided in this work.

by any constitutional separation of power' or constitutional limitation.<sup>14</sup> This formulation of immanent sovereignty indirectly implied constituent power to be an attribute of sovereignty. The usage of the phrase '*perpetually validates the constitution*' connotes a power to invalidate a constitution and create a new constitutional order, which is nothing but a different articulation of constituent power: power to create a new constitutional order. Thus, it is submitted that constituent power can be safely stated as an integral attribute of immanent sovereign. The logical consequence of such an understanding of constituent power would be that constituent power by virtue of its very nature is beyond constitutional limitations.

Another important characteristic of the immanent sovereign is the fact that it is indivisible. It transcends separation of powers and gives unity to constitutional order.<sup>15</sup> A paradigmatic example of Schmitt's immanent sovereign can be found in Schmitt's work *Die Diktatur* where he distinguished between a commissarial dictatorship and a sovereign dictatorship. According to Schmitt, a commissarial dictatorship is set up to defend an existing political order and hence, its powers and existence are '*constitutionally constrained*' whereas a sovereign dictator is entirely free from constitutional limitations and is capable of generating a new constitutional form. He has the power to overthrow the old constitutional form and to create a new constitutional order *ex nihilo*. This power is nothing but constituent power.<sup>16</sup> It has to be mentioned at this point that the theological approach of understanding sovereignty, adopted by Ernst Kantorowicz, is essentially different from that of Carl Schmitt's understanding and articulation of the concept of sovereignty. The difference between the two theories can be stated as a difference of 'Immanence' and 'Transcendence'. While an immanent account of sovereignty would imply existence of constituent power perpetually within the society, as already stated earlier, the transcendental account of sovereignty argues that constituent power as a concept vests in an imaginary collective body of the group (the society) and that imaginary body generally resides outside the group to which it belongs. It is only during significant constitutional moments that the imaginary body is enacted and rendered present by the group to which it belongs. This imaginary body is referred to as the 'sovereign communal body' at the instance of enactment by the group in a situation of dramatic constitutional event. At other instances, during its existence as a sovereign body in *absentia*, it is referred to as the corporate body.<sup>17</sup>

It is submitted that although Schmitt is widely recognized as a fascist scholar, we cannot help but notice certain similarities between, his notion of sovereignty and constituent power, at least in his early works, especially *Die Diktatur*; and the notions of sovereignty and constituent power in American constitutionalism. The familiarity lies in the fact that the idea of people as the

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<sup>14</sup> See Barshack, *supra* note 7.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

sovereign, having constituent powers and being the active creators of a constitutional order is the predominant undertone of American constitutionalism.<sup>18</sup> Such an idea is absolutely compatible with Carl Schmitt's account of immanent sovereign, where the living members of the body politic (the people) are vested with sovereignty. They are beyond all constitutional constraints and hence possess the power to recreate the constitutional order – the constituent power. This, in our view, highlights the potential of Schmitt's account of immanent sovereignty and constituent power for explaining the constitutional structure of modern democracies.

In the light of Carl Schmitt's immanent account of sovereignty, we shall now endeavour to provide a plausible functional solution to the long standing paradox of constituent power and constitutional form which is often understood to be forming the core of modern constitutional discourse.

### III. UNDERSTANDING THE 'PARADOX OF CONSTITUTIONAL FORM AND CONSTITUENT POWER' AND ANALYSING RAMIFICATIONS OF A SCHMITTIAN SOLUTION

At the risk of repetition, it is stated that a complete understanding of the term 'constituent power' demands a detailed understanding of the paradox which is contended to be forming the core of modern constitutionalism by several scholars: the paradox of constituent power and constitutional form.

The paradox is well expressed in the following words:

*"It is an expression of the fact that modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from and remains dependent upon the 'consent of the people', yet that, to be sustained and effective, governmental power must be divided, constrained and exercised through distinctive institutional forms that are far removed from the idea of popular sovereignty."*<sup>19</sup>

Now, this is referred in various scholarly writings as the paradox of constituent power and constitutional form. Our initial endeavour will be to locate the concept of constituent power within this paradox, understand its nature and finally ascertain its ramification on the understanding of amending power under the constitution. It is easy to see why the aspect of governmental power being

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<sup>18</sup> See Stephen M. Griffin, *Constituent Power and Constitutional Change*, available at [law.wustl.edu/uploadedFiles/Schlanger/ConstituentPowerConstChangeAmConstUSver.pdf](http://law.wustl.edu/uploadedFiles/Schlanger/ConstituentPowerConstChangeAmConstUSver.pdf). (Prepared for a conference on "Constituent Power and Constitutional Form" at the European University Institute, Florence, March 2006) (Last visited on January 6, 2008).

<sup>19</sup> See *Constituent Power and Constitutional Form*, *supra* note 3.

divided and constrained is referred to as the 'constitutional form' but in our opinion, it is still contentious whether the 'governmental power' generated from the '*consent of the people*' can be referred to as the 'constituent power'. To arrive at a definite conclusion as to whether our apprehensions in this regard are completely baseless, it is essential to delve into the domain of theological jurisprudence and examine the concept of constituent power as understood by various noted scholars. The dilemma is diabolical- whether to adopt the approach of modern scholars like Antonio Negri and Bruce Ackerman who approached the topic of constituent power without any reference to political theology, or whether to adopt the political theological approach of Carl Schmitt and Ernst Kantorowicz. Even the latter scholars' theological formulation of the subject of 'constituent power' is diverse in its nature and import.<sup>20</sup>

This section begins with an exposition of political theologies of Schmitt and Kantorowicz for understanding the nature of constituent power. Although Kantorowicz never explicitly challenged Schmitt's political theology, what Kantorowicz proposed in his study of *The King's Two Bodies* was an alternative theology different in import from that of Schmitt's.<sup>21</sup>

### A. INTERPRETING THE PARADOX FROM AN EARLY SCHMITTIAN ACCOUNT

As has already been stated in the previous section, according to the 'Immanent' concept of sovereignty and constituent power, sovereignty and constituent power vest in the members of the body politic. Thus, an immanent sovereign, in whom constituent power vests, can be an individual or a group of individuals who can constitute or perpetually validate the constitution. They are not a creature of the constitution, but they constitute and validate the constitution, and therefore, they are unfettered by any constitutional separation of powers.<sup>22</sup> Although the Schmittian account of sovereignty is often criticized as being somewhat 'ambiguous' in view of the inconsistent views of sovereignty espoused by Schmitt in his career, it is submitted that there are absolutely no ambiguities in his individual works formulating the concept of sovereignty. The criticism of being 'ambiguous' is only valid to the extent that the various accounts of sovereignty given by Carl Schmitt throughout his career are not entirely consistent if viewed collectively (*Die Diktatur* (1921), *Political Theology* (1922), *The Concept of the Political* (1927) and *Constitutional Theory* (1928)). Since the present line of argument is primarily based on '*Die Diktatur*' (1921), no such question of Schmitt's account being ambiguous or inconsistent arises. In his work '*Die Diktatur*' Schmitt categorically differentiated a sovereign and a commissarial dictatorship.<sup>23</sup> He stated

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<sup>20</sup> BARSHACK, *Supra* note 12.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Carl Schmitt, *La Dictature*, trans. by Mira Koeller & Dominique Seglard (Paris:Seuil, 2000) as cited in Barshack, *supra* note 7.

that a sovereign is entirely free from constitutional limitations where as a commissarial dictator is bound by constitutional constraints.<sup>24</sup> Now, the paper shall look back at the paradox keeping in mind this conception of constituent power. The discussion starts with breaking up the paradox into two simplified statements for the purpose of the present analysis.

1. Governmental power is derived from the ‘consent of the people’,
2. Since it is derived from the ‘consent of people’, it is supreme and absolute; yet in its working is limited by the constitutional form.

Since an immanent concept of sovereignty warrants that constituent power vests in the ‘*members of the body politic*’, it is absolutely consistent with the initial part of the statement of the paradox that governmental power ultimately is derived from the ‘*consent of the people*’. This can be interpreted as meaning that people are the supreme authority in whom the constituent power vests and hence it is the people from whom governmental power is derived. The conclusion that sovereign authority vests in the ‘people’ emerges from the fact that the phrase ‘*members of the body politic*’ is best represented by the ‘people’. Further, the fact that governmental authority is based on consent of the people points towards the fact that the consent of people to overthrow the existing governmental authority can result in the destruction of governmental authority. Thus, this implies that governmental authority is in no way ‘absolute’,<sup>25</sup> which is an essential characteristic of the sovereign. Since by such an argument it is the people who are the supreme and ‘absolute’ authority, it can be concluded that sovereignty ultimately vests in the people. The second statement of the paradox, however, is problematic in the opinion of the authors. The paradox hinges on this latter assumption that since governmental power is derived from the people, who are the supreme authority in whom constituent power vests, it is equally unfettered and absolute. Hence, this is a paradox that it is limited by the constitutional form. Now this is quite problematic in the sense that just because governmental power is a derivative of the sovereign authority, namely, the people, it cannot be blanketly assumed that they are equal in their scope and import. Pointers might be taken from the observation of a few constitutional law scholars who have said that a paradigmatic example of Schmitt’s concept of immanent sovereign is Thomas Hobbes’s sovereign.<sup>26</sup> Hobbes was of the opinion that a sovereign is absolute and unfettered in its authority. This concept

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<sup>24</sup> *Id.*

<sup>25</sup> See W.T.JONES, MASTERS OF POLITICAL THOUGHT, Vol. II, p.57 for characteristics of Sovereignty as cited in O.P. GAUBA, AN INTRODUCTION TO POLITICAL THEORY 155 (2003).

<sup>26</sup> *Id.* It is submitted that the parallel between Schmittian and Hobbesian sovereign is drawn in terms of their similarity in scope and power. However, the two accounts of sovereign are somewhat different in their origin. While Hobbes needed to justify the authority of his sovereign as it was not directly vested in members of the body politic, which might have been a valid formulation of the concept in that period, in view of the modern political and legal set up in societies, it is submitted that a reformulation of the point as to whether sovereignty can vest directly in members of the body politic was essential. Carl Schmitt addressed this point in his work ‘DIE DIKTATUR’ (1921) where he stated that sovereignty

was given a very elaborate and systematic form by John Austin, who among other things stated that sovereignty is absolute, indivisible, permanent, unlimited and inalienable.<sup>27</sup> Permanence of sovereignty is an expression of the absoluteness of the sovereign. Bodin stated that sovereignty is perpetual power and “*if power be held only for a certain time (it does not matter how long a time), it’s not sovereign power and he who holds it for that time is not a sovereign.*”<sup>28</sup> Distinction between the concept of state and government thus is essential for understanding this aspect of sovereignty. As governmental authority is not permanent, it cannot be sovereign. Thus, sovereignty if anything is a characteristic of the state, which is nothing but the collective whole of the body politic,<sup>29</sup> namely, the people. Another essential characteristic of sovereignty is the fact that it can not be transferred. In Lieber’s terms: “*Sovereignty can no more be alienated than a tree can alienate its right to sprout or a man can transfer his life and personality without self destruction.*”<sup>30</sup> Therefore, if it is said that sovereignty vests in the members of the body politic, subsequently it cannot be said that sovereignty then is delegated to a different determinate group. Neither can it be said that sovereignty is divided in the two mentioned bodies as ‘indivisibility’ is an essential characteristic of the sovereign authority. In the terms of Gettell: “*A divided Sovereignty is a contradiction in terms*”<sup>31</sup>

In view of these qualifications, it is difficult to ascertain as to how sovereign authority can be delegated from a determinate group to another since sovereignty by its very nature is inalienable and indivisible. It seems a much more practicable explanation that the governance of the political sovereign, the people, is delegated to a more defined body for efficiency of governance by the political sovereign, but this would not make the defined body entrusted with the task of governance, the ‘sovereign’ itself. Since it is a body entrusted or delegated with some aspect of sovereign function for efficiency, it hardly seems to be a paradox that governmental power is limited by constitutional form. In fact, this constitutional form is something mandated by the sovereign in it’s own interest, in the interest of the body politic. The view of sovereign authority being vested in the people, the members of the body politic, with the discretion to delegate certain sovereign functions for functional efficiency is much more practicable for explaining constitutionalism in modern democracies. It should be understood that such a

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indeed can vest in the members of the body politic, which can either be an individual or a group of individuals. Since in such a formulation the sovereign authority vests directly in members of the body politic, no justification for legitimacy of such authority is necessary. See generally O.P. GAUBA, AN INTRODUCTION TO POLITICAL THEORY 155 at 156 (2003).

<sup>27</sup> See generally for characteristics of Sovereignty GAUBA, *supra* note 25 at 155.

<sup>28</sup> See GAUBA, *supra* note 25 at 156.

<sup>29</sup> See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1998). (especially on the concept of ‘State’).

<sup>30</sup> R.N. Gilchrist, *Principles of Political Science*, p.112 as cited in GAUBA, *supra* note 25 at 156.

<sup>31</sup> R.G. Gettell, *Political Science*, p.125 as cited in GAUBA, *supra* note 25 at 157.

delegation is purely functional and is consistent with the idea of sovereignty being indivisible. Such an interpretation/explanation of the immanent account of sovereignty in fact resolves the paradox almost completely and the paradox no longer remains a paradox in view of such an interpretation.

At this point, we think it prudent to point out that test of validity of an interpretation is to some extent the logic involved and to a large extent it's contribution in strengthening legal and political order of the society. Of course, it needs no explanation that such an understanding would not have been considered to be a valid and useful interpretation in a society, which does not value democratic constitutionalism, even though it might have some sound logical base. We think it best to leave the matter of ascertaining the validity of the proposed interpretation to the reader. Now assuming the validity of the proposed interpretation, the paper will look at the possible ramifications of such an explanation of the paradox as regards the subject of amendment of constitution vis-à-vis constituent power. Since it is now clarified in light of the present explanation of the paradox that the body exercising the governmental function is indeed not the sovereign authority and hence not a body in which constituent power vests, it is easy to accept the fact that governmental power need not be unfettered and supreme. It is no longer in the realm of paradox that governmental power is fettered by constitutional form, which itself is a creation of sovereign authority by delegation of its constituent function to a body called the 'constituent assembly'. Since the power to amend the constitution is part of the constitutional form; a function that is mandated to be exercised by the governmental functionary, who do not possess any constituent power, by it's very structure, the power to amend is a limited power falling short of the power to reconstitute the constitutional form, which falls in the eminent domain of 'constituent power'. If ever such power to amend the constitution assumes unfettered dimensions in the hands of the governmental functionary, it would be an unconstitutional exercise for the simple reason of being *ultra vires* the capacity of such functionary. After all, constitutionality is always a question of power.<sup>32</sup>

### *B. A REJOINER: ASSESSING ALTERNATIVE THEOLOGICAL ACCOUNTS OF SCHOLARS LIKE KANTOROWICZ, MAITLAND*

The transcendental account of sovereignty formulates that sovereign authority, and hence constituent power,<sup>33</sup> is vested in an imaginary collective body of the group which resides outside the group to which it belongs.<sup>34</sup> This imaginary body is interchangeably termed as 'corporate body' or 'communal body' depending on it's vicinity in time, with the actual enactment of this imaginary

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<sup>32</sup> See COOLEY, *supra* note 29 at Vol.3, 375.

<sup>33</sup> We have used the terms 'sovereignty' and 'constituent power' interchangeably. See *supra* note 13.

<sup>34</sup> *Id.*

group. This account is based on the works of Frederic William Maitland and Ernst H. Kantorowicz, and is heavily influenced by Henry Sumner Maine who suggests the association of sovereignty with corporate entities. The central theme of this concept is that the corporate body in which sovereign authority vests,<sup>35</sup> is incarnated only during constitutional episodes like declaration of independence, revolution, referenda and states of emergency.

In contrast to the immanent account of sovereignty, it is very difficult to derive any interpretation from the transcendental conception of sovereign authority by Kantorowicz, which would prove useful in explaining modern constitutional democracy. Although few international constitutional scholars are of the opinion that the transcendental account of sovereignty provides a better understanding of modern constitutionalism<sup>36</sup>, there are few inconsistencies in view of which the preceding submission has been made by us.

This account of sovereign authority fails to explain the concept and working of direct democracies. By this transcendental account of sovereignty, sovereignty is vested in an imaginary body not continuously present. But in a direct democratic set up, even if we assume that the body in which sovereign power vests is an absent body, it cannot be said that such sovereign body is incarnated only during constitutional events; theoretically, they are bound to be incarnated every time any constitutional decision is taken. It is also vague as to how the corporate body in exile is incarnated at times of constitutional events. It's criticism of the Schmittian concept of sovereignty on the grounds that it vests sovereignty in living members who are mortal, thereby hampering the perpetuity of the sovereign is not based upon a sound foundation. When Schmitt stated that sovereign authority vests in 'living members of the body politic' it can be interpreted as meaning sovereignty vested in a designated body called '*living members of the body politic*', which clearly is not a body corporate. It means that whoever is a living member of the body politic at a certain point of time, is a member of the body politic in which constituent power vests. The death of individual members does not alter the identity of the designated body in which constituent authority vests. But even if we overlook these proposed inconsistencies, what finally is arrived at is the notion of sovereignty. Hence, constituent power is vested in a body corporate which clearly is not the governmental authority. The effect of this formulation on the paradox again is similar to that of the previous section: one of resolving it. If governmental authority is not sovereign, it is no longer a paradox that governmental authority is limited by constitutional form, a creation of the incarnated body corporate at the time of a constitutional episode; which might be independence, or which might be revolution. Even though the concept of sovereignty is different, the ultimate ramification of such sovereignty and constituent power is same on the amending power as formulated in the previous section – since amending power is

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<sup>35</sup> Hence sovereignty is corporate; it is indivisible and external to the group unlike Schmittian sovereignty. See Barshack, *supra* note 7.

<sup>36</sup> See generally Barshack, *supra* note 7.

vested in the constitutional functionaries, which is not a sovereign authority and hence is without constituent power, such amending power by its very construction is limited and short of power to reconstitute constitutional form.

#### IV. CONCLUSION

In light of the aforementioned arguments, we deem it established that a deeper understanding of Carl Schmitt's immanent account of sovereignty can provide an interpretation of the Schmittian account of sovereignty that can accommodate both ends of the paradox of constituent power and constitutional form. Such an interpretation of Schmittian sovereignty can resolve the paradox by providing a rationale for distinction of pedigree of '*governmental power*' from that of the '*consent of the people*' since the sovereign authority is vested in 'the people' as members of the body politic. The interpretation essentially distinguishes governmental power from sovereign power. Hence, it no longer remains a paradox that governmental power is derived from the consent of the people, yet it is fettered by constitutional form. A direct implication of such an interpretation will be the fact that governmental power can no longer be understood to be inclusive of constituent power, which by definition is an attribute of the sovereign, and in this case, the people. This distinguishes constituent power, a power to constitute a new constitutional order, a power unfettered as a consequence of being an attribute of sovereignty, from that of the power to amend the constitution, which is an aspect of governmental power, a power which is structurally inferior in pedigree to that of constituent power and is fettered by constitutional form. In light of this view, we deem it established that there exists a structural distinction between the natures of '*Constituent Power*' and '*the power to amend the constitution*'.