



# Constitutionalism and Rule of Law- A Compendious Analysis of the two Complementing Terms.

Raunak Chaturvedi | Student, B.B.A.LL.B.(HONS.) | Amity University, Kolkata

## Abstract-

It is indeed very normal for us to encounter the various terms related to Constitutional jurisprudence, like federalism, Rule of Law, Constitutionalism, etc. But, have we ever tried to understand the true meaning of these terms? This article particularly, is going to understand the meaning of the two terms, viz., Constitutionalism and Rule of Law and also, focus upon their relationship with one another.

**Keywords-** Constitutionalism, Rule of Law, Lex Rex, International Constitutionalism.

## Introduction-

Constitutionalism. This is the term that forms the very theme of this article. But, not so fast. We have another one and that is the Rule of Law. It is really interesting to see that how, when we are in classes 5 or 6, we are told by our teachers that Rule of Law simply means that no one is above the law. However, we may or may not have been introduced to the term of Constitutionalism at the time. This is a very vital topic, as both of them are often confused with one another. Is 'Rule of Law' 'Constitutionalistic'? Or is Constitutionalism nothing but another name for Rule of Law? We will delve into answering all of these tricky yet, very vital questions. Moreover, we must also look into a hypothesis presented by me, to understand the three major schools of thought regarding this question's answer. But, before all that, we will surely try to understand and find out a definition of both, 'Constitutionalism' and 'Rule of Law' with very exciting examples. Finally, as we all love to know what goes on around the world, we will look into the situation of our 'friendly' neighbour China and understand what is the status of Constitutionalism there. So, as mentioned, let us first look into the very basic understanding of the term Constitutionalism.

## So, What is Actually Constitutionalism?

To put it in the simplest possible way, it means hindrance. Yes, Constitutionalism is nothing but hindrance. But, for whom? The ruling Government! It is our elected rulers who are 'hindered' or shall we say, have 'limited power' by the virtue of the Constitution of India. So, if we try to provide a comprehensive definition of Constitutionalism, then, it would be something like this,

‘When, under all the circumstances, the ruling Government’s power is limited by the Constitution of the country, either due to certain declarations made within it for the citizens of the nation, or due to the procedures laid down, or due to any other authority established by it, or any other arrangement of that sort, then, it is what we call Constitutionalism.’

Now, before going into explaining the above definition, we must understand the very spirit of Constitutionalism. For that, the best example is that of the traffic police. We all have heard (I apologise if experienced too), about incidents where the traffic guards fine the people for either over-speeding, or driving rash, or breaching any other road safety rule. Constitutionalism is nothing but the same. The only difference is that here the traffic guard is our beloved Constitution and the driver is the Government. So, whenever the Government tries to expand its powers, the Constitution prevents it from doing so by the virtue of its provisions. We may also understand another point, which is that just like people refrain from breaking the traffic rules as they know that there is someone who will impose a fine upon them, in the similar way, the Constitution watches the Government and also limits its power, so that they don’t become whimsical. ‘BIG BROTHER IS WATCHING YOU’, the catchphrase from the famous novel 1984 by George Orwell is the best line to explain Constitutionalism.

Let us now look at our simple definition and try to understand its various facets.

1. Constitutionalism is evergreen- ‘Under all circumstances’ is the defining term of Constitutionalism. This indicates that for Constitutionalism to exist, the supremacy of the Constitution is of paramount importance and also, at all times this must prevail. Thus, if either the ruler doesn’t abide by the Constitutional restraints upon his power (we will understand this through China’s example) or if the Constitution is too flexible that it can be amended at any time, then, Constitutionalism can’t exist.
2. Limited Government- The next step is that the Government has limited powers. Now, this power maybe limited either by a formal declaration of Fundamental Rights, nature of the amending process and also, by the establishment of a vigilant judiciary which is independent to act.

Thus, the above two are the two most vital ingredients of Constitutionalism. Constitutionalism must be approached as a culture rather than a process or a doctrine. It is culture that is practiced by democracies around the world. It is what makes them democracies in the true sense. Moving on, let us understand what is Rule of Law.

### ***Lex Rex-***

The sub-heading is indicative of the very definition of Rule of Law. *Lex Rex* is the famous Latin maxim meaning that ‘Law is the King’. This is the simplest definition. It supposes that-

1. No one is above the Law.
2. Everyone, literally, is equal before the law.
3. Everyone will be provided with the equal protection of the law.

These are the three legs of the tripod of Rule of Law. However, it is quite hilarious to see that once upon a time in medieval Europe, this rule that everyone was equal before the law was taken literally and even animals were

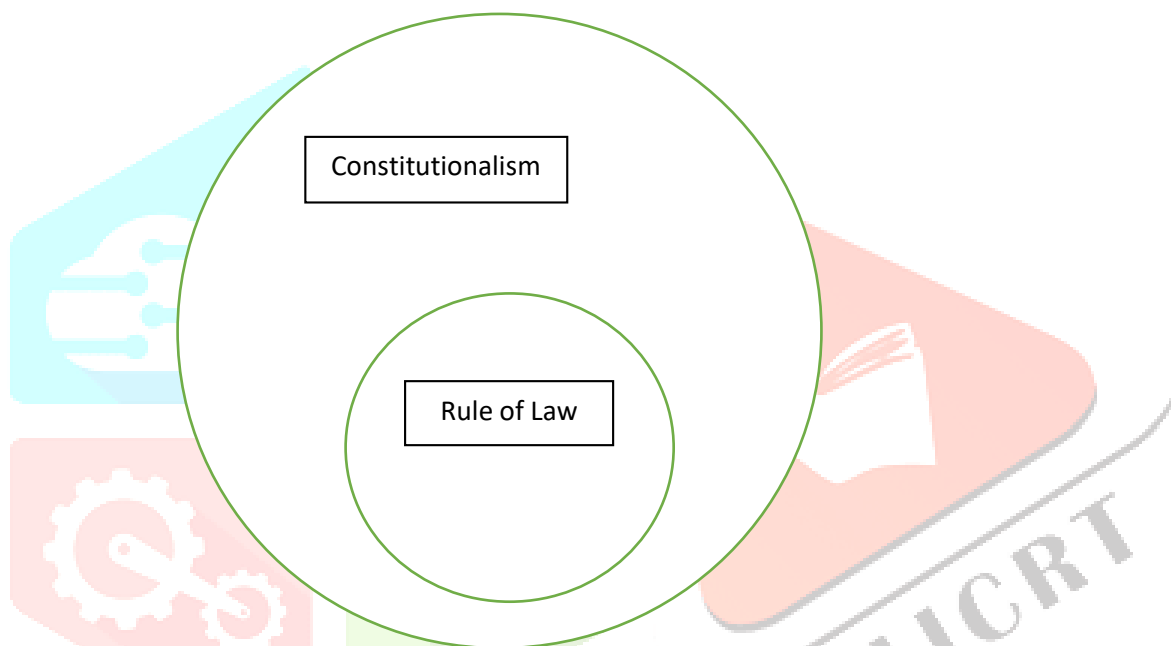
presented before the Courts to be tried as humans and trials were conducted.<sup>1</sup> However, for our purpose, the above three points are self-explanatory.

Thus, we may see that Constitutionalism talks about the Constitution being supreme. Rule of Law talks about the 'Law' being supreme. So, are these two the same? That is the million-dollar question. For this, we will have to look into some details.

### **The Three Schools of Thought-**

#### **1. The Concentric Circles**

This hypothesis considers Rule of Law and Constitutionalism to be the same. However, it also says that Constitutionalism is nothing but an expanded version of Rule of Law.

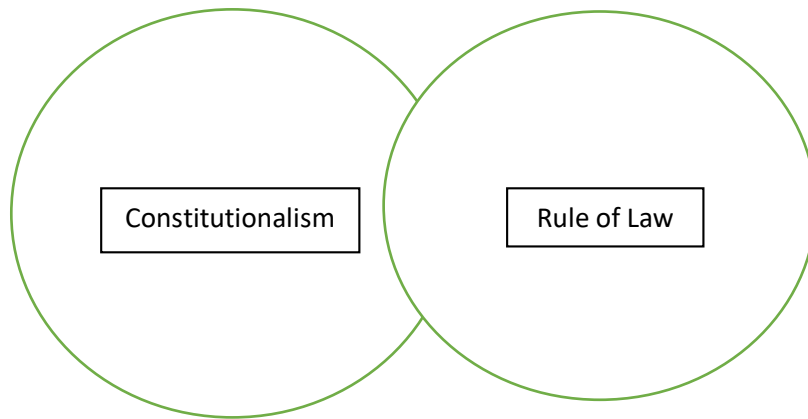


The above diagram clearly helps us understand the hypothesis of the first school. Thus, the Concentric Circle hypothesis suggests that Rule of Law deals with only one aspect of Constitutionalism, viz., the Law or the Constitution being supreme and imperative. However, Constitutionalism also talks about the limitation of the powers of the Government through the various provisions of the Constitution, the establishment of an independent judiciary and also seeing that the Constitution is upheld at all times.

#### **2. The Overlapping Circles**

<sup>1</sup> Matt Simon, *Fantastically Wrong: Europe's Insane History of Putting Animals on Trial and Executing Them*, [WWW.WIRED.COM](http://WWW.WIRED.COM) (September 24, 2014, 6:30 AM), <https://www.wired.com/2014/09/fantastically-wrong-europes-insane-history-putting-animals-trial-executing/>

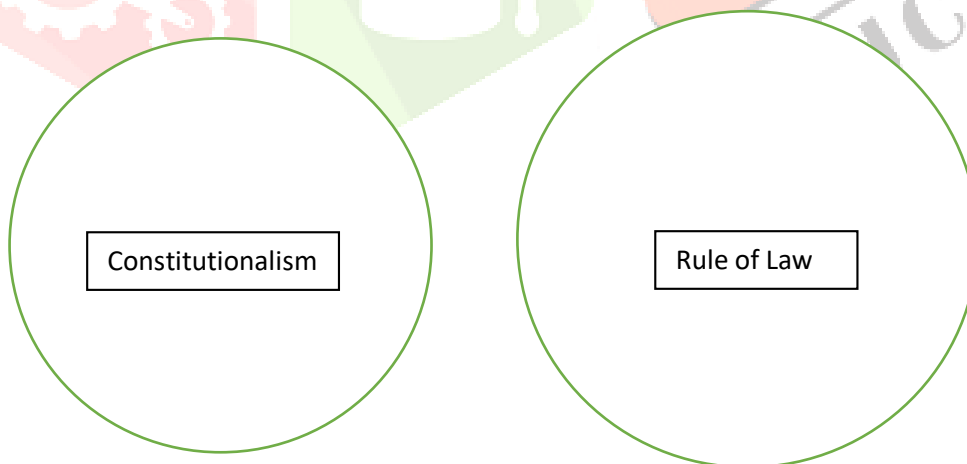
This hypothesis states that Rule of Law and Constitutionalism are partly similar.



This diagram indicates the fact that the overlapping hypothesis presumes that Constitutionalism too talks about the supremacy of the law, but, its main aim is to limit the Government's powers, streamline their functioning and ensure that the Government remains responsible towards the citizens. Rule of Law too talks about the supremacy of law, but, it is more of a judicial principle, whereby everyone is treated equally by the law and everyone is entitled to equal remedies and protections of the law.

### 3. The Separate Circles

As the name indicates, it says that both Constitutionalism and Rule of Law are different.



The above hypothesis presumes that Rule of Law is strictly a judicial principle, whereby everyone, including the Government by virtue of the supremacy of the law, are equal before the law, whereas Constitutionalism is strictly a political concept, whereby its main aim is to limit the powers of the Government and also make it accountable to the people. It is interesting that both talk about supremacy of the law, viz., the Constitution, but, one says that the supremacy is only for the purposes of justice and nothing else, whereas for the other concept the supremacy has a regulatory function. Thus, both have a different nature of supremacy of the law.

It is for the readers to decide which school do they belong to. Whatever it maybe, one thing will be common and that is, *Lex Rex*.

### **Fundamental Rights: A Link between Rule of Law and Constitutionalism-**

The Fundamental Rights declared in part three of the Constitution of India are the biggest link between these two concepts. For instance, Article 14 reads that every person will be provided equal protection and treatment of the Law.<sup>2</sup> So, this concept clearly indicates Rule of Law. However, whether or not this provision is followed and the Government can change it or not, depends upon the amending power given by the Constitution. We see that it is really not possible for the Government to change this principle due to the 'Basic Structure Doctrine' of the Constitution of India. So, we may say see that Article 14 is a beautiful example of how the concept of Constitutionalism and Rule of Law is exercised simultaneously. Another beautiful example is that of Article 20 (3) which says that no person shall be forced to be a witness against himself if he is alleged to be a felon.<sup>3</sup> Let us take an example. In case a person has done a crime against the Government, then, the Government may try to compel him to testify. But, this article limits the Government's power to do so. Moreover, it ensures that even if a person has done seditious acts, he is provided an equal status before the law, along with an equal opportunity to be heard. In this manner, we may understand this very interesting fact that the Fundamental Rights act as a link between the two concepts of Constitutionalism and Rule of Law. On one hand they act as a noose over the Government. The Government can't make any law, provision, rule, ordinance, etc., which partly or wholly infringes any of these Rights. Thus, they basically serve a dual purpose. They limit the power of the Government by acting as the ground rules which the Government has to follow and in the act of following them, the Government and everyone else considers them to be supreme and thus, maintains the supremacy of the Law, which is nothing but Rule of Law.

### **Federalism- Is it similar to Constitutionalism and Rule of Law?**

This indeed is a very tricky question. Federalism, in some respects, is similar to Constitutionalism. The federal principle laid down by Professor Wheare<sup>4</sup> is "meant the method of dividing powers, so that the *general* and *regional* Governments are each within a sphere co-ordinate and independent. Both the federal and the regional Governments are co-ordinate and independent in their spheres and not subordinate to one another."

The above definition clearly implies one thing. The fact that both the Central and State Governments are 'independent within their own sphere' is an indication that federalism means limitation of powers too, in a way. The State Governments can't look into the matters of the Centre and the Centre can't dominate the States upon their matters. Thus, this may be treated as another aspect of 'limited Government' whereby the Centre and the States have a limited jurisdiction to function. The fact that the Constitution is establishing such a limitation is indicative towards the fact that federalism can't exist without the Rule of Law, whereby supremacy of the Law and equality before the same is of utmost importance. Although similar, federalism is more about the separation of powers between various levels within the polity of a country and also, the interactions of the various

<sup>2</sup> See Article 14, Constitution of India.

<sup>3</sup> See Article 20 (3), Constitution of India.

<sup>4</sup> Pandey, J.N., Constitutional Law of India, pg. 17, Prayagraj: Central Law Agency, 2019, Print.

Governments within the same. Constitutionalism on the other hand is primarily about limiting the powers of each Government, be it Central or State, so that it doesn't become whimsical and be responsible to the people.

### China- A Perspective on International Constitutionalism-

Very recently, on the 6<sup>th</sup> of July, a law professor had been arrested in China for criticizing the Xi Jinping Government. It is imperative to see that Professor Xu Zhangrun<sup>5</sup> of the Tsinghua University of Beijing was arrested for criticizing the Government and exercising his Constitutional Right vide Article 41 of the Constitution of the People's Republic of China.<sup>6</sup> Another person, named Xu Zhiyong who was actively involved in People's Rights movements and organization was arrested a few months back.<sup>7</sup> In August, 2013, another person named Charles Xue who was a prominent investor and social commentator was arrested because of trying to expose the problems of child labour and the underprivileged class of China.<sup>8</sup>

A reason for citing all these examples is to help the readers understand the statement that Constitutionalism is not a process. It is a culture. Although the Constitution of China, under Article 41, clearly mentions that the people of China have the express Right of criticizing the Government, (which as per other provisions of the Constitution is to be solely responsible to the public) and orders the Government or any other person not to suppress the voice of such people, still such incidents take place and are happening. One thing must be understood by the readers. A Constitution is nothing but a book, just like the *Geeta* and the *Vedas* are. But, what makes the *Geeta* and the *Vedas* so holy, pure and revered is our respect and the value that we attach to the same. Today, a person would think repeatedly before damaging the *Vedas* or the *Geeta*, due to the religious values attached with them and also of the fear of becoming sinned too. In the similar manner, what makes a Constitution supreme is the value we attach to it and also the reverence we have for the same. If we want, we can simply surpass the provisions and do as we please. The Constitution won't be able to stop us as it is merely a book. But, if we respect it and attach the value of supremacy with it, like we have at present, then and only then Constitutionalism and Rule of Law prevail within a nation.

China is the perfect example of the fact that how a Constitution, merely by the actions of the Government can be rendered rudimentary. Thus, we should always remember that be it Constitutionalism or be it Rule of Law, they are like a culture, like a religion. We will have to follow it in order to help it survive.

<sup>5</sup> Chris Buckley, *Seized by the Police, an Outspoken Chinese Professor Sees Fears Come True*, [WWW.NYTIMES.COM](https://www.nytimes.com/2020/07/06/world/asia/china-detains-xu-zhangrun-critic.html) (July 6, 2020), <https://www.nytimes.com/2020/07/06/world/asia/china-detains-xu-zhangrun-critic.html>

<sup>6</sup> See Article 41, Constitution of the People's Republic of China.

<sup>7</sup> Javier C. Hernandez, *China Detains Activist Who Accused Xi of Coronavirus Cover-Up*, [WWW.NYTIMES.COM](https://www.nytimes.com/2020/02/17/world/asia/coronavirus-china-xu-zhiyong.html) (February 17, 2020), <https://www.nytimes.com/2020/02/17/world/asia/coronavirus-china-xu-zhiyong.html>

<sup>8</sup> David Barboza, *Chinese-American Commentator and Investor Is Arrested in Beijing*, [WWW.NYTIMES.COM](https://www.nytimes.com/2013/08/26/world/asia/chinese-american-commentator-and-investor-is-arrested-in-beijing.html) (August 25, 2013), <https://www.nytimes.com/2013/08/26/world/asia/chinese-american-commentator-and-investor-is-arrested-in-beijing.html>



## Conclusion-

The readers may have understood the concept of Constitutionalism and Rule of Law by now. The three schools of thought are an indication of the ways in which we may approach the two simultaneously. The Fundamental Rights indeed are the best example for showing how the two have been linked with each other so easily and beautifully. Federalism may be construed to be similar to Constitutionalism and Rule of Law, but, we have understood the differences. Finally, the atrocities of China may have helped the readers to understand that Constitutionalism is nothing but a culture. Just like one has to follow a culture to keep it alive, in the similar manner, democratic citizens need to follow the same so as to establish a system which globally follows Constitutionalism. The difference between a democracy and a dictatorship is very simple. It is simply the way how we want to be governed. If we accept the atrocities, then we promote hegemony. If we revolt or take the necessary steps, we establish democracy or in other words, accountability of the Government. Whatever be the case, one thing is very clear. Constitutionalism along with Rule of Law, is the road to be followed ahead.

**Acknowledgments-** I would like to thank my parents, without whose love and support this paper wouldn't have been a success; my Constitutional Law professor Mr. Indranath Dey for suggesting me such an interesting topic to write upon and lastly, but not the least, Santoshi Maa, for always helping me throughout all my steps in life.

