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While the phrase "Constitutional Morality" can be found in Kesavananda Bharti in 1973, S.P. Gupta in 1981 and in the Supreme Court Judges' Appointment Case of 2016, the doctrine was recently expanded in the judgement of Chief Justice Mishra in the Government of NCT Delhi vs. Union of India case. It has had a strong influence on the Sabarimala judgement and finds mention in the Navtej Singh Johar case relating to Section 377 of the Indian Penal Code.

Why is this doctrine or concept a matter of concern? Well, to put it simply, let us look at the phrase "Constitutional Morality" and understand that if it is read simply it only means to enforce the Constitution. There is nothing dangerous about this phrase, but when we divorce the word Constitutional from the word Morality and look at them separately, we could have one outcome in Court No.1 and a different outcome in Court No.2.

This does not in any way relate to the fact that Justice Madan Lokur presides over Court No.2 of the Supreme Court of India. I mean that two different courts could offer two different results for the same case based on the concerned judge's ideas of morality which may influence his or her decision on what is Constitutional Morality.

Most law is about perception and after arguing for hours, some of us think we have won, the other side also thinks so. The Judge whispers an Order that we think we heard in our favour until two days later when the certified copy emerges and one of us finds out that we missed hearing the word "not" in the dictation. Unlike dictated orders Judicial interpretation of concepts can take years to resolve especially if they relate to phrases like Constitutional Morality.

This phrase has been equated with public morality which occurs in Articles 19 and 26 of the Constitution, the question for us today is whether this will be perceived to assume an amorphous shape to fit the requirements of necessity like the basic structure doctrine or is it just old constitutional wine in a new bottle.

Perceptions are very important in law and if we treat a doctrine as encompassing articles, rules and a system which we call Constitutional Morality, we are still okay, but when these words can trigger yawning gaps in the outcome of certain cases exemplified by dissenting judgements, the question arises whether Constitutional Morality is like “public policy”. Is it an unruly horse which one should never ride?

As a commercial litigator, I have to say that it took our Supreme Court many years to undo a decision that opened the flood gates for setting aside arbitral awards on the grounds of public policy in arbitration law. The fear is that notions like public morality and constitutional morality are equally unruly horses. As I am now an older horseman who has ridden many unruly horses, I may say that one must try to avoid unruly horses. They tend to be dangerously unpredictive. This is the very issue arising from the newly developing doctrine of constitutional morality, so far perhaps reading the judgements of the Supreme Court that refer to Constitutional Morality, it seems to me this may only be a re-packaging of constitutional rights, public interest and a constitutional theme in this new bottle. As long as this genie stays within these confines and as long as the word constitutional is strongly mated to morality, we may not find ourselves in the realm of uncertainty. We can then still rely upon the underpinning seamless (or not so seamless) old web of constitutional law and principle the way the late Ronald Dworkin had advocated.

Ultimately, the battle between the two sides of the debate is only a battle between lawyers wanting certainty and lawyers wanting the flexibility of doing complete justice and equity.