Decriminalisation Revisited: *PP v The Judges of Dublin Circuit Court, the DPP, Ireland and the Attorney General* [2019] IESC 26

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1. Introduction

The decision in *PP v The Judges of Dublin Circuit Court*[1] revisits the fate of s 11 of the Criminal Law Amendment Act 1885, a provision that, before its repeal in 1993, prohibited gross indecency between men. This was the law under which Oscar Wilde was prosecuted, and a measure that profoundly affected the lives of many gay and bisexual men (in both direct and indirect ways) over many decades in both Ireland and the UK. Long reviled by the LGBTQ community, s 11 was repealed in 1993.[2]

The core question in *PP* was whether it is constitutional in the present day to apply s 11 to same-sex sexual activity that allegedly occurred between an adult male and an adolescent between 1978 and 1980, before the repeal of s 11. On this point, the Supreme Court split. The majority, O'Donnell, MacMenamin and Dunne JJ, ruled that the section could be validly invoked specifically in respect of such circumstances, and that the prosecution could therefore proceed. By contrast, Clarke CJ and O'Malley J dissented, agreeing with the accused's contention that the proposed prosecution could not now proceed.

The case addresses several complex and nuanced issues concerning the application of s 11, the locus standi requirement and the general rule against allowing a person to plead a jus tertii, along with some intricate questions about the effect of a finding of unconstitutionality. It raises difficult and challenging questions about the aftermath of decriminalisation.

O'Donnell J succinctly summarises the issues at the heart of the case, remarking how:

> The movement towards comprehensive liberalisation of the law on relationships between homosexuals has occurred at the same time as, though separately from,

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1. [2019] IESC 26.
2. See the Criminal Law (Sexual Offences) Act 1993.

> a hardening of social and legal attitudes in relation to sexual contact by adults with young people. This case lies at the intersection of those developments.[3]

The criminal law as it relates to sexual offences in the decades since 1990 has indeed broadly pivoted away from penalising consensual sexual acts between adults in private,[4] towards a greater focus on penalizing non-consensual offences and acts involving children, marked in particular by a tightening of the rules around the age of consent.[5] The problem that arises in *PP* is that the pre-1993 law invoked against the accused – s 11 of the 1885 Act – patently failed to differentiate between situations in which the parties were consenting adults and those where one of the parties was a minor at the relevant time. The key question is whether one can rely on undoubted concerns over the constitutionality of applying s 11 to the pre-1993 acts of consenting adults, in a context where the allegations concern acts between an adult and a person who was under 17 years of age at the relevant time.

2. Homosexual offences pre-1993

As O'Donnell J remarked in his judgment '[t]here can be little doubt that the world of 1978 and 1979 in Ireland was a very different country as far as attitudes to sexuality, sexual orientation, sexual behaviour and many other matters were concerned.'[6] Until 1993, inherited British laws criminalised same-sex sexual conduct between males, even where such conduct was between consenting adults and in private. At common law, anal intercourse ('buggery') was prohibited in all cases until 1993, with the penalties being set out by ss 61 and 62 of the Offences Against the Person Act 1861. Buggery involved anal intercourse ('intercourse by penetration per anum')[7] between a man and a woman or between two men. It also encompassed (and still encompasses) intercourse between humankind and animals, which remains an offence.[8] In respect of buggery between humans prior to 1993, consent was no defence.[9] Indeed, if both parties consented, both were potentially guilty of an offence. The offence also applied prior to 1993 regardless of the age of the parties or the context (private or public) in which it occurred.

3. [2019] IESC 26, O'Donnell J [7].
4. There are some rare exceptions, for instance, in the case of incest (Punishment of Incest Act 1908) or potentially where a sexual assault causes serious physical harm (though see the comments of O'Malley J in *People (DPP) v Brown* [2018] IESC 67 [2]).
5. See [2019] IESC 26, Clarke CJ [2.6].
6. ibid O'Donnell J [13].
7. Brian Hunt, *Murdoch's Dictionary of Irish Law* (5th edn, Tottel Publishing 2009) 134.
8. See Thomas O'Malley, *Sexual Offences* (2nd edn, Round Hall 2013) 125. See also *R v Jacobs* (1817) Russ & Ry 331.
9. [2019] IESC 26, O'Malley J at [14] – 'it is beyond doubt that the consent of the other participant was not a defence.' See also Thomas O'Malley, *Sexual Offences* (2nd edn, Round Hall 2013) 125.

The offence of gross indecency between men was introduced by s 11 of the Criminal Law Amendment Act 1885:

> Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Like common law buggery, the offence of gross indecency applied regardless of the age of the parties. Critically, consent was no defence.[10] Similarly, s 11 applied whether the acts took place in private or public.

While s 11 did not stipulate what amounts to 'gross indecency', the provision was broadly addressed to various sexual acts involving two men, including but not limited to oral sex and mutual masturbation.[11] English case law suggests, however, that it was not necessary that the parties had come into physical contact with each other for the offence to have arisen.[12] One notable feature of s 11 was that it included 'exploitative, though non-assaultive' sexualised conduct falling short of sexual assault.[13]

As McWilliam J observed in *Norris v Attorney General,* (hereafter '*Norris*'),[14] s 11 'contains no definition of an act of gross indecency by a male person with another male person, or any indication of what is intended.'[15] Although the section expressly stated that it applied to both public and private acts, McWilliam J nonetheless noted that context was to some degree relevant: 'what may be an act of gross indecency in which two male persons participate in public may be nothing of the sort when it is done in private. I would mention only the unlikely case of two men undressing in the public street and the everyday case of undressing in a room, sleeping compartment or cabin which is shared.'[16] He also suggested that what might constitute gross indecency may change over time, reasoning that the Act left it to '...the courts to decide what is, or what is not, an act of gross indecency in private. In this respect changing attitudes must affect such decisions.'[17]

10. [2019] IESC 26, O'Malley J [17]. See also Thomas O'Malley, *Sexual Offences* (2nd edn, Round Hall 2013) 138.
11. *Report of the Committee on Homosexual Offences and Prostitution* (The 'Wolfenden Report') (HMSO 1957) [105].
12. *R v Hunt and Badsey* [1950] 2 All ER 291: it was not necessary that there be any physical contact provided that the persons have 'put themselves in a such a position that it can be said that a grossly indecent exhibition is going on'. See also *R v Preece and Howells* [1977] QB 370, and Henchy J in *Norris* [1984] IR 36 (SC) 71.
13. Thomas O'Malley, *Sexual Offences* (2nd edn, Round Hall 2013) 138.
14. [1984] IR 36.
15. ibid 48.
16. ibid.
17. ibid.

In *Quesnel v Quesnel* the Ontario Court of Appeal defined 'gross indecency' rather broadly as a 'marked departure from the decent conduct expected of the average Canadian in the circumstances that existed'.[18] Nonetheless, both the High Court and Court of Appeal in *PP* rejected a claim that s 11 was vague and found that the offence did not infringe the constitutional requirement of legal certainty for criminal offences. As Birmingham J observed in the Court of Appeal: 'While it may be possible to conceive of borderline or marginal cases, and such cases can safely be left to the good sense of juries if prosecuted, in the great majority of cases jurors would have no difficulty in determining what is grossly indecent'.[19]

3. Challenges and reform

These laws against buggery and gross indecency were the subject of some considerable controversy. In *Norris*,[20] both offences were unsuccessfully challenged as being in breach of the constitutional rights to equality, privacy, free expression, and association. Speaking for the Supreme Court majority in 1983, O'Higgins CJ concluded that the laws in question were constitutionally valid. He reasoned that the State was entitled to maintain laws that penalise homosexual activity with a view to protecting marriage, the family, public morality, and public health. He observed also that such laws could be considered necessary, inter alia, to prevent 'a mildly homosexually orientated person [from being led] into a way of life from which he may never recover'.[21] He rejected the proposition that a Constitution that, in its Preamble and elsewhere, foregrounded Christian values could have invalidated laws that proscribed activity that 'has always been condemned in Christian teaching as being morally wrong.'[22]

A minority of the Court, however, dissented (Henchy and McCarthy JJ). While agreeing that some legal prohibitions were necessary to protect younger and vulnerable persons, Henchy J condemned the laws for being in breach of the constitutional right to privacy, concluding that they were 'in constitutional error for overreach or overbreadth. They lack necessary discrimination and precision as to when and how they are to apply.'[23] They interfered, he continued, with 'an area of personal intimacy and seclusion which requires to be treated as inviolate for the expression of those primal urges, functions and aspirations which are integral to the human condition of certain kinds of homosexuals.'[24] On broadly similar grounds, in 1988, the European Court of Human Rights in *Norris v Ireland*[25] reasoned that, given their breadth and scope, these measures

18. (1979) 51 CCC (2d) 270, 280.
19. [2017] IECA 82 [43].
20. [1984] IR 36.
21. ibid 64.
22. ibid 63.
23. ibid 79.
24. ibid.
25. (1991) 13 EHRR 186.

infringed the requirement of respect for a person's private life set out in Art 8 ECHR.

This ECtHR verdict added some political and moral impetus to a sustained campaign that resulted, in 1993, in decriminalisation (subject to new laws protecting those under 17 and persons with intellectual disabilities). The Criminal Law (Sexual Offences) Act 1993 abolished the common law offence of buggery, with notable and arguably unintended implications. Section 2 of that Act stipulated that, subject to new provisions in that Act that prospectively criminalised buggery with a person under the age of 17 or with a mentally impaired person, 'any rule of law by virtue of which buggery between persons is an offence is hereby abolished.' In *DPP v Devins*[26] the Supreme Court concluded by a 3-2 majority that this meant it was no longer possible to prosecute buggery between persons that had taken place before 1993. This was the case even where one of the parties was not an adult. The majority reasoned that buggery had been a common law offence, the *penalty* for which was set out in the 1861 Act. Although saving provisions in the Interpretation Acts 1937 and 2005 allow for a prosecution to proceed in respect of conduct committed before the repeal of the law banning such conduct, these saving provisions in 1993 only applied to *statutory* offences, and not those (like buggery) that were the product of the common law.[27] Thus, it is now impossible to mount prosecutions in respect of historic acts of buggery committed before 1993.

The offence of gross indecency, however, has met a somewhat different fate. As part of the decriminalisation of consensual adult male homosexual activity, s 11 was repealed by s 14 of the Criminal Law (Sexual Offences) Act 1993.[28] Nonetheless, because s 11 was a statutory provision, it is still possible to prosecute under that section in respect of acts that took place *before repeal*. Section 21 of the Interpretation Act 1937 and s 27 of the Interpretation Act 2005 stipulate that the repeal of an enactment does not affect its previous operation. Legal proceedings can be instituted after repeal in respect of acts that occurred pre-repeal 'as if such statute or portion of a statute had not been repealed'. Yet, because s 11 made no distinction based on age or consent, in principle this left open the prosecution under s 11 of consenting adult males in respect of conduct that occurred *before* 1993.

26. [2012] IESC 7.
27. The Interpretation (Amendment) Act 1997 made similar provision for common law offences but this post-dated the repeal of the buggery offence.
28. It was replaced with provisions banning gross indecency between men where one of the parties was under 17 or mentally impaired (see ss 4 and 5 of the Criminal Law (Sexual Offences) Act 1993) though each provision has since been repealed by the Criminal Law (Sexual Offences) Acts of 2006 and 2017 respectively.

4. Facts and proceedings

PP involves a male accused, PP, who was alleged to have committed offences under s 11 against MD, also male, between November 1978 and July 1980. In 2014, PP was charged on seven counts of gross indecency under s 11, to which he pleaded not guilty. At the time of the alleged offences, PP was in his mid-30s and MD, a student in the school in which PP was a teacher, was between 15 and 17.5 years of age. MD alleged that, on several occasions over the space of 2 years, PP had invited the adolescent to PP's house, where they engaged in various sexual acts, including anal and oral intercourse, and masturbation. The DPP committed not to prosecute in respect of activity that was alleged to have occurred after MD turned 17 or to plead indecent assault. Following the decision in *Devins*, it was not open to her to pursue a prosecution for buggery. The offences of rape under s 4 of the Criminal Law (Rape)(Amendment) Act 1990 or defilement of a child under the Criminal Law (Sexual Offences) Act 2006 could not be applied retrospectively.

In response, PP asserted that s 11 was inconsistent with several articles of the Constitution, namely Arts 38.1 (the right to a fair trial and due process), 40.1 (the right to equality), 40.3 (specifically, the unenumerated rights to privacy and autonomy), and 40.4 (the right to liberty) and had therefore not been carried over as law in 1937. He further claimed undue delay, that the section was unfairly discriminatory on grounds of gender, and was vague and lacking in legal certainty.

The High Court (Moriarty J) dismissed these claims on the merits. The Court of Appeal dismissed an appeal, further concluding that PP lacked locus standi in respect of some of the specific arguments he sought to employ to demonstrate that s 11 was unconstitutional.[29] The Supreme Court subsequently allowed certain questions, though not others, to be the subject of a further appeal centred on three questions:

(i) Is the consent of both parties an essential ingredient of the offence of gross indecency under s 11 of the Criminal Law Amendment Act 1885?
(ii) Having regard to the answer to the first question, does the appellant have locus standi to challenge the compatibility of that section with the Constitution?
(iii) Having regard to the answer to the foregoing question is s 11 of the 1885 Act compatible with the Constitution?[30]

PP, however, was not permitted to pursue on appeal his claims relating to delay, gender discrimination, and vagueness.

29. [2017] IECA 82.
30. [2017] IESCDET 107.

5. Is consent a prerequisite?

Mutual consent was certainly not a defence to a charge under s 11.[31] Section 11 clearly permitted prosecution 'for consensual conduct in private', even where both parties were adults.[32] The question that arose, however, was whether consent was an *essential* element of the offence. If the offence was confined to consensual acts, PP claimed, it would stand in breach of the constitutional rights to privacy and equality and run counter to the spirit of the Thirty-Fourth Amendment (the 2015 constitutional amendment that facilitates the marriage of same-sex couples by inserting a new Art 41.4 into the Constitution) to try him under s 11.[33]

The Supreme Court verdict clearly confirms that consent was not an essential ingredient of the offence of gross indecency. O'Donnell J (with whom MacMenamin and Dunne JJ concurred)[34] concluded that s 11 was not in fact confined to consensual acts but also embraced conduct where the consent of one of the parties was lacking. Notably, in *DW v DPP*,[35] Hardiman J had indicated that a person could be criminally liable for gross indecency whether or not the other party consented to the act. Likewise, in *Norris*, O'Higgins CJ emphatically stated that s 11 'applies irrespective of the ages of the male persons involved and irrespective of whether the act is committed in public or private, or *with or without consent*.'[36] (Emphasis added.) Indeed, as O'Donnell J observed, many past criminal prosecutions had featured s 11 alongside indecent assault charges, and in circumstances where consent was not possible because children were involved.

That being said, although s 11 does not mention consent, it speaks of the commission by any male person of 'any act of gross indecency *with* another male person'. One might argue that the word 'with' seems to imply some common enterprise or at least the cooperation of both parties. Notably, in *R v Preece & Howells*[37] the English and Welsh Court of Appeal concluded that gross indecency necessitated that the parties act in concert, with 'the participation, the co-operation, of two men'. In *R v Hall*,[38] however, Parker LCJ ruled that consent was not necessary for the commission of the offence. It was instead sufficient that the act was carried out 'against' or 'directed towards' another male person.

31. [2019] IESC 26, O'Malley J [17]. See also Thomas O'Malley, *Sexual Offences* (2nd edn, Round Hall 2013) 138.
32. [2019] IESC 26, O'Donnell J [14].
33. [2019] IESC 26, O'Malley J [8].
34. Clarke CJ [2.10] agreed with both O'Donnell and O'Malley JJ's analysis on this point.
35. [2003] IESC 54 [16].
36. [1984] IR 36 (SC) 51.
37. [1977] QB 370. See also *R v Hornby and Peaple* [1946] 2 All ER 487.
38. [1964] 1 QB 273.

Considering the different context in which *Preece* arose,[39] O'Donnell J in *PP* concluded that *Preece* was 'something less than a compelling authority.'[40] He doubted whether *Preece* in fact required the willing and free *consent* of both parties, noting instead that the decision required participation of both parties. It did not require (O'Donnell J argued) that such participation be the 'result of a consent voluntarily and lawfully given'[41] (though, arguably, this interpretation sits uneasily with Scarman LJ's statement in *Preece* that '[t]o construe the section so that the complete offence could be committed even though the other man did not consent could lead to the embarrassment of, and injustice to, innocent men.'[42]) Nor does *Preece* suggest (O'Donnell J observed) that there is no gross indecency if the other party to the act was a child or was otherwise unable to consent.

Although more reticent on the point, O'Malley J ultimately acknowledged that consent had not been a prerequisite element of the offence in Irish law. Had there been no Irish case law on the point, she would have been inclined, she stated, to favour *Preece and Howells* over *Hall*. The use of the word 'with' in s 11 combined with the fact that non-consensual touching was already a common law offence in 1885, supported the contention (she observed) that s 11 was intended primarily to address consensual acts. Nonetheless, O'Malley J ultimately affirmed that Irish case law endorsed the view that the offence could be committed without mutual consent, adding that '[a] quarter of a century after the repeal of the section appears to be too late to embark on a reconstruction.'[43]

6. Locus standi and jus tertii: the majority view

The case largely turned on whether the plaintiff had a right specifically to claim that s 11 was unconstitutional because it prohibited consensual same-sex sexual acts between adults contrary to present day constitutional norms. Broadly, the majority found that PP was not permitted to assert that the section was constitutionally infirm in respect of consenting adults when the allegations made against him concerned sex with a person who was under 17 at the relevant time. O'Donnell J made a subtle yet important distinction between having locus standi and being able to assert in one's favour a jus tertii, a claim based on another person's circumstances rather than one's own. While he agreed that PP had locus standi to challenge the constitutionality of the section under which he had been charged, crucially the judge added that 'such a challenge must arise out of his own particular circumstances.'[44] Citing *Cahill*

39. The English legislation considered in *Preece* exempted private activity between adults, and primarily concerned public acts or those involving underage parties.
40. [2019] IESC 26, O'Donnell J [35].
41. ibid [36].
42. [1977] QB 370, 375.
43. [2019] IESC 26, O'Malley J [39].
44. ibid O'Donnell J [39]. See also [42].

v Sutton,[45] he observed that PP '...cannot summon up the hypothetical case of the possibility of the section being applied to prosecute adult consensual sexual activity with a person over seventeen years of age, because he is not facing such an accusation.'[46] Although a person might have locus standi because they stand charged under a specific provision, that does not entitle him or her to raise arguments against the provision that were entirely divorced from his or her own specific situation. In *Norris,* for instance, a majority of the Supreme Court concluded that while the plaintiff had locus standi to challenge the ban on buggery based on his own situation as a gay man, he had no right to challenge the ban on buggery as an infringement of the rights of married couples.[47] As he was unmarried, he could not raise the situation of married persons as part of his challenge.

PP, the judge observed, was seeking to make a claim not in respect of the actual circumstances of his case – involving an allegation of gross indecency with a *child* – but rather in respect of different circumstances that did not apply to him. According to O'Donnell J, it was certainly open to PP: 'to advance the claim that to prosecute him for sexual conduct with an adolescent male between the ages of 15 and 17 is an impermissible interference with his right to privacy.'[48] This was not, however, the argument PP was making. PP was seeking to rely on a jus tertii, drawing on a situation that had not arisen in his own case and that was not relevant to his circumstances.

In summary, O'Donnell J concluded that while PP, having been charged under s 11, had locus standi to challenge its constitutionality, he could only do so based on arguments relevant to his own personal circumstances. He did not have standing to assert that s 11 infringes the privacy rights of consenting adults, as his case did not concern consenting adults. Having regard to PP's actual circumstances, the judge ruled, s 11 could not be said to be unconstitutional in the context of an allegation of unlawful activity with a child. Indeed, it is arguably stretching the bounds of credulity to claim that the Constitution confers a right to engage in sexual acts with a person aged 15. As Birmingham J pointedly concluded in the Court of Appeal: 'Bluntly, there is and there was no constitutional right to privacy in order to abuse a child.'[49]

Dunne and MacMenamin JJ concurred. Highlighting the age gap and the tender years of MD at the time of the alleged acts, Dunne J observed that the appellant was not entitled to 'put forward the hypothetical case of the section being applied to prosecute adult consensual sexual activity with a person over seventeen years of age because he is not facing such a charge.'[50] If the DPP were to prosecute two persons who were at the relevant time consenting

45. [1980] IR 269.
46. [2019] IESC 26, O'Donnell J [39].
47. In a similar vein see *A v Governor of Arbour Hill* [2006] 4 IR 88.
48. [2019] IESC 26, O'Donnell J [65].
49. [2017] IECA 82 [50].
50. [2019] IESC 26, Dunne J [10].

adult males in respect of acts of gross indecency engaged in prior to 1993, they would 'undoubtedly' have locus standi to challenge s 11 on the basis that it condemned consensual sexual acts between two adults. The case before the Court, however, was of an entirely different character.

7. The relevance of the complainant's age: O'Malley J's dissent

By contrast, Clarke CJ and O'Malley J (dissenting) agreed with PP that his trial should be prohibited from proceeding. Both concluded that PP had standing to challenge the constitutionality of s 11, with O'Malley J further intimating that such a challenge would be successful.[51] Clarke CJ agreed that the prosecution should be prohibited, though instead of seeking to declare s 11 unconstitutional, he maintained that 'it is impermissible under the Constitution for the DPP to prosecute Mr P in respect of the alleged offences…'[52]

The minority's reasoning effectively turns on their conclusion that, under the law applicable at the time of the alleged offences, MD was 'to be treated as an adult'[53] at least for the purpose of the relevant criminal law.[54] The State's argument, O'Malley J noted, presupposed that MD was underage at the relevant time, an approach that was only correct if one applied today's law on the age of consent. In O'Malley J's view, however, rather than extrapolating from current legislative norms the Court had to look to the relevant law that applied at the time of the alleged offences. Outside the context of homosexual offences, a boy aged 15 or over in 1978 was entitled to consent to sexual activity, even sexual intercourse, with a woman. Although the law at that time made it an offence to have sexual intercourse with a girl under 17,[55] there was no corresponding offence in respect of consensual sexual intercourse between an older woman and a young male aged 15 or older. The law at that time stipulated 15 as the minimum age at which consent can be a defence to an act that would otherwise constitute indecent assault (that is still the case for sexual assault falling short of a 'sexual act' as defined by the 2006 Act).[56] Thus, while it would be unlawful today for a female school teacher to have consensual sexual intercourse with a consenting 16 year old male,[57] such conduct was legal in the 1970s. Therefore,

51. ibid O'Malley J [95]. See also O'Donnell J (summarizing the minority view) [43-44]: '[O'Malley J] concludes, as I understand it, that the operation of s 11 is now repugnant to the Constitution, and therefore is not capable of being the basis of the criminal charge which the appellant now faces.'
52. ibid Clarke CJ [6.2].
53. ibid O'Malley J [109].
54. This view is somewhat complicated by the fact that the age of majority at the time was 21.
55. Criminal Law (Amendment) Act 1935, ss 1 and 2.
56. Criminal Law Amendment Act 1935, s 14. Though Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill and Macmillan 2015) 330 suggests that even where a person is over 15 the consent may be inoperative if the person was insufficiently mature to understand to what they were consenting.
57. Criminal Law (Sexual Offences) Act 2006, s 3 (see also s 3A).

according to O'Malley J, a 'sixteen-year-old male was, at the time now under consideration, treated as fully adult in respect of all sexual conduct.'[58]

It was not self-evident, O'Malley J reflected, that 17 should be a universal benchmark of capacity to consent. Notably, the Constitution does not generally address age limits for being treated as a child.[59] Although the courts have a role in ensuring that the right to privacy is respected and the protection of children is ensured, O'Malley J observed that the question as to where the age of consent lies is primarily a matter for the Oireachtas. Even today, that age can vary depending on the act in question. To set 17 as a limit, she added, would effectively tie the hands of the Oireachtas in future, a choice not open to the Court. Thus, O'Malley J emphasised that:

> ...the most that an individual can claim is a right to engage in consensual sexual activity with any person considered to be an adult for the purposes of the *law in force at the relevant time*. I think that it must follow that the question of capacity must be determined by reference to that law.[60]

The legislative policy in the 1970s '...was that the protection for children enshrined in law was, in the case of males, afforded only up to the age of fifteen... At that age, a male could give effective consent to any activity that was lawful for any adult.'[61] It was not open to the Court to recast the then extant age limits.[62] Applying current standards to past events, O'Malley J added, risked 'retrospectively criminalising conduct and invalidating relationships that were fully lawful at the time'.[63]

On that basis, O'Malley J concluded that as 'the Constitution now views homosexual relationships in the same way as heterosexual relationships' it would clearly be 'inconsistent with that view to prohibit consensual expressions of sexuality between persons who are, as a matter of legislative policy, determined to be of sufficient age to consent.'[64] It was not possible, she added, to read down the gross indecency legislation to provide for a defence of consent. The legislature in 1885 had intended to criminalise same-sex sexual activity between all men. Applying s 11 only to non-consensual or underage activity would involve changing the intent of Parliament. To do so, O'Malley J remarked, would also require the Court to decide at what age consent could be given, usurping the role of Parliament by rewriting the 1885 Act.[65] Fixing an age

58. [2019] IESC 26 [85].
59. Though see the decision in *Sinnott v Minister for Education* [2001] 2 IR 545.
60. [2019] IESC 26, O'Malley J [79]-[80]. Emphasis added.
61. ibid [93].
62. ibid [96].
63. ibid [80].
64. ibid [95].
65. Cf *CC v Ireland* [2006] 4 IR 1 where Hardiman J concluded that it was not possible to rescue the law challenged in that case by reading in a reasonable belief defence. To do so would have involved making what would effectively be a legislative choice.

of consent was a matter of policy for legislatures, not courts. Nor could she see how the Court could read in an age even on a temporary basis: 'By reference to what evidence, debate, or philosophy would it do so?'[66]

8. The Chief Justice's dissent

Clarke CJ joined O'Malley J in dissenting, ruling that the prosecution of PP based on s 11 could not now proceed. The purpose of the law of standing, he noted, is primarily to preclude parties benefitting from arguments that are not relevant to their situation. He therefore agreed with the majority that PP should be confined to arguing that it would be unconstitutional to prosecute him 'based only on the question of whether such unconstitutionality can be said to have been established in respect of an alleged offence with a sixteen year old some forty years ago.'[67] Equally, he acknowledged that it would be '...difficult to argue, today, for an entitlement to have sexual relations with a sixteen year old.'[68]

Based, however, on the standards applicable at the time the offences were allegedly committed, the complainant (the younger party) had the capacity, the Chief Justice argued, 'to consent to any otherwise lawful sexual activity.'[69] From the standpoint of 1978, he said, 'there is at least an argument that the complainant must be considered an adult for sexual purposes.'[70] To rule otherwise would involve retrospectively applying current standards to events that occurred prior to those standards evolving.[71]

The Chief Justice was in no doubt that, judged by modern constitutional norms, it would not be possible to prosecute consensual same-sex sexual acts between adults, even if they occurred pre-1993, prior to decriminalisation.[72] Given the law's approach in 1978 to the sexual capacity of younger males, had the DPP sought to prosecute PP around that time, PP would, the Chief Justice continued, 'have had a strong case to make that the complainant was an 'adult' for such purposes...'[73] It would be unfair, he concluded, to prevent PP from looking to the standards of the 1970s just because he was prosecuted some 40 years later. The fact that the standards relating to the age of consent have since changed did not mean that he should lose the right to make such an argument today. PP was thus entitled to argue that 'the complainant was, at the time of the alleged offences, of an age which was generally considered to be one at

66. [2019] IESC 26, O'Malley J [109].
67. [2019] IESC 26, Clarke CJ [3.6].
68. ibid.
69. ibid [2.9].
70. ibid [3.9].
71. ibid [3.11].
72. ibid [2.4] and [2.8].
73. ibid [5.2].

which a male could consent to sexual activity and that his prosecution today for such an offence would be inconsistent with the Constitution as it now stands.'[74]

Clarke CJ therefore ruled that PP's prosecution should be prohibited. He would not have declared s 11 unconstitutional, but instead suggested that it would be impermissible under the Constitution to proceed with the prosecution, 'having regard to the fact that the complainant was, at the time of the alleged offences, of an age which was generally considered to be one at which a male could consent to sexual activity and that his prosecution today for such an offence would be inconsistent with the Constitution as it now stands.'[75]

Although there is a certain logic to this position, it is difficult to disagree with O'Donnell J's observation that it was 'incongruous', to look to the standards relating to the age of consent that applied in 1978-1980 while simultaneously invoking contemporary constitutional values in challenging s 11.[76] It is likewise hard to dispute Birmingham J's observation in the Court of Appeal, that PP's argument 'would have received short shrift'[77] if it had been raised much closer to the time of the alleged offences.

Notably, O'Donnell J queried the minority's assumption that there was any consensus in law as to the age of consent for males as of 1978-1980. The age of consent that applied at that time in respect of what might otherwise be indecent assault, he said, 'cannot be construed as a general age of consent.'[78] O'Donnell J further suggests that the minority judgments rely on a 'submerged equality claim' based on the proposition that the prosecution of PP would not be impermissible in itself, but impermissible because a woman in his position would not have been treated the same way. Given the decision in *SM v Ireland (No 2)*,[79] there is potentially some merit in this assertion.[80] Nonetheless, even if the difference of treatment was unjustified, this did not necessarily render the section unconstitutional, particularly where the ban was not in itself unreasonable but arguably under-inclusive for not penalizing women in the same manner. To rely indirectly on equality grounds, moreover, would be impermissible given that the Court had ruled out entertaining an appeal based on Art 40.1.[81]

9. The effect of a finding of unconstitutionality: date of invalidity

The various decisions also throw up interesting and complex issues around the effect of a finding of unconstitutionality. The nub of PP's case was that s 11 essentially criminalised consensual sexual activity between men in a manner

74. ibid [6.2].
75. ibid.
76. [2019] IESC 26, O'Donnell J [63].
77. [2017] IECA 82 [51].
78. [2019] IESC 26, O'Donnell J [61].
79. [2007] IEHC 280.
80. Though see *MD (a minor) v Ireland* [2012] IESC 10.
81. [2019] IESC 26, O'Donnell J [68].

that, he claimed, is now contrary to the Constitution in particular by virtue of the Thirty-Fourth Amendment. Admittedly, s 11 was explicitly upheld as constitutional in *Norris*. PP did not, however, seek to overturn *Norris*, but rather argued that, because of subsequent developments including the adoption of the Thirty-Fourth Amendment, s 11 was *now* unconstitutional.

The judgments in response to this point seem to harbour the possibility of a refinement in certain circumstances to the well-established understanding that the invalidity of a law found to be unconstitutional generally dates from the time of the law's passage (it is void ab initio), or, if it was passed before 1937, from the date on which the Constitution came into force (it is void from that date).[82] In particular, a pre-1937 law found to infringe the Constitution is deemed (to the extent that it conflicts with the Constitution) not to have been carried over into post-1937 law by the Constitution in 1937, and therefore to have been null and void as of the date on which the Constitution came into force. This does not, however, mean that everything already done under that measure prior to the Court's finding must necessarily be undone. In *A v Governor of Arbour Hill Prison*,[83] the Supreme Court rejected the proposition that a person convicted and imprisoned under legislation later found to be unconstitutional was necessarily entitled to be freed. The Court concluded that it was possible for actions already taken on foot of such legislation prior to the Court's finding to continue to have legal effect notwithstanding a subsequent finding that such laws were constitutionally invalid. Therefore, even if a statute is found to be constitutionally invalid, it does not follow that everything previously done under that void statute lacked legal effect.

If the general principle as to the date from which an unconstitutional statute is invalid were to be applied in the case of s 11, this would, as both O'Donnell and O'Malley JJ remarked, have the rather peculiar effect that the section, if found unconstitutional, would be so deemed with effect from 1937, even though it was upheld as constitutional in 1983 in *Norris*.

Given the circumstances of PP, however, this general principle required, O'Malley J argued, 'some refinement'. For instance, the Constitution can be amended, thereby prompting a change in the constitutionality of legislation formerly considered valid. It is also widely acknowledged that the Constitution is a living, dynamic document, subject to an 'updating interpretation' in line with present day mores, values and ideals: the understanding of what the

82. *Murphy v Attorney General* [1982] 1 IR 241, *A v Governor of Arbour Hill Prison* [2006] 4 IR 88. See for instance Henchy J in *Murphy v Attorney General* [1982] IR 241, who spoke of a declaration of inconsistency as constituting 'a judicial death certificate, with the date of death stated as the date when the Constitution came into operation.' For a nuanced analysis of the courts' approach to findings of unconstitutionality, see David Kenny, 'Grounding constitutional remedies in reality: the case for as-applied constitutional challenges in Ireland' (2014) 37(1) Dublin University Law Journal 53.

83. [2006] 4 IR 88.

Constitution requires is not frozen in time.[84] As Walsh J observed in *McGee v Attorney General* 'no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.'[85] In *McGee*, Walsh J acknowledged that a pre-1937 statute that was initially constitutionally unobjectionable might later become unconstitutional due to changed circumstances or the repeal of other related legislation. For instance, in *Brennan v Attorney General*[86] legislation was deemed unconstitutional mainly on the basis that the valuations on which it was based, though accurate when made, were hopelessly out of date by 1984.

In *McGee*, Walsh J suggested that if an inconsistency with the Constitution arises for the first time after 1937, 'the law carried forward *thereupon* ceases to be in force.'[87] Similarly, O'Malley J in *PP* remarks that as the Constitution ages and is subjected to various amendments and evolving judicial interpretations, a strict application of the theory that voidness dates from the Constitution's inception 'will encounter increasingly formidable objections.'[88] Therefore, she concluded, that theory 'may need to be refined' to distinguish 'between pre-1937 legislation that was not consistent with the Constitution as enacted in 1937, and legislation that is inconsistent with the Constitution as it stands at the time the Court considers the matter.'[89] In the latter case, she suggests '... the legislation ceases to have legal force *only when the finding of inconsistency is made.*'[90] This meant that the Court had a middle ground open to it between concluding, on the one hand that s 11 was never carried over in 1937 and, on the other, that s 11 is valid in all cases. It followed then that the appellant could argue 'that a trial on charges brought pursuant to s 11 of the Act of 1885 would not, *at this point in time,* be in accordance with the Constitution.'[91]

Although differing on the outcome of the case, Dunne J appears broadly to have agreed with O'Malley J's analysis on the effect of a finding of unconstitutionality in certain cases.[92] O'Donnell J also affirmed (albeit *obiter*) that the rigid approach to findings of unconstitutionality 'may require to be reviewed somewhat.'[93] He suggests that where the inconsistency of a pre-1937 statute with the Constitution 'arises for the first time after the coming into force of the Constitution, the law carried forward *thereupon* ceases to be in force.'[94] A similar outcome might arise where the Constitution itself has been

84. See Walsh J in *McGee v Attorney General* [1974] IR 284, O'Higgins CJ in *State (Healy) v Donoghue* [1976] IR 325, *Sinnott v Minister for Education* [2001] 2 IR 545.
85. *McGee v Attorney General* [1974] IR 284. See also [2019] IESC 26, O'Malley J [71].
86. [1984] ILRM 355.
87. [1974] IR 284 (SC) 307.
88. [2019] IESC 26, O'Malley J [71].
89. ibid.
90. ibid.
91. ibid [73].
92. See for instance [2019] IESC 26, Dunne J [7].
93. [2019] IESC 26, O'Donnell J [45].
94. ibid.

amended or where interpretation of the Constitution has evolved in line with the 'living document' doctrine.[95] Therefore, there may be cases, he said, 'where it is appropriate to depart from an absolute rule of invalidity ab initio.'[96]

Without concluding definitively on the point, Clarke CJ agreed that where constitutional principles change because of shifts in social values or amendments to the text, 'it may be entirely appropriate to regard legislation as being constitutional at one point in time, but as having become unconstitutional either because contemporary norms have altered or because the Constitution itself has changed.'[97] It may not, he said, in such cases, be appropriate to say such legislation was never valid.

10. Severability and the separation of powers

The various judgments also contain some interesting propositions on the issue of severability and the separation of powers. In her judgment, O'Malley J had rejected the claim that s 11 could be read down as applying only to acts involving minors or where both parties had not consented. This would involve, she argued, usurping the role of the legislature, in that it would draw the Court into reshaping legislation to rescue it from unconstitutionality.[98]

For O'Donnell J, however, deeming s 11 to be unconstitutional in certain contexts would not necessarily mean its operation would offend the Constitution in all cases. In saying this, he seems to suggest that a remedy could be fashioned that would rescue s 11 insofar as it applied to conduct with minors or other vulnerable persons. If s 11 could be restricted to cases that did not impinge on the privacy rights of adults, or read down, it could still potentially apply in this case, unless PP was able to establish a privacy right to engage in sexual acts with persons aged 15 and 16. By analogy, in *Navtej Singh Johar v Union of India*[99] the Indian Supreme Court applied its Constitution to 'read down' a law banning sexual activity 'against the laws of nature' so that it no longer validly applied to sex between consenting adults.

In O'Donnell J's view, it is possible to find legislation partially invalid, ('repugnant in some respect, but not in others') and to salvage portions of a measure that were not offensive to the Constitution. Article 15.4.2°, after all, renders legislation invalid 'to the extent only of such repugnancy'. The function of a court in such circumstances, he suggests, 'is to attempt in as clinical a way as possible to undo the consequences of any invalid act, but not more.'[100] He pointed out that the effect of Art 15.5, banning retrospective criminalisation

95. In *State (Healy) v Donoghue* [1976] IR 325 for instance, the verdict requiring legal aid as a vindication of constitutional rights in criminal cases did not mean, O'Donnell J said, that prior trials were thereby invalidated.
96. [2019] IESC 26, O'Donnell J [46].
97. [2019] IESC 26, Clarke CJ [4.4].
98. Cf *Maher v Attorney General* [1973] IR 140 and *CC v Ireland* [2006] 4 IR 1.
99. WP (Crl) No 76 of 2016; D No 14961/2016.
100. [2019] IESC 26, O'Donnell J [52].

of acts, is that once a criminal statute is found to be unconstitutional, the legislature cannot legislate retrospectively to remedy the gap. Thus, a finding of invalidity ab initio or dating from the enactment of the Constitution effectively would render past behaviour retrospectively immune from criminalisation, even where the behaviour threatened young and vulnerable people. One option that might be 'particularly appropriate here', he said, would be to follow *NHV v Minister for Justice and Equality*[101] in suspending the making of any declaration of invalidity to allow for amending legislation.[102]

O'Donnell J cited *SM v Ireland (No 2)*[103] as a case supporting this more nuanced approach to a finding of unconstitutionality. In *SM*, Laffoy J concluded that a statutory provision imposing a maximum penalty of 10 years for the common law offence of indecent assault upon males, when the corresponding penalty for indecent assault on females was a maximum of two years, was unconstitutional for infringing the Constitution's equality guarantee. This did not mean, however, that the offence could not be prosecuted or penalised. Instead, she ruled that, while the maximum sentence at common law was potentially unlimited, the Constitution precluded a maximum sentence being imposed that exceeded that available where the victim was female.[104]

Clarke CJ acknowledged that there may be cases in which an order of inconsistency with the Constitution could be made in a nuanced manner 'which leaves the legislative measure in question extant in respect of its application to circumstances where no constitutional difficulty arises.'[105] He added, however, that, in some cases, 'it may be impossible to avoid throwing out the baby with the bath water, such that persons who might not themselves be in a position to argue that their constitutional rights were infringed may be incidental beneficiaries of the striking down of a piece of legislation which impermissibly interfered with the constitutional rights of others.'[106]

11. Changing constitutional values: the impact of the Marriage Amendment

Notably, some of the judgments suggest that the passage of the Thirty-Fourth Amendment to the Constitution (allowing same-sex couples to marry) has implications beyond the realm of marriage law and arguably endorses a broader principle of equality between same-sex and opposite-sex couples.

The Chief Justice had no doubt, for instance, that 'today's constitutional standards' precluded a prosecution in respect of consensual acts between adults, even if those acts occurred prior to decriminalisation. It would be unconstitutional, he remarked, for the DPP to prosecute in respect of consensual

101. [2017] IESC 35.
102. Cf *PC v Minister for Social Protection* [2018] IESC 57.
103. [2007] IEHC 280.
104. See also *Director of Public Prosecutions v Maher* [2016] IESC 31, [2016] 2 IR 634.
105. [2019] IESC 26, Clarke CJ [3.1].
106. ibid.

adult activity engaged in prior to decriminalisation: 'such an action on the part of the DPP would infringe the Constitution....In such circumstances, it might be said that even if the legislation remains constitutional, it would be a breach of the Constitution to prosecute under it.'[107] These views no doubt provide some relief and reassurance to older gay and bisexual men who had consenting adult sexual relationships prior to 1993.

The impact of the Thirty-Fourth amendment is writ large here. As Clarke CJ remarked: '...Consensual sexual activity between adult males not only is no longer a criminal offence but is implicitly recognised by conferring the constitutional status of marriage on same sex male partners.'[108] Likewise, O'Malley J highlights how the amendment means that homosexual and heterosexual relationships must now be treated alike insofar as the right to enter into relationships and to marry was concerned.

Although PP had not sought to overturn the *Norris* verdict, at least three of the judges seem to reject the majority's reasoning therein. To O'Malley J, it seemed '...incontestable that a case such as *Norris* simply could not now be decided on the same basis as that espoused by the majority of this Court in 1983.'[109] O'Donnell J agreed that there 'would be a strong argument that the dissenting judgment of Henchy J [in *Norris*] in particular might well commend itself to any court before which the issue came, even by reference to the Constitution as it stood in 1980.'[110] In a similar vein, the Chief Justice remarked that 'the minority judgments [in *Norris*] are more persuasive than those of the majority.'[111] Albeit *obiter*, these comments seem to whittle away the *Norris* majority judgment's precedential value to vanishing point.

12. Observations

The proposition that the Constitution restrains the application of a law in a case where sexual activity between an adult and a minor is alleged seems intuitively troubling. Although the minority decisions are logically compelling, the majority verdicts arguably are more pragmatic. Mindful of the need effectively to address historic allegations of sexual exploitation, the majority judgments strain to rescue s 11. As O'Donnell J remarks, 'It would indeed be a serious matter if, as a consequence of determining that consent was an essential ingredient of the offence under s 11 of the 1885 Act, that section became unavailable for prosecution of offences against very young children or people under a disability'.[112] Given the fate of the pre-1993 buggery laws in *Devins,* it is understandable he might not wish the 'application of...mechanical and formal

107. ibid [2.4].
108. ibid [2.6].
109. [2019] IESC 26, O'Malley J [72].
110. [2019] IESC 26, O'Donnell J [67].
111. ibid Clarke CJ [5.3].
112. ibid O'Donnell J [28].

rules…to put any such offences beyond the reach of prosecution.'[113] To strike down s 11 would involve removing an important tool in addressing historic sexual abuse by male adults against male children. In particular, O'Donnell J warned against the Constitution being used as 'a blunt instrument' invalidating provisions that 'prohibit conduct which is regarded today as just as, if not more, serious than it was when the provision was first enacted.'[114]

The fact that s 11 was a 'notorious provision which has blighted the lives of many men during the 20th century in this country'[115] might understandably tempt a court to rule against it. Nonetheless, the *Devins* outcome suggests that the State should at least be cautious in the face of proposals for a comprehensive repeal or striking down of historic legislation. Notably, even prior to 1993, s 11 was 'more often invoked in relation to conduct involving older men and young boys, than consenting adult men.'[116] Such conduct is still criminal today, and there would be nothing unconstitutional in taking such an approach to contemporary sexual exploitation of children.

The judgments on both sides seem to suggest or at least necessarily imply that, notwithstanding the continued application of s 11 to pre-1993 conduct, a prosecution today in respect of consensual conduct prior to 1993 between males *both of whom were undeniably adults at the relevant time* would most likely be unconstitutional or at least would not be allowed to proceed. O'Donnell J's stated preference for Henchy J's minority judgment in *Norris* seems to support that view. Notably, the DPP deliberately chose not to bring prosecutions in respect of activity that occurred after MD reached the age of 17, an indication that she too had taken the view that prosecuting in respect of such activity might be constitutionally infirm. The question nonetheless lingers regarding those who were unfairly convicted for consensual acts between adults prior to decriminalisation; the fate of those who were unfairly targeted by the section in the past remains to be properly addressed.[117]

The verdicts also offer some enlightened and nuanced alternatives to the rather blunt default rule that the invalidity of an unconstitutional measure dates from its inception or, if later, from 1937, as well as offering some flexibility on the prospect of 'reading down' unconstitutional legislation. Although the comments on this score are mostly *obiter*, it will be interesting to see how this line of thinking develops in the future.

The outcome of the case allows the trial to proceed against PP but leaves some difficult questions unanswered. For instance, the basis on which the line between adults and minors is to be drawn in applying s 11 to historic conduct seems dubious. The age of 17 is logical when viewed from the perspective of

113. ibid [57].
114. ibid [69].
115. ibid [58].
116. ibid.
117. Cf Convictions for Certain Sexual Offences (Apology and Exoneration) Bill 2016 (Bill 106 of 2016).

2019, but the minority has a strong point when it concludes that applying a threshold of 17 to a time when such a threshold did not generally apply to boys is problematic. The minority judgments undermine the settled view that 17 is a natural age of consent and expose the wide variation among different laws across time in respect of the age at which sexual activity is legally appropriate.

That being said, the minority's view that the Constitution prevents a prosecution in this specific case in respect of sexual acts with a 15 year old sit uneasily with Art 42A's emphasis on the State's duty to vindicate children's rights and to protect children at risk of harm. It begs the question whether the courts would invariably yield to the Oireachtas' views on what is an appropriate age of consent. Would the minority have thought differently if the law at the time had set the age of consent below 15?

The case highlights the difficulties of dealing in retrospect with indiscriminate Victorian laws that sweepingly banned homosexual acts without any distinction based on context, age or consent. It arguably exposes the deep flaws in historic laws addressing sexual offences as well as some of the errors made at the time of decriminalisation. It nonetheless highlights that, notwithstanding the patently discriminatory nature of those laws, wholesale repeal can also sweep away important measures that ensure prosecution of historic acts involving alleged exploitation of minors. As a result, a nuanced approach to such legislation is clearly required.