

Impact case study (REF3)

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| Institution: King's College London | | |
| Unit of Assessment: 18 Law | | |
| Title of case study: LGB equality in hate speech, immigration, family and pensions law | | |
| Period when the underpinning research was undertaken: 2001 – 2017 | | |
| Details of staff conducting the underpinning research from the submitting unit: | | |
| Name(s): | Role(s) (e.g. job title): | Period(s) employed by submitting HEI: |
| Robert Wintemute | Professor of Human Rights Law | From 01/09/1991 |
| Period when the claimed impact occurred: June 2016 - Jan 2020 | | |
| Is this case study continued from a case study submitted in 2014? N | | |

1. Summary of the impact

Research by Professor Robert Wintemute at King's College London drove the development of an equal legal framework for different-sex and same-sex couples beyond the first step of decriminalising sexual activity. Using strategic litigation, Wintemute brought his human rights-based research to the attention of supra-national and domestic courts. Through carefully chosen test cases, interventions and advocacy, he has influenced multiple, precedent-setting judgments for lesbian, gay and bi-sexual (LGB) people. Leading courts have relied to an exceptionally high degree on his arguments. The resulting judgments require states to, *inter alia*, investigate hate crimes effectively, allow same-sex partner immigration, create a 'specific legal framework' for same-sex relationships and prohibit discrimination in pension provision. Wintemute's work has benefited the millions of LGB people in 47 countries in Europe who can now rely on these decisions to claim equal rights. It has also changed the organisation of societies that now have to ensure that equal treatment is implemented in practice.

2. Underpinning research

For more than two decades, Wintemute has been at the forefront of human rights and discrimination research. His work involves critical analysis of leading judgments regarding same-sex discrimination and offering human rights-based arguments for achieving same-sex equality through the courts. His scholarship is both comparative and jurisdiction-specific. He argued that decriminalising same-sex activity was merely an insufficient first stage in a progressive movement. He contended that the gap between the protections afforded to private 'sex rights' by Article 8 (respect for private and family life) of the European Convention on Human Rights (ECHR) and public 'love rights' for same-sex couples has perpetuated social exclusion and discrimination. He argued that 'social rights' associated with the legal recognition of same-sex partnerships, homes and families must follow [1], and that further attention needed to be given to the social, structural and institutional processes that perpetuate inequality. Wintemute argued that the abolition of the European Commission on Human Rights – which screened all applications to the European Court of Human Rights (ECtHR) until 1998 – meant that all its negative judgments regarding LGB equality cases were 'frozen'. This created a 'blank slate' for equality arguments to be renewed before the ECtHR [1]. His research supporting these challenges can be examined in three main strands.

Equal protection from hate crimes

Wintemute argued that the criminal justice system should protect LGB people from expressions of hatred towards them (hate speech), which could lead to crimes of violence against them (hate crimes) [2]. He examined the gaps in UK legislation prohibiting anti-LGB hate speech [3] and argued that the ECHR could be interpreted as imposing a positive obligation on governments to prosecute anti-LGB hate speech in situations where comparable comments about a different-sex couple or a Jewish person would have been investigated.

Equal pension rights

Wintemute studied EU, UK and Canadian law on the prohibition of discrimination against LGB people in all forms of employment [3,5,6]. Drawing upon case law in a range of jurisdictions,

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he argued that pension schemes that did not make the same payments to a surviving same-sex partner as they would to a surviving different-sex partner were acting in a discriminatory manner. He argued that, by refusing to make such payments, the deceased would effectively have been paid a lower 'gay wage' (one with no expectation that a survivor's pension would be paid) instead of a higher 'heterosexual wage' (which would pay for a surviving partner's pension).

Marriage and civil partnership equality

Wintemute's research contended that trends in international and comparative law supported an obligation on governments to provide the same choices of legal framework to all couples, regardless of sexual orientation. His edited book, *Legal Recognition of Same-Sex Partnerships* [4], the first of its kind, brought together an international team of scholars to examine the theoretical issues and the variety of legal developments around six months after the first same-sex marriages took place in the Netherlands. This demonstrated the beginning of a legal trend towards equality. He consolidated his research on the influence of consensus on same-sex marriage case law in the United States Supreme Court, the ECtHR and the Inter-American Court of Human Rights (IACtHR [1,2,4,5,6]). His research on equal treatment of unmarried same-sex couples [4] demonstrated an emerging 'European consensus' on civil partnerships. He argued that this supported the ECHR challenging the discriminatory status quo.

Wintemute analysed the legislative and judicial steps taken to achieve formal legal equality for LGB individuals and same-sex couples in Canada between 1985 and 2005 [5]. He drew upon his comparative research to argue for further specific changes in the law in the UK and EU. He contended that the UK Government contravened the ECHR by its failure to extend the Civil Partnerships Act 2004 to different-sex couples, after same-sex couples were allowed to marry as well as to register a civil partnership [3]. Wintemute exposed the direct and indirect discrimination faced by bi-national, same-sex couples who wished to live together in Europe. He argued that the foreign partner must be granted a residence permit in 47 Council of Europe (CoE) countries (even if the couple had not been able to marry anywhere), and a right to be recognised as the spouse of an EU citizen (if they had married in an EU Member State) and to reside with the citizen in 27 EU countries [2,5,6].

3. References to the research

Publication [5] has gone through a strict peer-review process. Publications [1,2,3,4,6] were included in high-profile edited collections. All publications are widely cited in the literature.

- [1] Wintemute, R. (2005). From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Rights in N. Bamforth (ed.), *Sex Rights*, Oxford University Press, Oxford, pp. 186-224.
- [2] Wintemute, R. (2017). European Law Against Discrimination on Grounds of Sexual Orientation in K. Boele-Woelki & A. Fuchs (eds), *Same-sex relationships and beyond: Gender matters in the EU*, 3rd edn., Intersentia, pp. 179-204, DOI: 10.1017/9781780684956.010
- [3] Wintemute, R. (2012). Homophobia and United Kingdom Law: Only a Few Gaps Left to Close? in L. Trappolin, A. Gasparini & R. Wintemute (eds), *Confronting Homophobia in Europe: Social and Legal Perspectives*, Hart Publishing, Oxford, pp. 233-264.
- [4] Wintemute, R. (2001). *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, Hart Publishing, Oxford (with honorary co-editor Mads Andenæs).
- [5] Wintemute, R. (2004). Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits, *McGill Law Journal*, vol. 49, no. 4, pp. 1143-1180.
- [6] Wintemute, R. (2015). In Extending Human Rights, which European Court is Substantively 'Braver' and Procedurally 'Fitter'? The Example of Sexual Orientation and Gender Identity Discrimination, in S. Morano-Foadi & L. Vickers (eds), *Fundamental Rights in the EU*, Hart Publishing, pp. 179-199.

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4. Details of the impact

Since joining King's in 1991, Wintemute has actively sought suitable cases to take to court to challenge discrimination, drawing on his detailed knowledge of discrimination law worldwide to improve the rights of LGB individuals and same-sex couples. Wintemute works closely with relevant non-governmental organisations (NGOs). He has drafted third-party interventions on behalf of LGB organisations in six successful cases (and four pending cases) and represented the applicants in two successful cases in the ECtHR. He has provided informal support and advice to individuals and legal advisers in multiple cases, including the 2018 UK Supreme Court (UKSC) decision that led to civil partnerships for heterosexual couples (*R. [Steinfeld & Keidan] v Secretary of State for International Development* [2018] UKSC 32). His work has influenced legal decisions establishing important new principles prohibiting discrimination against millions of LGB persons worldwide. His research was referred to in the case that decriminalised gay sex in India [A] and in the case that outlawed employment discrimination in Latin America and the Caribbean (*Duque v Colombia*, 26 February 2016). For clarity, this REF case study focuses on the most significant cases in UK and EU law, and under the ECHR.

Legislative reformHelping the Parliamentary Assembly of the Council of Europe (PACE) to encourage national legislative reforms

Wintemute advised the Committee on Equality and Non-Discrimination of the PACE on ECHR case law during a conference on private and family life for LGBTI people in March 2018 [B1, p. 8, fn. 18]. He urged the PACE to go beyond the case law of the ECtHR, as it had done in prior resolutions. Resolutions of the PACE, which provide evidence of 'European consensus', can be persuasive in legal argument, driving national legislative reforms and ECtHR judgments. In October 2018, the PACE adopted Resolution 2239, 'Private and family life: achieving equality regardless of sexual orientation' [B2]. The PACE Resolution called on the 47 CoE Member States to go beyond the case law of the ECtHR by providing for joint adoption by same-sex couples, extending automatic co-parent recognition to the same-sex partner of the parent who has given birth, and granting to same-sex couples the same access to medically assisted procreation as unmarried different-sex couples.

Obliging the police across Europe to investigate anti-LGB 'hate speech'

In 2017, the Lithuanian Gay League asked Wintemute to represent the applicants in the case of *Beizaras and Levickas v Lithuania* [2020] ECtHR (41288/15). Prosecutors had failed to investigate hateful comments posted on Facebook in response to a photograph the male couple posted of themselves kissing. Wintemute framed his legal submissions based on his research [3], asserting that the ECHR can be interpreted as imposing a positive obligation on governments to prosecute anti-LGB hate speech, and that comparable comments about a different-sex couple or a Jewish person would have been investigated. The ECtHR ruled unanimously that the Lithuanian authorities' failure to act was sexual orientation discrimination and that they must pay EUR10,000 to each of the applicants within three months of the judgment. As confirmed by Tomas Vytautas Raskevičius, who initiated the case as an independent LGBT human rights advocate, "*the Professor's knowledge and contribution was of crucial importance in defending the rights of the applicants*" and his involvement in leading the case "*significantly contributed to the systematic changes in responding to the negative phenomenon of hate speech and hate crimes in the Republic of Lithuania*" [C].

The judgment requires the 47 CoE countries (with a combined population of over 830 million) to investigate and prosecute anti-LGB hate speech. The European Parliament Resolution of 18 December 2019 on Public Discrimination and Hate Speech against LGBTI people (2019/2933(RSP)) recommended *inter alia* that Member States establish simple procedures enabling individuals to report online hateful content and to ensure that any alleged hate crime or hate speech is effectively investigated, prosecuted and tried [D]. It called on the Commission to support training programmes for law enforcement and judicial authorities [D, paras 8-10]. Raskevičius confirmed that, following the judgment, "*[Lithuanian] law enforcement agencies are more comprehensively engaged in investigating the instances of hate speech and hate crimes... Also, a working group has been founded within the Ministry of*

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the Interior of the Republic of Lithuania... with the aim of improving the institutional response to the negative phenomenon of hate speech and hate crimes... Non-governmental organizations have started trainings for law enforcement officers” [C].

Equal pension rights for surviving same-sex spouses and civil partners

In *Walker v Innospec Limited* [2017] UKSC 47, the UKSC took the unusual step of disapplying the provisions of the Equality Act 2010. This had allowed employers to refuse to pay a widow’s pension where a same-sex partner had made all the pension contributions before same-sex civil partnerships were allowed. The UKSC found unanimously that the exception was discrimination based on sexual orientation with regard to pay (which includes pension benefits) contrary to EU Directive 2000/78. Wintemute supported the case by publishing articles about decisions of the lower courts [2,6], advising Mr Walker’s barristers and commenting on drafts of their written arguments.

Max Schaefer, a barrister working on the appellants’ case, stated: *“Professor Wintemute’s academic work played an important role in helping develop, and externally validating, the arguments that the Supreme Court eventually accepted” [E].* Lord Kerr quoted directly from Wintemute’s article [6], accepting the argument *“that, from 1980 to 2003, Mr Walker had been paid the lower ‘gay wage’ (one with no expectation that a survivor’s pension would ever be paid ...), rather than the higher ‘heterosexual wage’ (one with an expectation that a survivor’s pension might be paid)” [F].* If Mr Walker divorced his husband and married a woman, Innospec would pay her a pension of over GBP40,000 per year. The judgment gives financial security not only to Mr Walker’s husband but also to all same-sex spouses or civil partners who are in a similar position.

Marriage and civil partnerships

Ensuring that bi-national, same-sex couples can legally live together in Europe

After being contacted by Arcigay, Italy’s first and largest national gay organisation, Wintemute encouraged an unmarried same-sex couple to challenge the anticipated refusal of a residence permit. At that time, foreign same-sex partners of Italian citizens were not accorded any immigration rights to permit a family to live together in Italy. Italy had treated the applicants as an unmarried different-sex couple (who would be able to marry in Italy and thus obtain a residence permit), even though, as a same-sex couple, they were unable to marry. Wintemute became their legal representative at the ECtHR in the case *Taddeucci & McCall v Italy* (2016). Drawing on his research on indirect sexual orientation discrimination [5] and on same-sex partner immigration [2,3], he persuaded the ECtHR to apply, for the first time outside the context of religious beliefs, its reasoning in an earlier case that discrimination may include *“fail[ure] to treat differently persons whose situations are significantly different” [G, p. 15].* The ECtHR ruled that Italy’s failure to provide any means for a same-sex partner to qualify for a residence permit was discrimination based on sexual orientation. This judgment was the first ever by an international tribunal regarding the immigration rights of a same-sex couple.

The judgment now benefits same-sex partners from any country in the world who seek a residence permit in one of the 47 CoE countries on the basis of a relationship with a citizen. This avoided considerable suffering for many lesbian and gay couples who may have found themselves forced to live in separate countries. As the successful applicants Roberto Taddeucci and Doug McCall explained, *“[Wintemute’s] legal strategy allowed us to stay together as a couple over the entire period and enjoy a life together with our wider Italian family ... Because of our sexual orientations we were deemed not worthy of equal treatment by the Italian state. Professor Wintemute skilfully took our experiences to the Court who validated the discrimination. The result was incredibly empowering” [H].*

Obliging Italy to create a new, alternative registration system for same-sex couples

Wintemute drafted a third-party intervention by ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans & Intersex Association) and other NGOs in *Oliari v Italy* (2015) [J]. This argued that European governments have an obligation to create an alternative registration system for same-sex couples, who are excluded from marriage. Wintemute’s research-based intervention not only demonstrated why a framework for recognition should exist as a human right, but also provided quantitative research on the

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number of CoE Member States where marriage or other forms of recognition existed. As Arpi Avetisyan, Head of Litigation at ILGA-Europe, explained: “*The third party intervention was extensively (almost in its entirety) cited and reflected in the judgment, which is very uncommon in Court’s practice. Remarkably, the Court delivered a positive judgment which very much read in line with our third party intervention drafted by Professor Wintemute*” [I].

The intervention helped to persuade the ECtHR that Article 8 of the ECHR imposes a positive obligation on Italy to create a ‘specific legal framework’ for same-sex couples. The ECtHR devoted over eight pages of its judgment [J, paras 134-143] to a summary of the research [5] and arguments presented in the intervention (including Wintemute’s [5] above, cited at para 135) regarding legal recognition of same-sex couples in CoE countries and other democratic societies. The ECtHR reached the same conclusion in *Orlandi v Italy* (2018, para 210) with regard to same-sex couples who had married outside Italy, after citing the intervention (paras 172-175) [K].

The 2015 *Oliari* judgment was followed by new laws recognising same-sex couples in six countries: Cyprus, Greece, Italy, Monaco, Montenegro and San Marino. Avetisyan from ILGA-Europe recognised the wide-reaching impact of Wintemute’s contribution: “*While the judgment itself has been a beacon in Court’s jurisprudence to pave the way for advancement of human rights of LGB persons, the research in Professor Wintemute’s brief has served as grounds for lawyers and policy makers to make arguments in their advocacy and litigation efforts at the national level*” [I].

5. Sources to corroborate the impact

- [A] *Navtej Singh Johar v Union of India thr. Secretary Ministry of Law and Justice* (2018) Supreme Court of India.
- [B] Documents illustrating Wintemute’s impact on PACE, including: [B1] Parliamentary Assembly of the Council of Europe (2018), *Report: Private and family life: achieving equality regardless of sexual orientation*; and [B2] Parliamentary Assembly of the Council of Europe (2018), *Resolution 2239: Private and family life: achieving equality regardless of sexual orientation*, Doc.13956, 26/01/2016.
- [C] Testimonial from: Tomas Vytautas Raskevičius, Member of the Parliament of the Republic of Lithuania and Chairman of Lithuania’s Human Rights Committee, 16 December 2020.
- [D] European Parliament Resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones (2019/2933(RSP)).
- [E] Testimonial from: Max Schaefer, Barrister at Brick Court Chambers, UK, 9 Feb 2021.
- [F] *Walker v Innospec Limited* (2017) UKSC 47.
- [G] *Taddeucci & McCall v Italy* (2016) ECtHR (51362/09).
- [H] Testimonial from: Roberto Taddeucci and Doug McCall, applicants in *Taddeucci & McCall v Italy* (2016) ECtHR (51362/09), 14 Jan 2021.
- [I] Testimonial from: Arpi Avetisyan, Head of Litigation at ILGA-Europe, 15 January 2021.
- [J] *Oliari v Italy* (2015) ECtHR (18766/11 and 36030/11).
- [K] *Orlandi v Italy* (2018) ECtHR (26431/12, 26742/12, 44057/12 and 60088/12).