

Impact case study (REF3b)

Institution: King's College London
Unit of Assessment: 20 Law
Title of case study: Equal human rights for same-sex couples and parents (Professor Robert Wintemute)
<p>1. Summary of the impact</p> <p>Prof. Robert Wintemute has presented his comparative law research on sexual orientation discrimination to the European Court of Human Rights or ECtHR (through written and oral arguments on behalf of intervening non-governmental organisations or NGOs), and the Inter-American Court of Human Rights or IACtHR (through oral and written evidence as an expert witness). His research has helped to persuade these Courts to adopt landmark judgments that greatly improve legal protection of the rights of same-sex couples and parents in the 47 countries with combined populations of over 800 million people that are parties to the European Convention on Human Rights (EConHR), and the 23 countries with combined populations of over 550 million people that are parties to the American Convention on Human Rights (AConHR).</p>
<p>2. Underpinning research</p> <p>Since 1 Jan. 1993, Prof. Wintemute has been continuously engaged in research at King's on all forms of discrimination based on sexual orientation, including decisions by legislatures, courts and other public authorities to deny to lesbian and gay individuals or same-sex couples the same rights as heterosexual individuals, or married or unmarried different-sex couples. In this field, which barely existed in 1993, he has become one of the leading academic lawyers in the world.</p> <p>In early 1993, the legal situation for same-sex couples and parents in Europe, the USA and Canada was grim. There were no favourable decisions from the ECtHR, the EU's Court of Justice, the UK's House of Lords, the IACtHR, or the US or Canadian Supreme Courts. Same-sex couples could register their relationships in Denmark, but nowhere else in the world. Allowing a same-sex couple to marry was legally and politically unthinkable, and there were no laws (in force) or appellate court decisions authorising joint adoption of children. Discrimination against same-sex couples and parents was largely seen as legal and unproblematic.</p> <p>Through his research, Wintemute challenged this hostile status quo. By analysing trends in international human rights law, EU law, and national constitutional, criminal and family law, together with other data (including resolutions of the Council of Europe's Parliamentary Assembly and the EU's European Parliament), he has developed a conceptual framework for analysing discrimination based on sexual orientation. This provides arguments for interpreting international human rights treaties and national constitutions as requiring differences in treatment based on sexual orientation to be treated as "suspect" (prohibited discrimination unless the government can establish a strong justification for them), in the same way as differences in treatment based on race, religion or sex. The underlying rationale is that an individual's sexual orientation is difficult to change, or should not have to be changed, like their race, religion or sex. He has also perfected an analysis of sexual orientation discrimination as also constituting sex discrimination, and therefore prohibited by existing law. Wintemute has demonstrated that, whether a "sexual orientation" or "sex" approach is adopted, it would be extremely difficult to justify denying same-sex couples the rights of different-sex couples (including access to marriage), or excluding lesbian and gay individuals and same-sex couples from access to parental rights, including custody of their genetic children, adoption of children, and use of donor insemination or surrogacy.</p> <p>His research outputs include books published in 1995 [1] and 2001 [2], both viewed as key texts, and several articles [3, 4, 5]. David (now Lord) Pannick said of [1]: "an important new book ... recommended to judges and politicians" (<i>The Times</i>, 26 March 1996), Andrew Koppelman, called it "a valuable contribution... I know of no comparative study in this area that is more thorough" (<i>Michigan Law Review</i>, May 1997, vol. 95, pp. 1636-1667), while John Gardner said: "a rare combination of legal learning and moral insight...does much...to illuminate the structure, scope, and significance of anti-discrimination law as a whole" (<i>Oxford Journal of Legal Studies</i>, Spring 1998, vol. 18, pp. 167-186).</p> <p>The 2001 text [2], which Wintemute edited, was launched at the House of Commons on 9 Jan. 2002 in the presence of Lord Lester, whose Civil Partnerships Bill was introduced the next day, six MPs, and Cabinet Office representatives, and at the Law Society of Barcelona on 27 May 2002,</p>

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before members of the Spanish and Catalan Parliaments. It was reviewed by Alan Inglis, *Family Law*, Feb. 2002, p. 151 ("the Government is 'following with interest' debates about the legal status of gay and lesbian relationships. It is difficult to conceive of a more thorough treatment of those debates than that provided in this book.") and *International Family Law*, March 2002, pp. 49-51 ("an invaluable study of the issues ... in a debate that is ... assuming increasing importance"), by Ian Sumner, *Cambridge Law Journal*, July 2002, pp. 473-75 ("an essential tool... The breadth of material is extremely impressive ... bring[ing] together the legal climate of ... [23] jurisdictions, along with the activity at ... the European and international level [and providing] a theoretical basis to the discussion."), by Bruce MacDougall, *Adelaide Law Review*, 2002, Vol. 23, pp. 177-81 ("surely one of the must-reads for anyone involved in gay and lesbian studies or with international family law."), and by Loveday Hodson, *Human Rights Law Review*, 2002, Vol. 2, pp. 343-47 ("an impressive snap-shot of legal developments .. a reflection of a growing global consensus that same-sex relationships ought to be offered the protection of the law.").

3. References to the research (all available from King's College London on request)

- (1) *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford University Press, 1995).
- (2) *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford, Hart Publishing, 2001) (with honorary co-editor Mads Andenæs and 45 contributors from 25 countries). Wintemute also contributed the Introduction, the Conclusion and his own chapter: "Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention", pp. 713-29.
- (3) "Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes", (1997) 60 *Modern Law Review* 334-359; cited by Lord Justice Ward, Court of Appeal (England and Wales), *Smith v. Gardner Merchant Ltd.*, [1998] 3 All ER 852; Lord Prosser, Court of Session, Inner House (Scotland), *Secretary of State for Defence v. MacDonald*, [2001] IRLR 431; Lady Justice Hale, Court of Appeal (England and Wales), *Pearce v. Mayfield Secondary School*, [2001] IRLR 669; Lords Hope and Rodger, House of Lords, *Advocate General for Scotland v. MacDonald*, [2003] IRLR 512.
- (4) "Sexual Orientation and the [Canadian] Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits", (2004) 49 *McGill Law Journal* 1143-1180.
- (5) "Same-Sex Couples in *Secretary of State for Work and Pensions v. M*: Identical to *Karner and Godin-Mendoza*, Yet No Discrimination?", [2006] *European Human Rights Law Review* 722-735 (criticising House of Lords decision, which was effectively reversed by ECtHR in 2010).

4. Details of the impact

Prof. Wintemute's research and detailed knowledge of comparative law developments have allowed him to contribute to campaigns for legal change and significantly influence the development of human rights law. In 1999, he set out to find ways to participate in cases of discrimination against same-sex couples or parents in international human rights courts, because these cases can benefit many more countries than cases in national courts. Judgments of the ECtHR apply to the 47 countries (with combined populations of over 800 million people) that are parties to the EConHR. Judgments of the IActHR apply to the 23 countries (with combined populations of over 550 million people) that are parties to the AConHR. Favourable judgments of these courts could therefore benefit all lesbian and gay individuals and same-sex couples and parents in these countries, and their children.

Before 2000, there had been no "third-party interventions" in ECtHR cases on sexual orientation discrimination. Seeing an opportunity to combine his pre-PhD litigation experience at a New York law firm with his research at King's, Wintemute contacted an NGO (ILGA-Europe, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association) about a potential third-party intervention. In so doing, he created an academic-NGO partnership, which transformed ILGA-Europe's work, by opening up a whole new field of activity, strategic litigation. Since 2000, ILGA-Europe has been granted leave to submit 14 interventions to the ECtHR, 9 of

which Wintemute has drafted. In these 9 interventions (on behalf of ILGA-Europe and 9 other NGOs, including the International Federation for Human Rights or FIDH, and the International Commission of Jurists), he has drawn on his research and expertise to advise the ECtHR as to whether developments in comparative law support a finding of discrimination violating the EConHR.

Since 1 Jan. 2008, these interventions have helped to persuade the ECtHR to adopt crucial anti-discrimination principles in five cases, outlined below. In cases (1)-(3) and (5), the only intervention supporting the applicants was drafted by Wintemute, while in case (4), Amnesty International's intervention stressed United Nations materials of limited relevance to the case. In all five cases, the interventions contained much more detailed comparative law research than the written arguments of the applicants' lawyers. In case (4), only the intervention drafted by Wintemute made the specific "European consensus" argument mentioned below. All 5 judgments discussed below are extremely useful precedents, which practising lawyers and NGOs around the world are citing when they seek legal reforms from national legislatures and courts. For each case, the paras. of the judgment with the court's reasoning are cited, followed by the paras. of the judgment referring to the intervention (ECtHR) or report (IACtHR) or to the specific arguments it makes, and the paras. or pp. of the intervention or report where those arguments can be found:

(1) *Karner v. Austria* (Chamber judgment of 24 July 2003): Countries that grant rights to unmarried different-sex couples must grant the same rights to unmarried same-sex couples: (judgment paras. 39-43 for reasoning; judgment paras. 8, 27, 36 for references; cf. intervention pp. 2-9) (right to remain in home after death of tenant). Although decided in 2003, *Karner's* impact continued when it was cited and applied by the ECtHR in *Kozak v. Poland* (2 March 2010, same facts as *Karner*), *P.B. & J.S. v. Austria* (22 July 2010, sickness insurance cover for partners of civil servants), and *J.M. v. UK* (28 Sept. 2010, calculation of child support), the subject of [5] above.

(2) *E.B. v. France* (Grand Chamber judgment of 22 Jan. 2008): Countries that permit unmarried individuals to adopt children may not exclude lesbian women or gay men (judgment paras. 94-97 and Judge Costa's opinion para. 3 for reasoning; judgment para. 3 for reference; cf. intervention paras. 7-37). This judgment overruled *Fretté v. France* (2002), which had allowed governments to exclude lesbian and gay individuals from the possibility of adopting children.

(3) *Schalk & Kopf v. Austria* (Chamber judgment of 24 June 2010): "A cohabiting same-sex couple ... falls within the notion of 'family life' [in Article 8]" (judgment para. 92-94 for reasoning; judgment paras. 5-6, 84 for references; cf. intervention paras. 4-13); and the right to marry in Article 12 could apply to a same-sex couple in the future (judgment para. 61 for reasoning; judgment paras. 5-6, 47-48 for references; cf. intervention paras. 14-27). This overruled prior decisions by the ECtHR that same-sex couples did not enjoy "family life" under Article 8 (*Mata Estevez*, 2001), and that Article 12 "secures the fundamental right [only] of a man and woman to marry" (*Christine Goodwin*, 2002). The "family life" statement was cited by the IACtHR in *Atala v. Chile*, 24 Feb. 2012 (para. 174), and by Italy's *Corte di Cassazione* (Supreme Civil Court), 15 March 2012 (part 4.2, pp. 72-74). A third aspect of *Schalk* is the dissenting opinion (3 of 7 judges), which agreed with the intervention that the absence of a legal framework for same-sex couples in Austria (like the UK's Civil Partnership Act 2004) was discrimination violating the EConHR (dissenting op. paras. 4-6, 9-10 for reasoning; judgment paras. 5-6, 85-86 for references; cf. intervention paras. 28-44).

(4) *X & Others v. Austria* (Grand Chamber judgment of 19 Feb. 2013): Countries that permit unmarried different-sex couples to adopt each other's children may not exclude same-sex couples (judgment paras. 139-141, 151, 153 for reasoning applying *Karner*, paras. 7, 78-80 for references; cf. intervention paras. 6-15, 20-38); the burden of proof is on the government to justify the exclusion of same-sex couples (judgment para. 141 for reasoning; judgment para. 7 for reference; cf. intervention para. 14); and "European consensus" should be assessed by examining only Council of Europe member states that allow unmarried couples to adopt, not all 47 member states (judgment para. 149 for reasoning, paras. 7, 79 for references; cf. intervention paras. 16-19). *X & Others* made visible the discrimination suffered by children of same-sex parents in most European

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countries, which do not permit a child to have two legal parents of the same sex. It will require changes to the laws of 7 European countries (unless they abolish adoption by unmarried couples), and could inspire changes in others.

(5) *Vallianatos v. Greece* (intervention on 20 June 2011; hearing on 16 Jan. 2013; Grand Chamber judgment finalised on 11 Sept. 2013, published on 7 Nov. 2013): Countries that create an alternative to marriage for different-sex couples must extend the alternative to same-sex couples (judgment paras. 85, 91-92 for reasoning, paras. 6, 69 for references; cf. intervention paras. 3-8).

Prof. Wintemute's reputation for work in the ECtHR gave rise to a second form of participation in the case of *Atala v. Chile*, the IACtHR's first dealing with any aspect of lesbian and gay human rights. Having been proposed by Ms. Atala's lawyers, he was invited by the IACtHR to appear as an expert witness at a hearing held in 2011 in Bogotá, Colombia. He was asked to provide a report on international law with regard to sexual orientation discrimination, with emphasis on the EConHR, because a critical question for the IACtHR was how the ECtHR would handle a similar case. Wintemute's evidence on this specific question helped to persuade the IACtHR to conclude:

(6) *Atala v. Chile* (judgment of 24 Feb. 2012): Sexual orientation is a "protected category" under the AConHR (judgment para. 91 for reasoning; judgment para. 18(c) for reference; cf. report pp. 2-5, 17-21, 22-23, 25-26); it was discrimination to transfer custody of 3 girls from their lesbian mother to their heterosexual father (judgment para. 146 for reasoning; judgment paras. 18(c), 134 and 153 and footnotes 126 and 157 for references; cf. report pp. 8-14, 21, 24). *Atala* lays the foundation for future IACtHR case law regarding sexual orientation discrimination in the criminal law, in access to employment, or in relation to the rights of same-sex couples, as well as with regard to parental rights other than custody (including access to adoption).

Prof. Wintemute speaks frequently at conferences, seminars and NGO training sessions about the potential applications of these judgments (eg, *Universidad Diego Portales*, Santiago, Chile, 8 Nov. 2012; Ministry of Foreign Affairs, Tallinn, Estonia, 23 Sept. 2013; Bandhu Social Welfare Society, Dhaka, Bangladesh, 9 Nov. 2013; all funded by the local British Embassy or High Commission).

5. Sources to corroborate the impact

(a) Published sources

ECtHR judgments are at: <http://hudoc.echr.coe.int>. The interventions drafted by Wintemute and submitted to the ECtHR on behalf of ILGA-Europe and other NGOs may be found at:

http://www.ilga-europe.org/home/how_we_work/litigation/ecthr_litigation/interventions.

The IACtHR's *Atala* judgment is at: <http://www.corteidh.or.cr>. A copy of the report submitted by Wintemute to the IACtHR will be provided on request.

(b) Individuals familiar with the impacts

(i) Statement by ILGA-Europe's Council of Europe Adviser who corroborates the significant role played by Wintemute in cases (1) to (5), including how he approached ILGA-Europe with a proposal to bring his comparative law research to the attention of the ECtHR through strategic interventions, how this has transformed ILGA-Europe's advocacy, how he and ILGA-Europe subsequently developed and implemented this strategy from 2000 to date (with impacts from 1 Jan. 2008), and the value of the ECtHR's judgments in cases (1) to (5) to human rights lawyers.

(ii) Statement by a prominent Belgian law professor, former Secretary-General of the International Federation for Human Rights (FIDH), and United Nations Special Rapporteur who corroborates the significant contribution made by Wintemute's research to the judgements in cases (1) to (5).

(iii) Statement by the International Commission of Jurists' former Senior Legal Adviser on Sexual Orientation who corroborates the critical influence of Wintemute's research on the ECtHR and IACtHR's reasoning in cases (1) to (6), and the value of these judgments to human rights lawyers.

(iv) A former Judge (1998-2012) and President (2011-12) of the ECtHR who may be contacted to comment generally on the helpfulness to the ECtHR of the interventions in cases (1) to (5).

(v) A former Judge (1998-2012) and Vice-President (2011-12) of the ECtHR who may be contacted to comment generally on the helpfulness to the ECtHR of the interventions in cases (1) to (5).