



EQUALITY UPDATE

“Advancing Equality for all”



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Introduction

The focus in this publication is on the policy of the Roman Catholic Church¹ on the ordination of women and homosexuals. The position of the church is that women and homosexuals are not eligible to be ordained as priests. This publication does not in any way suggest that this policy is wrong or flawed. The issue is whether the church is constitutionally justified in their policy or whether the policy unfairly discriminates against women and homosexuals.

Gender and Sexual Orientation

Section 9 of the Constitution of the Republic of South Africa Act 108 of 1996² provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9 (3) of the constitution lists the grounds upon which the state may not unfairly discriminate against anyone. These grounds include gender and sexual orientation. Section 9 (4) also places an obligation upon every person not to discriminate against another on any of the grounds mentioned in section 9 (3).

To give effect to section 9 (4) of the constitution national legislation was passed in 2002 to promote equality and to prohibit unfair discrimination.³ Section 8 of the Equality Act provides that no person may unfairly discriminate against any person on the ground of gender and it includes in sub section (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and men and undermines the equality between women and men, including the undermining of the dignity and well-being of the girl child.

In terms of section 13 of the Equality Act, discrimination is deemed to be unfair when the complainant makes out a *prima facie* case and the onus lies with the respondent to prove that it was fair discrimination. Section 14 of the Equality Act is a yardstick to determine whether or not discrimination is fair or unfair. The onus is thus on the discriminator to show that the discrimination is protected under section of the Equality Act. In the event that the discriminator is unable to discharge the onus, the discrimination is thus unfair.

Both women and homosexuals are thus protected against

¹ Hereinafter referred to as “the church”

² Hereinafter referred to the “constitution”

³ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (*Also known as PEPUDA or the Equality Act*)

discrimination by the constitution and the Equality Act, which gives effect to the constitution. They are protected by virtue of them being women and homosexuals regardless of how they attained the attributes.

The Roman Catholic Church

The church has over the years reiterated its position that it would not recognise women and homosexuals as ordained priests.

In a document the Vatican renews ban on gay priests⁴. Reference in the document, is not made, however, to priests that are already ordained but to prospective priests. The document describes homosexual acts as grave sins that cannot be justified under any circumstances. The document refers to homosexuality as a tendency not orientation and says that those who are able to overcome it can begin training to be ordained as priests. A period of three years is given to individuals after they have overcome the tendency before they can be ordained.

The result of the above policy is that some gay priests and prospective might end up having to lie about their sexual orientation in order to remain within the church's senior structures. This often leads to homosexual scandals within the church.

There is however a marked difference between the more liberal west and the rest of the world, particularly Africa where in some

parts homosexuality is still very unacceptable generally in society.

The church bases its policy on homosexuality on the interpretation of the Bible and the fact that sexual relations should be between only men and women for procreation and the fact that priests take an oath of celibacy. Based on the latter it would seem that there would not be any difference if the concerned priest were to be homosexual or heterosexual seeing that he would no engage in sexual acts due to the oath of celibacy. Therefore, whether a priest is gay or not would in actual fact not bear any difference if he were celibate.

The church however in the Vatican document professes to have the utmost respect for women and everyone irrespective of their sexual orientation. Much as the church respects all people and their rights the church still reiterates its position that homosexuals and women cannot be ordained as priests. Many liberals within the church have called for reformation of the church to accommodate all it's members. They have argued that the underlying principle is that prospective priests should swear that they would live a life of celibacy, that it should not matter whether they are homosexuals or women. The groups also argue that it is difficult to prove sexual orientation when the person under question is celibate.

The pope, however, is still resistant to this kind of change despite the fact that some of the other churches have accepted women as

⁴ "Vatican Renews Ban on Gay Priest", www.caleidoscop.org.ro

priests⁵ but there is still a problem with homosexual priests.

Jurisprudence

There has not been any jurisprudence in South African courts that pertains to discrimination on the grounds of gender and sexual orientation in a church environment. It would be interesting, however to see how the courts would handle it, more especially in the light of previous judgements pertaining to the same grounds of discrimination.

The courts have, in equality matters, usually found in favour of applicants who were discriminated against on the ground of sexual orientation. These are among others, matters where the respondent could not show that the discrimination was fair and it was aimed at advancing a previously disadvantaged group. The courts have also looked at the effect of the discrimination on human dignity and whether there could have been any more humane way in which the matter could have been dealt with without having to discriminate against the person(s).

Taking into account all the legislative measures put in place to prohibit unfair discrimination and to promote equality and the operation of our equality courts and the constitutional court, one would like to believe that the court would find in favour of the applicants.

Conclusion

As mentioned earlier, this publication is not intended to show

that the policy of the Roman Catholic Church not to ordain women and homosexuals as priests is wrong or flawed. What we are looking at is whether their policy is compatible with the provisions of the constitution and the equality legislation.

In terms of the Equality Act any discrimination is unfair unless the discriminator can show that it is fair or is intended to advance a previously disadvantaged group. In terms of the policy of the church it is not clear for which purpose there is this discrimination. In fact the discrimination goes against the very letter, spirit and purport of the constitution of achieving equality.

What is left to do is for some of the individuals and advocacy groups, which are opposed to the discrimination in the church to take the matter to an Equality Court so that there can be a binding pronouncement on issues concerning the ordination of women and homosexuals which will serve as a precedent in future matters of this nature.

⁵ E.g., The Anglican Church and the Methodist Church