

Denise Buser: Die unheilige Diskriminierung – eine juristische Auslegeordnung für die Interessenabwägung zwischen Geschlechtergleichstellung und Religionsfreiheit beim Zugang zu religiösen Leitungsämtern. LIT Verlag, Berlin, Zürich 2014.

## Summary

The study *Unholy Discrimination (Die unheilige Diskriminierung)* concerns the clash between gender equality and religious freedom, and the lack of female access to leading spiritual offices. In the Roman-Catholic Church canon law forbids female priesthood (Can. 1024 “Only a baptised man can validly receive sacred ordination.”). Islam poses no comparable legal, only social, barriers. In Judaism too there exist primarily *de facto* inequalities between men and women which, to a large extent, block access to a female rabbinate (apart from inconsistently applied medieval law).

The contradiction between the right to non-discrimination and religious communities’ invoking their right to religious freedom needs to be solved by weighing up competing interests. For the latter, the interests (or arguments) are the following:

- a long-term uncontested tradition (argument of continuity),
- theological reasons (“God’s eternal plan” – interpreted by the clergy; in the Roman-Catholic Church, especially the male sex of Jesus),
- the danger of schism (by introducing female priesthood), and
- the proven effectiveness of traditional sex roles in the religious field.

On the other side of the balance are, first, the specific features of equality conflicts in the religious field:

- the power differentials of counterparts (Catholic women vs. potent religious authority),
- the possibility of leaving the religious community (the argument of avoiding the conflict; but also the take-it-or-leave-it-dilemma), and
- the argument of Ideological Enterprise (*Tendenzbetrieb*, enterprises serving ideological ends: as a voluntary member of an enterprise, one is supposed to accept its objectives).

Subsequently, the interests of the damaged party carry more weight, if the “interferer” makes it completely impossible for the other side to exercise its fundamental rights.

Finally, the counter-arguments must be taken into account when the competing interests are weighed up:

- much evidence for the admissibility of female priesthood examined by theological science,

- the transition from the hitherto existing consensus to the dissent of many against the “church of men,”

- the argument of established practice in all religious communities (female parish leaders in the Roman-Catholic Church, female rabbis in Liberal and Reformed Judaism, female imams in the mosques).

In this study the concept of balancing interests is put into concrete terms with three model cases concerning the Catholic Church (1st case: refusal of access for a female theology student to seminary, where candidates for priestly ordination receive their theological formation; 2nd case: refusal of equal payment for male parish leaders [with ordination] and their female fellows [without ordination]; 3rd case: cancelled election of a female theologian, who was ordained “*contra legem*”). The weighing up of the opposite interests in these concrete model cases as well as the analysis of the arguments and counterarguments lead to the result that the (nationally and internationally guaranteed) principle of equality between men and women is to be valued more highly than the appeal to a very long tradition of male religious leadership (an image of man to which all three great monotheistic religions are committed).

The study takes a *legal* approach to equal treatment of men and women, and argues from a legal perspective. It discusses the question of the aptness of this method to the religion field, and also considers the problem that it is the State that has a duty to protect the fundamental rights of its citizens, and that fundamental rights mainly have no direct third-party effect between private-law subjects.

The study also includes three interviews: with a German Roman-Catholic female priest “*contra legem*,” with a Swiss female rabbi, and with a female law professor and expert on Islam from Morocco.

Translation: Denise Buser/David Jacobson