ACCESS TO EMERGENCY CONTRACEPTION FOR RAPE SURVIVORS IN LESOTHO

A dissertation submitted in partial fulfilment of the requirements of Master of Philosophy in Sexual and Reproductive Rights

By

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DECLARATION OF ORIGINALITY

I, **Mathoka Khaile**, declare that this is my own work and that it has not previously been submitted for any degree or examination in any other university or institution. Where the work of other people has been used, it has been duly acknowledged.

Signature of student: ______________________

Signature of supervisor: _______________________

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SUMMARY

Sexual violence is prevalent in Lesotho. However, all Catholic health facilities deny survivors of rape access to emergency contraception. As a result, some survivors have experienced unplanned pregnancies and illegal and unsafe abortions. Despite the ratification of human rights treaties, the government is not remedying this situation. Hence this study seeks to determine the compliance of the legal framework relevant to the protection of survivors of rape in Lesotho with international human rights norms and standards relating to access to emergency contraception.

The study used desktop review to collect data and adopted a socio-legal approach. The findings of the study show that Lesotho has legislation and policies that protect the right to access to emergency contraception for the survivors of rape. Nevertheless, the state does not intervene when a third party violates this right. Therefore, the state does not comply with its human rights obligations. The study recommends different human rights-based approaches to the government and Catholic Church.

LIST OF ACRONYMS AND ABBREVIATIONS

ACERWC	African Charter on the Rights and Welfare of the Child
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CHAL	Christian Health Association Lesotho
CMW	Convention on Migrant Workers
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EC	Emergency Contraception
FIGO	International Federation of Gynecology and Obstetrics
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LNFOD	Lesotho National Federation of Organisations of the Disabled
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
SADC	Southern African Development Community
UN	United Nations
WHO	World Health Organisation

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CHAPTER 1: AN OVERVIEW OF THE STUDY

1.1 Background information

Non-discriminatory, accessible and responsive medical care to the needs of survivors of rape is needed.[1] Accordingly, medical treatment for survivors of rape includes emergency contraception.[2]

World Health Organisation (WHO) defines emergency contraception (EC) as a method used for preventing pregnancy after unprotected sexual intercourse; it can be used in cases of rape.[3] EC conveys urgency[4] and it is a standard care for rape survivors.[5] It can also be used after having a failed contraceptive use[6] but it must be used before conception.[7] Its effectiveness depends on timely use since it functions well if it is used within 5 days after the incidence of unprotected sex.[8] In Lesotho, emergency contraception is expected to be accessible at all levels of service delivery.[9] However, some health facilities do not provide their clients with EC.

According to WHO, there are three methods of emergency contraception, namely: emergency contraceptive pills, the Yuzpe method and copper-bearing intrauterine devices (IUCDs). Emergency contraceptive pills prevent pregnancy in at least 98%.[10] The Yuzpe method combines oral contraceptives which are taken in two doses, and the first dose should be taken soon after unprotected sexual intercourse but not later than five

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[1] D Kuwali, C Nakirya & G Amuge 'Protection from sexual and gender-based violence in Africa' in D Kuwali & F Viljoen (eds) *By all means necessary: Protecting civilians and preventing mass atrocities in Africa* (2017) 173.
[2] DP Sulmasy 'Emergency contraception for women who have been raped: Must Catholics test for ovulation, or is testing for pregnancy morally sufficient?' (2006) 16 *Kennedy Institute of Ethics Journal* 305.
[3] World Health Organisation *Fact sheet on emergency contraception Geneva 2016.*
[4] Ministry of Health and Social Welfare 'National Family Planning Guidelines' (2012) 69.
[5] S Steven and others 'Informed consent for emergency contraception: Variability in hospital care of rape victims' (2000) 90 *American Journal of Public Health* 1372.
[6] BG Lindeque 'Contraception for first-time users' (2008) 50 *South African Family Practice* 18.
[7] PS Steyn & D Mason 'Emergency contraception – a review' (2009) 19 *Obstetrics & Gynaecology Forum* 128.
[8] A Vahratian and others 'College students' perception of emergency contraception provision' (2008) 17 *Journal of Women's Health* 103.
[9] Ministry of Health and Social Welfare (n 4) 14 – 15.
[10] World Health Organisation (n 3).

days.[11] IUCD is 99% effective provided it is inserted within five days of having had unprotected sex and it is considered to be the most effective method.[12]

The Ministry of Health dictates the contents of the package to be provided to the survivors of rape in Lesotho. The minimum package consists of Post-Exposure Prophylaxis (PEP) to prevent the spread of HIV and emergency contraception to prevent pregnancy. These services are freely provided to the survivors of rape in public health facilities.

There are two kinds of public health facilities in Lesotho: government health facilities and those that belong to Christian Health Association (CHAL), the main partner of the Ministry of Health. CHAL consists of health facilities belonging to different denominations of Christian faith. There are 155 public health facilities of which 81 are run by the government and 74 are under the administration of CHAL. Out of these 74 health facilities, 61 health facilities are owned by a Roman Catholic Church. Therefore, the Roman Catholic Church owns many health facilities which are mostly located in the rural areas where there is lack of health services.

1.2 Problem statement

According to Gender Links, 86% of women experienced gender based violence in their lifetime, while 24% of women experienced sexual violence and 10 % of men agreed to have perpetrated sexual violence in their lifetime.[13] This translates into implicating that rape is a national problem in Lesotho. Hence, rape is such a crisis that has negative consequences which can either be worsened or diminished by health care providers.[14] Such consequences include posttraumatic disorder, depression, substance abuse, suicide and unwanted pregnancy.[15] Therefore, CHAL plays a role in the provision of EC to the survivors of rape. Accordingly, 'timely access to emergency contraception can contribute to reducing the number of unwanted pregnancies, and ultimately, the number

[11] Ministry of Health and Social Welfare (n 4) 70.
[12] World Health Organisation (n 3).
[13] LM Chipatiso and others *The gender-based violence indicators study Lesotho* (2014) 8.
[14] S Mavundla & C Ngwena 'Access to legal abortion for rape as a reproductive health right: A commentary on the abortion regimes of Swaziland and Ethiopia' in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 62.
[15] R Campell 'The psychological impact of rape victims' experiences with the legal, medical and mental health' (2008) *American Psychologist* 703.

of unsafe abortions and maternal fatalities.'[16] However, Catholic health facilities do not offer any contraceptives because they advocate for natural family planning methods.[17] Hence, women do not have access to emergency contraception in hospitals, clinics and pharmacies affiliated with the Catholic Church.[18] These health facilities do not provide EC even to the survivors of rape because of link the church makes between contraception and abortion.[19]

It was against this background that it was necessary to conduct a study that explored the intersection between religion and human rights obligations of the state and the survivors of rape as human rights holders in Lesotho. A majority of health facilities under the ownership of Catholic Church are located in rural areas where there is no access to services, and they serve a large population living in these areas. Hence the denial of EC to survivors of rape puts their health and lives at risk.[20] There are incidents of unplanned pregnancy, maternal mortality and illegal abortions due to failure to access to emergency contraception. Some survivors of rape who do not have means to access EC from non-Catholic health facilities are left with no option but to conceive from a rape act. Therefore, conscientious objection impedes access to EC because health professionals whose religion links use of contraceptives with immorality refuse to provide the survivors of rape with EC. The study addressed questions that follow below.

1.3 Research question

The main research question of this study is: Does the legal framework relevant to the protection of survivors of rape comply with international human rights norms and standards relating to access to EC in Lesotho?

1.3.1 Sub-questions

The sub-questions of this study are the following:

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[16] M Hevia 'Ethical and legal issues in reproductive health: The legal status of emergency contraception in Latin America' (2011) *International Journal of Gynaecology and Obstetrics* 87.
[17] P Kabi 'Catholics under the spotlight' *Lesotho times* (Maseru) 22 October 2015 14.
[18] International Consortium for Emergency Contraception 'Emergency contraception: Catholics in favour, bishops opposed' (2010).
[19] J Lemaitre 'Catholic constitutionalism on sex, women, and the beginning of life' in RJ Cook, JN Erdman & BM Dickens (eds) *Abortion law in transnational perspective: Cases and controversies* (2014) 247.
[20] Mavundla & Ngwena (n 14).

1. What is the role of Catholic Church in facilitating access to EC for rape survivors?
2. How do interpretation and implementation of conscientious objection impact access to EC for survivors of rape?
3. What are state's obligations to facilitate access to EC for survivors of rape?

1.4 Methodology

A desktop methodology was used in this study. Data was collected through desk review with content analysis of relevant documents on access to emergency contraception for the survivors of rape and state's obligations in protecting rape survivors as well as the role of Catholic Church in facilitating access to EC. Moreover, the study focused on the analysis of primary sources which included human rights treaties, case law, national legislation and policies. Pertinent secondary sources such as journals and books were also used.

Since the violation of women's rights is not only a legal issue but also a deeply socially entrenched matter,[21] the study adopted a socio-legal approach. Socio-legal research entails studying existing laws concomitantly with their implementation in social context. This approach is 'helpful in analysing existing national and international law and policy concerning the protection of women's human rights.'[22] The socio-legal approach can uncover and expose the political nature of law, thereby exploring law in books *vis-a-vis* law in action. It enables researchers study law in a broader social and political context instead of understanding law by only referring to case law.[23]

1.5 Significance of the study

The study's significance is based on bringing about a discourse at the intersection between religion and state's human rights obligations as well as rights-holders. Therefore, the proposed study will contribute towards enhancing knowledge on the human rights compliance in the provision of emergency contraception to the survivors of rape. Thus, it will contribute towards strengthening state agencies in implementing state's human rights

[21] S Qureshi 'Research methodology in Law and its application to women's human rights law' (2015) 22 *Journal of Political Studies* 634.
[22] As above.
[23] M McConville & W Hong Chui 'Introduction and overview' in M McConville & W Hong Chui (eds) *Research methods for law* (2007) 5.

obligations. Moreover, this study will contribute to the achievement of Sustainable Development Goal 3, indicator 3.7 that aims to ensure universal access to sexual and reproductive health-care services because there is inadequate experience in applying human rights from the health care perspective.[24] The study will also result in a new avenue for advocacy on sexual and reproductive rights since there has never been an advocacy programme focusing on access to EC for the survivors of rape in Lesotho. Therefore, it will be contributing to the new knowledge and further research on sexual and gender based violence post-care because there is no study conducted on facilitating access to EC for the survivors of rape. Hence, care for women who are likely to fall pregnant because of rape remains largely unexplored and unaddressed[25] and only a few international human rights forums and documents have explicitly recognised a right by rape survivors to access EC.[26]

1.6 Literature review

1.6.1 Introduction

'The medical management of pregnancy associated with rape is recognised as a basic human right and an essential public health service.'[27] Different factors limit access to EC though it must be accessed by all women on equal basis.[28] Hence it is crucial to have emergency contraception readily available as 'both a human rights and public health imperative.'[29] However, access to EC is determined by the health care provider whom a woman seeks health care services from and the applicable state law.[30] There are studies carried out on the significance of access to emergency contraception. Hence, this section will focus on the importance of EC to the survivors of rape.

1.6.2 International standards and norms for EC after rape

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[24] C Ngwena & R Cook 'Rights concerning health' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 111.

[25] A Lathrop 'Pregnancy resulting from rape' (1997) *JOGNN Principles and Practice* 25.

[26] J Thompson, CC Undie & I Askew *Access to emergency contraception and safe abortion services for survivors of rape: A review of policies, programmes and country experiences in Sub-Saharan Africa* (2014) 7.

[27]As above.

[28] ES Mellik 'Time for plan B: Increasing access to emergency contraception and minimizing conflicts of violence' (2006) 19 *Journal of Health Care Law and Policy* 402.

[29] International Consortium for Emergency Contraception 'Emergency Contraception for rape survivors: a human and public health imperative' (2013).

[30] Mellik (n 28) 406.

The 57th session of the United Nations Commission on the Status of Women made a conclusion that bound all Member States to ensure that first responders include EC provision in post-rape care.[31] Lesotho participated in this session. Hence, Lesotho committed itself to provide rape survivors with EC. Furthermore, WHO recommended the provision of emergency contraception as a prompt women-centred care for survivors of sexual violence in its global guidance on sexual violence in 2013.[32] Above all, rape survivors' right to emergency contraception access is recognised and promoted by the International Federation of Obstetrics and Gynaecology.[33] By the same token, the United States Supreme Court in its decision in *Carey v Population Services International* stated that access to contraception is a fundamental constitutional right, and therefore without a right to access, the right to contraception cannot be exercised.[34] Thus, a state must ensure that its agencies provide EC to clients who need it.

Failure to provide rape survivors with EC is in contravention of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[35] It is important to note that Lesotho is the state party to CAT, and therefore she is obligated to facilitate access to EC for rape survivors. Accordingly, the SADC Gender Protocol, of which Lesotho has ratified, urges member states to ensure access of EC to sexually assaulted survivors.

Women and girls have a right to health. Thus, a state is duty-bound to have a strategy that aims to provide access to high quality and affordable sexual and reproductive services in order to reduce women's health risks and remove all barriers to access to sexual and reproductive health care services.[36] Accordingly, the provision of emergency contraception is a sexual and reproductive service that can minimise possible health risks for the survivors of rape. Hence, policies that deny or restrict access to EC are very

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[31] UN Commission on the Status of Women *2013 Agreed conclusions: Elimination and prevention of all forms of violence against women and girls* E/2013/27-E/CN.6/2013/11.

[32] World Health Organisation 'Responding to intimate partner violence and sexual violence against women: WHO clinical and policy guidelines' (2013).

[33] R Jina and others 'Report of the FIGO Working Group on Sexual Violence/HIV: Guidelines for the management of female survivors of sexual assault' (2010) 109 *International Journal of Gynecology and Obstetrics* 85.

[34] *Carey v Population Services International* 431 US 678 (1977).

[35] Concluding Observations on the Fifth and Sixth Reports of Peru, CAT Committee (21 January 2013) UN Doc CAT/C/PER/CO/5-6 (2013).

[36] CESCR General Comment 14 UN Doc E/C.12/2000/4 para 21.

problematic from a human rights standpoint.[37] This assertion can be invoked where the third party provides sexual and reproductive health care services but deny the survivors of rape access to EC.

A state must also ensure availability and accessibility of contraception responsive to the needs of women in all contexts.[38] The responsiveness in the provision of contraception implies that all barriers must be eliminated. Thus, the state must ensure the removal of all barriers to women's access to sexual and reproductive health services.[39] Therefore, a state is obligated to ensure that women victims of violence in the rural areas and isolated areas have access to services[40] that include access to EC.

1.6.3 Access to EC as a human right

Cook posits that human rights must not be dependent on privilege or the legal or democratic approval of other people.[41] Thus, any inherent entitlement must not be denied on the basis of approval by certain individuals in a democratic country. Failure to protect human rights is failure to comply with democratic principles. Therefore, access to emergency contraception to the survivors of rape is a human right that must be protected and claimed in a democratic state. However, a democratic claim of such a right is not justifiable according to religious leaders who do not intend to comply with democratic accountability.[42]

'Timely access to EC is not just a matter of convenience, but one of necessity,'[43] in order to meet unmet needs of women. As a result, there is a dire need to strengthen service delivery and demand generation as key strategies to achieving access to EC.[44] Women

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[37] International Conference on Population and Development Programme of Action (1994).

[38] African Commission General Comment 2 on Article 14.1 (a), (b), (c) and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (55th ordinary session, 2014) para 53.

[39] CEDAW General Recommendation 24 UN Doc A/54/38/Rev1 para 31.

[40] CEDAW General Recommendation 19 UN Doc HRI/GEN/1Rev8 para 24.

[41] RJ Cook 'Human rights and reproductive self-determination' (1995) 44 *The American University Law Review* 977

[42] Cook (n 41) 978.

[43] JE Boggess 'How can pharmacies improve access to emergency contraception?' (2002) 34 *Perspectives on sexual and reproductive health* 162.

[44] A Dawson and others 'Improving access to emergency contraception pills through strengthening service delivery and demand generation: A systematic review of current evidence in low and middle-income countries' (2014) 9 *PLOS ONE* 1.

are often unable to contact a health provider quickly.[45] EC is an essential means to provide 'secondary prevention of sexual violence' as it reduces health related harms and other effects that result from sexual violence.[46]

Women have the right to access to emergency contraception which must be affirmed by state actors.[47] Thus, a decision of a woman to use EC must be respected.[48] A table below summarises some rights relevant to EC access and availability.

Table 1: Women's right to access to emergency contraception

- Women's right to healthy, satisfying, non-procreative sex;
- Women's right to make an informed choice among all safe and effective contraceptive methods;
- Women's right to obtain emergency contraception over-the-counter without intrusive questioning;
- Women's right to use the emergency contraceptive pill as frequently as she deems necessary;
- Every child has the right to be a wanted child and not enter this world because the mother was denied access to emergency contraception;
- Rights of providers who have a conscientious objection to provision on religious or moral grounds.

Source: E Weisberg and IS Fraser (2009)

According to table 1, access to emergency contraception as a human right plays a critical role in the lives of women. The table clarifies that denying women access to EC in different ways is a violation of women's rights, and it shows that failure to provide EC over-the-counter is also a violation of this right. However, the table indicates that service providers who have a conscientious objection on the basis of religion or morality have guaranteed rights as well.

There is a debate on the rights of women's access to EC and the rights of service providers who have conscientious objection to provision of emergency contraception on religious grounds.[49] Provision of EC to the survivors of rape creates a conflict of

[45] E Weisberg & IS Fraser 'Fertility regulation: Rights to emergency contraception' (2009) 106 *International Journal of Gynecology and Obstetrics* 160.
[46] D Shaw & RJ Cook 'Improving reproductive health: Applying human rights to improve access to reproductive health services' (2012) 119 *International Journal of Gynecology and Obstetrics* 58.
[47] Weisberg & Fraser (n 45) 162.
[48] As above.
[49] Weisberg & Fraser (n 45) 162.

conscience for some Catholic hospitals.[50] It has been found that Catholic health facilities are less likely to offer emergency contraception to rape survivors than non-Catholic hospitals.[51] Conversely, Weisberg and Fraser assert that there should be no legal or religious impediments to availability of EC.[52]

A majority of women gets health care services from Catholic health facilities whose employees are expected to adhere to the Ethical and Religious Directives for Catholic Health Care Services, which foster care for the beginning of life.[53] Contrariwise, Cook disputes that religious authorities that are used to instruct employees in their duties and demand obedience to divine will are not ready to protect or recognise human rights.[54] Thus, they do not commit themselves to protect the rights of the survivors of rape. Skeeles argues that it is significant to look at the rights of rape victims to access EC versus the rights of religious freedom of Catholic hospitals, thereby proposing an ethical framework for balancing patient autonomy and religious freedom.[55] Hence, the survivors of rape should not be denied access to EC on the basis of conscientious objection.

Further, conscientious objection on the basis of religion is refuted in *Brownfield v Daniel Freeman Marina Hospital*.[56] In this case, a rape survivor lodged a case against a Catholic hospital that failed to provide her with information about EC due to linking emergency contraception to abortion, and the court concluded that EC is a 'pregnancy prevention treatment,' not a method of terminating a pregnancy. This case highlights that it is a rape survivor's right to receive medical care from a medical practitioner attending to her although rape survivors are not aware of their rights.[57] Additionally, some survivors may

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[50] CT Bradley 'Emergency contraception and physicians' rights of conscience: A review of current legal standards in Wisconsin' (2009) 108 *Wisconsin Medical Journal* 160.
[51] KD Rosenburg, JD DeMunter & J Liu 'Emergency contraception in Emergency Departments in Oregon, 2003' (2005) 95 (8) *American Journal of Public Health* 1453.
[52] n 45, 162.
[53] NB Thorne and others 'Reproductive health care in Catholic facilities' (2019) 133 (1) *Catholic Health Care Scoping Review* 105.
[54] Cook (n 41) 978.
[55] HR Skeeles 'Patient autonomy versus religious freedom: Should state legislatures require Catholic hospitals to provide emergency contraception to rape victims?' (2003) 60 *Wash Law Review* 1010.
[56] Brownfield v Daniel Freeman Marina Hospital 208 Cal.App 3d 405, 413-14 1989.
[57] YF Schaper 'Emergency contraception for rape victims: A new face of the old battleground of legal issues in the bi-partisan abortion politics in the United States' (2005) 29 *Rutgers Law Record* 9.

not know if a health facility is affiliated with a religious institution; they only become aware when they arrive at the facility to receive a service that they are later denied.[58]

In summary, states are expected to comply with international standards and norms for emergency contraception after rape. Hence, failure to compliance of these standards and norms implicates 'secondary violation' of human rights of the survivors of rape. Conscientious objection is an impediment to access to EC for rape survivors. Nevertheless, literature shows that the rights of clients should be prioritised over the rights of health care service providers. Government failure to ensure wide access to EC is a denial to women's right to life, health, benefits of scientific progress and equality in accessing health services.[59] It is therefore recommended that domestic courts uphold distribution of EC.[60] Nevertheless, Lesotho has never handed down a decision touching directly on access to EC for the survivors of rape because denial to access to emergency contraception has not yet been in litigation.

1.7 Outline of chapters

Chapter 1 provides an overview of the study and its motivation. The chapter outlines background to access to emergency contraception, the problem to access to emergency contraception, research questions and the significance of the study.

Chapter 2 focuses on the role of Catholic Church in facilitating access to EC for rape survivors and conscientious objection as a barrier to access to emergency contraception. The chapter also explores the intersection between religion, Lesotho's human rights obligations and survivors of rape in realising access to emergency contraception.

Chapter 3 is the analysis of state's obligations in realising access to EC for the survivors of rape. It also explains human rights obligations typology and right to health and its interdependence on other rights. The analysis is based on relevant treaties ratified by Lesotho at African Union and United Nations levels in order to determine how treaties ensure that survivors of rape have access to emergency contraception.

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[58] M Sloboda 'The high cost of merging with a religiously-controlled hospital' (2001) 140 *Berkerley Women's Law Journal* 152.
[59] Shaw & Cook (n 46).
[60] As above.

Chapter 4 looks into the domestic legislation and policies to determine their compliance with the state’s human rights obligations under international law. Therefore, the chapter explores the extent at which Lesotho’s human rights instruments address access to EC for the survivors of rape.

Chapter 5 are conclusions and recommendations that address the research question.

CHAPTER 2: THE ROLE OF CATHOLIC CHURCH IN FACILITATING ACCESS TO EC FOR RAPE SURVIVORS VS CONSCIENTIOUS OBJECTION

2.1 Introduction

Roman Catholism is a denomination of the Christian faith, and therefore the Catholic Church principally bases its faith on the Bible. According to the Bible, rape is as sinful as murder.[61] Thus, victims of attempted murder require health care; the same applies to the survivors of rape. This chapter aims to explore the role of Catholic Church in facilitating access to emergency contraception. Moreover, access to EC *vis-à-vis* conscientious objection in the context of constitutional and policy measures in Lesotho will be explored. Factors that facilitate access to emergency contraception will also be discussed.

2.2 History of the provision of emergency contraception and religion

The Catholic Church provided women with education on taking measures to prevent pregnancy in case of sexual assault because rape is a criminal offence of violence, not a natural act of sexual intercourse.[62] Thus, prevention of fertilisation is acceptable in this case. Sanchez holds that if a woman resists insemination by rape, she defends herself,[63] thereby not interfering with the principles of morality. Hence, she could use EC as a defence mechanism against unwanted pregnancy. In 1968, Pope Paul VI reminded Catholics that preserving life of the unborn was the law of the Catholic Church,[64] although the unborn was not described in terms of age. Nevertheless, Pope Paul VI singled out the cases of rape from the preservation of the life of the unborn. The proscription on contraception does not apply in cases of rape as explained by Pope Paul VI[65] because a good religion does not aim to have a cause loss to people.[66] Accordingly, Catholics nuns

[61] Deuteronomy 22:25 – 27.
[62] Sulmasy (n 2) 306.
[63] JT Noonan *Contraception: A history of its treatment by the Catholic theologians and canonists* (1965) 369.
[64] LJ McAndrews 'Before Roe: Catholics, Nixion, and the changing politics of birth control' (2015) 47 *Fides et Historia* 24.
[65] SS Smugar, BJ Spina & JF Merz 'Informed consent for emergency contraception: Variability in hospital care of rape victims' (2000) 90 *American Journal of Public Health* 1374.
[66] *Forum for Women, Law and Development (on behalf of Meera Dhungana) v HGM* as cited in UN Women '2011-2012 Progress of the world's women: In pursuit of justice' 17.

who were in the Congo in the 1960s were allowed to take contraceptives due to high chances of rape.[67]

Furthermore, the Catholic Church could accept the use of emergency contraception by the survivor of rape for preventing seminal fluid from entering her uterus because at this stage the semen is equated to an unjust aggressor.[68] For exemplification, an attacked woman may use a douche to prevent conception.[69] In accordance with the provided assertions, the Catholic Church does not refute the administration of EC to the survivors of rape since EC does not interfere with conception. Consequently, Catholic moralists have a fresh perspective on the provision of emergency contraception.

Catholic moralists now appreciate that EC can be provided to the survivors of rape who seek medical treatment at Catholic health care facilities; provided that their pregnancy test results come out negative. This understanding of appreciating the administration of EC implies that women should defend themselves against rapists by protecting themselves against unwanted pregnancy.[70] Hence, the health facilities have a role of ensuring access to EC to rape survivors who seek medical care at Catholic health care facilities. On the one hand, there is a debate by some Catholic moralists on the provision of EC to the survivors of rape. They contest that testing for pregnancy is enough to examine the eligibility of providing EC, and if the pregnancy is negative, the treatment can be given to the survivor.[71] On the other hand, other Catholic moralists argue that further pregnancy testing for ovulation is needed in order to find out if a woman is to be pro-life, since EC has never been scientifically proven that it never prevents early embryos from implanting in the wall of the uterus.[72] However, there is no medical test for conception at the present.[73] Therefore, this argument cannot be used to support the facilitation of pregnancy testing of ovulation that determines if a survivor of rape could be provided with emergency contraception.

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[67] G Valente 'La pilule et la légitimedéfense' (1993) 7 *30 Jours* 12.
[68] H Jone & U Adelman *Moral Theology* (1951) 541.
[69] FJ Connel *Outlines of Moral Theology* (1958) 171.
[70] Sulmasy (n 2 above) 306.
[71] RP Hamel & MR Panicola 'Emergency contraception and sexual assault. Assessing the moral approaches in Catholic teaching' (2002) 83 *Health Progress* 16.
[72] EF Diamond 'The ovulation or pregnancy approach in cases of rape?' (2003) 3 *National Catholic Bioethics Quarterly* 690.
[73] Sulmasy (n 2) 307.

This history can be invoked to ensure access to EC for the survivors of rape who receive medical care at Catholic health care facilities. Procreation should result from love, willingness and respect in order to lead happier life thereafter. Therefore, some Catholic health facilities provide rape survivors with EC in order to prevent procreation that has resulted from the violation of women's sexual and reproductive rights. Since Catholics have different perceptions about the provision of EC to the survivors of rape, it is worthwhile to look into the Ethical and Religious Directives for Catholic Health Care Services to determine whether they provide options of access to EC for rape survivors. This is a standard tool used for guidance in the provision of health care services at the Catholic health facilities.

2.3 Catholic health care directives and access to emergency contraception

The Catholic Church is committed to promoting the health care systems in countries through its health care institutions and services. Firstly, the Catholic health care ministry is committed to promote and protect human dignity with simultaneous realisation of the right to life by ensuring that people get adequate health care.[74] Adequate health care implies that clients receive comprehensive health care services at the health facilities that belong to a Catholic Church. Hence, it is expected that the survivors of rape would have been provided with emergency contraception in accordance with directives of the church in order to protect their right to life, as well as promoting their human dignity by protecting them against unwanted pregnancy. However, health facilities do not provide them with such commodities. Failure to provide EC to the survivors of rape at the Catholic health facility implies that the facility is not in compliance with the first directive because unintended pregnancy has a possibility of resulting in maternal mortality. Yet, it has been noted that EC can reduce the number of maternal fatalities.[75]

Secondly, the Catholic health care institutions are obliged to accommodate the health care needs of needy people who cannot afford health insurance,[76] because many households in developing countries are not able to purchase health insurance.[77]

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[74] United States Conference of Catholic Bishops 'Ethical and religious directives for Catholic health care services' 5th edition (2009) 10.
[75] M Hevia 'Ethical and legal issues in reproductive health: The legal status of emergency contraception in Latin America' (2012) 116 *International Journal of Gynecology and Obstetrics* 87.
[76] United States Conference of Catholic Bishops (n 74).
[77] J Schaffner *Development Economics: Theory, empirical research, and policy analysis* (2014) 580.

According to the second directive, the survivors of rape must have access to health care services provided by the Catholic health facilities. The health care services could include EC since women at the reproductive age do not have health insurance yet they are vulnerable to rape. A majority of women who are at the child-bearing age and coming from the lowest and second wealth quintile, who live in the rural areas, do not have health insurance in Lesotho.[78] Denying access to EC to the survivors of rape implies that the second directive is partially implemented by Catholic health facilities.

Thirdly, the Catholic Church health ministry is committed to contributing towards ensuring the protection of the fundamental human rights of all individuals and enable them reach their common goal on equitable basis.[79] This directive is geared towards promoting access to health care on equal and non-discriminatory basis. The survivors of rape also have a right to health that is indivisible from the right to life, and therefore, they need access to health care services that include access to EC because it is their primary need after rape. Furthermore, they have aspirations, of which they would like to achieve without interference of unwanted and unplanned pregnancy. Although Directive 3 provides for assurance of protecting human rights of all individuals and treating people equally at the Catholic health facilities, Lesotho is an exception since the survivors of rape are not provided with EC.

Fourthly, the Catholic health care recognises a right to conscientious objection by deterring medical procedures that are considered immoral by the authority of the Catholic Church.[80] This directive could be interpreted by looking at the case where Catholic health facilities have employed health professionals who are Catholics and those who are non-Catholics. The non-Catholics may not object to doing medical procedures that are not condoned by the Catholic teachings, while the Catholics may object to medical procedures which are against their religion. However, non-Catholic employees are not allowed to perform such procedures yet the directive dictates that the Catholic health care must recognise the rights of individual rights. Therefore, the church doctrine is applied

[78] Lesotho Demographic and Health Survey (2014).
[79] United States Conference of Catholic Bishops (n 74).
[80] United States Conference of Catholic Bishops (n 74).

instead of implementing the concept of individual conscience in line with the directive in delivering health care services to rape survivors.

Lastly, the Catholic health institutions do not promote or condone use of contraceptives for married couples because they interfere with procreation.[81] The directive is specific to married couples by emphasising that they are expected to procreate. Nevertheless, the survivors of rape are married and unmarried women. Thus, the directive implies that unmarried women could use contraceptives and it can also be used to invoke a standpoint that married women who have been raped did not have an intention of falling pregnant. Therefore, they can use emergency contraception. However, the practice of Catholic health facilities is contrary to the 5th directive.

It has been found that most of the directives governing the provision of health care services at the Catholic health facilities intend to promote and protect human rights of all individuals. However, their implementation is opposite to what has been written in the document. The next section will explore conscientious objection against the provision of EC to the survivors of rape at the Catholic health care facilities.

2.4 Conscientious objection

To act in respect of individuals' conscience in various activities is a fundamental human right.[82] Conscientious objection is enshrined in the Universal Declaration of Human Rights (article 18), the International Covenant on Civil and Political Rights (article 18), the Convention on the Rights of the Child (article 14), the American Convention on the Human Rights (article 12), the European Convention on human rights and fundamental freedoms (article 9), the Charter of fundamental rights of the European Union (article 10) and the African Charter on Human and Peoples' Rights (article 8) as a right.[83]

2.4.1 Conscientious objection *vis-à-vis* access to EC in Lesotho

[81] United States Conference of Catholic Bishops (n 74) 27.
[82] BM Dickens 'Conscientious objection and professionalism' (2009) 4 (2) *Expert Review of Obstetrics & Gynecology* 97.
[83] G Montari Vergallo and others 'The conscientious objection: debate on emergency contraception' (2017) 168 *Clin Ter* 116.

The Constitution of Lesotho provides that every person has freedom of conscience, including freedom of thought and religion.[84] Nevertheless, the objective of the Lesotho Health Policy is to make reproductive health services acceptable to individuals, families and communities.[85] In addition, one of the guiding principles of National Family Planning Guidelines is that no client requesting a family planning method should be sent away without a suitable method.[86] Furthermore, all individuals have right to access sexual and reproductive health services regardless of religion and this right could be fulfilled by ensuring access through various service providers and service delivery systems.[87] Thus, service providers are obliged to put aside their social and intellectual prejudices when providing health services.[88]

The guidelines and the policy do not mention the application of conscientious objection in the provision of reproductive health services at all. Furthermore, the constitution does not provide on what grounds the right to conscientious objection should be compromised. This gap is invoked to guarantee the health professionals in the health facilities owned by the Catholic Church a right to conscientious objection against the administration of emergency contraception after rape. However, it is not clear if there is substantiation of claiming conscientious objection against the provision of EC to the survivors of rape. The following sub-section points towards establishing the link and distinction between conscientious objection and access to emergency contraception.

2.4.2 Does conscientious objection deter access to emergency contraception?

The right to conscience guarantees individuals the respect and protection of the right to differ in thought, belief and religion for different reasons.[89] Thus, this right protects any clinical practice related to conscience in the health sector.[90] Conscientious objection does therefore deter access to emergency contraception for the survivors of rape. Accordingly,

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[84] The Constitution of Lesotho, 1993 sec 13(1).
[85] Ministry of Health and Social Welfare 'Lesotho Health Policy of 2011'.
[86] Ministry of Health and Social Welfare (n 4).
[87] As above.
[88] As above.
[89] CG Ngwena 'Conscientious objection to abortion and accommodating women's reproductive health rights: reflections on a decision of the Constitutional court of Columbia from an African regional human rights perspective' (2014) 58 (2) *Journal of African Law* 199.
[90] As above.

Frader and Bosk argue that conscientious objection is the abuse of professional power.[91] It should be noted therefore that conscientious objection is basically about the service provider's fundamental human rights; however, institutions do not have beliefs.[92] In fact, no clinic, hospital or health centre can claim conscientious objection.[93] Nevertheless, all health facilities that operate under the administration of Catholic Church in Lesotho do not provide contraceptives on the grounds of conscience.

In accordance with Casas' assertion that health institutions cannot claim conscientious objection, the facilities must ensure that there is enough health personnel so that there will be no clients who will be denied access to EC on the basis of conscientious objection. Hence, Catholic health facilities should not deny survivors of rape access to EC.

Catholic countries must ensure access to emergency contraception because abortion is illegal.[94] Although the Catholic Church does not condone the administration of emergency contraception because it is linked to abortion, there is a need to facilitate access to EC to the survivors of rape. That is why the Catholics interpret directives individually and each health care facility determines under what circumstances it can provide EC. Consequently, its access differs from one place to another because institutions do not have conscientious obligations.[95] Nevertheless, Dickens argues that religion may fuel conscientious objection to prescription or supply of emergency contraception,[96] even though there are no written rules that authorise conscientious objection in relation to the prescription and supply of emergency contraception.[97] As a result, Catholic health facilities do not provide emergency contraception to the survivors of rape in Lesotho.

It seems that conscientious objection creates heated debate about health care services, including emergency contraception. Firstly, there is an argument based on the assertion that the institutions that offer health care services do not have conscientious objection;

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[91] J Frader & CL Bosk 'The personal is political, the professional is not: conscientious objection to obtaining/providing/acting on genetic information' (2009) 151C *American Journal of Medical Genetics* 62.

[92] L Casas 'Invoking conscientious objection in reproductive health care: evolving issues in Peru, Mexico and Chile' (2009) 17 (34) *Reproductive Health Matters* 80.

[93] As above.

[94] Weisberg & Fraser (n 45) 161.

[95] ES Mellick 'Time for plan B: Increasing access to emergency contraception and minimizing conflicts of conscience' (2006) 9 (2) *Journal of Health Care Law and Policy* 416 – 417.

[96] Dickens (n 82).

[97] G Montari Vergallo 'Negligence and embryo protection: a new frontier for medical law?' (2014) 33 *Medical and Law* 2.

only individuals who work for such institutions can claim their conscientious objection. The implication is that the Catholic institutions should not deny their clients access to emergency contraception but devise strategies of availing or providing their clients with EC in situations of being attended by conscientious objectors. There are international norms and case law which substantiate this standpoint.

Basically, a state must oblige health workers to not deny access to sexual and reproductive health services, including emergency contraception on the basis of conscientious objection.[98] However, in situations where conscientious objection is invoked, a state must ensure that required infrastructure is available in order to facilitate timely referrals for women to non-objecting health care providers.[99] According to international norms, a state must regulate the practice of conscientious objection by obliging the consent institution to refer the clients to accessible health providers who are ready to offer required services.[100] In the case of *Greater Glasgow Health Board v Doogan and others*, two Catholic midwives refused to participate in the treatment of a woman on the basis of conscientious objection while their employer was against their refusal to undertake the treatment. They sought justice. Accordingly, the Supreme Court of the United Kingdom ruled in favour of the employer by pointing out that if conscientious objection deters a provision of health services, an objector must find a non-objecting professional and refer the client to that professional.[101] Generally, Doogan is a significantly satisfactory judgement which explains participation in conscientious objection.[102] Furthermore, the court in *Barr v Matthews* upheld that the doctor who invokes conscientious objection should refer a patient to a non-objector with immediate effect.[103] Moreover, FIGO guideline 6 provides that an objecting practitioner has a duty to refer a patient to a practitioner who does not object.[104] In a nutshell, if Catholic health facilities continue to deny their clients' access to EC on the basis of claiming conscientious

[98] African Union Commission General Comments on article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa para 31.
[99] African Union Commission (n 38) para 26.
[100] CESCR General Comment 22 UN Doc E/C.12/GC/22 para 43.
[101] *Greater Glasgow Health Board v Doogan and others* (2014) UKSC 68 para 40.
[102] C O'Neill 'Conscientious objection in Greater Glasgow Board v. Doogan and others [2014] UKSC 68' (2016) *Medical Law International* 8.
[103] *Barr v Matthews* (1999) 52 BMLR 217.
[104] International Federation of Gynecology and Obstetrics guidelines https://www.figo.org (accessed 20 February 2019).

objection, they should have strengthened organisational capacity geared towards the establishment of a referral system of the survivors of rape who may need emergency contraception.

Secondly, it is debatable if conscientious objection overrides the rights of clients. The argument is beefed up by looking into experiences of the survivors of rape whose rights have already been violated and again been denied access to medical care at the health facility. It has been noted that the state is obliged to protect sexual and reproductive rights of its people by ensuring that there is no inhibition of the performance of health services in emergency situations,[105] which include rape cases.

African Commission clarifies that a right to conscientious objection is not claimed when a woman's health condition requires emergency care or treatment.[106] Additionally, according to Guidelines on combating sexual violence and its consequences in Africa, states are duty-bound to ensure that female victims of rape have timely access to EC in order to prevent pregnancy.[107] FIGO guidelines also provide that a health practitioner must provide patients with the required medical care in emergency situations, irrespective of his/her personal objections.[108] Because of the high prevalence of violence against women, the states must ensure that there is the provision of appropriate health services to the victims of violence[109] and there should not be delays on religious grounds.[110] The health services include emergency contraception.[111]

In the judicial measures taken against conscientious objection vis-à-vis contraception, the case of *Pichon and Sajous v France*[112] is apt in this context. The case entails three women who were denied prescribed contraceptives by the pharmacists on the grounds of conscience, and the women lodged a case against the pharmacists who lodged an appeal against the complainants. Because of the decision reached by the European Court of Human Rights in this case, it has been found out that there are situations where

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[105] CESCR Committee (n 100) para 43.
[106] African Union Commission (n 98).
[107] African Commission 'Guidelines on combating sexual violence and its consequences in Africa' (2017).
[108] International Federation of Gynecology and Obstetrics guidelines (n 104).
[109] CEDAW General Recommendation 24 (n 39) para 15.
[110] CEDAW General Recommendation 24(n 39) para 21.
[111] CEDAW General Recommendation 35 CEDAW/C/GC/35 para 33c.
[112] *Pichon and Sajous v France* (2001) ECHR 898.

conscientious objection cannot override the rights of women seeking medical care, such as the survivors of rape who seek to be provided with EC. The court ruled that service providers must not give priority to their religious beliefs and impose them on clients; they can only manifest their beliefs outside the professional sphere. Besides that case, the states have an obligation of ensuring that health professionals do not obstruct patients from accessing health care services they are entitled to.[113] Therefore, conscientious objection must be compromised where women's health is at risk and there is no referral system within the objecting health facilities.

Thirdly, there is a concern that conscientious objection must be conditional so that in cases of emergencies, such as rape, the rights of the clients will be protected. It has been found out that to endure pregnancy out of rape violates women's rights.[114] Moreover, forced pregnancy is a crime against humanity[115] and a violation of personal security and interference of the woman's body.[116] Denied access to emergency contraception is an interference with woman's right to privacy that protects her right to use EC.[117] Therefore, conscientious objection of service providers and protection of the sexual and reproductive rights of the survivors of rape should be balanced. Accordingly, the government should harmonise conflicting rights and obligations.[118] The section that follows addresses how to strike a balance between conscientious objection and the rights of the survivors of rape.

2.4.3 Collision of patients' needs and the morals of service providers

Human rights are inalienable. Therefore, a right to health of the survivors of rape and the right to conscientious objection of health professionals must both be realised. The right to health interlinks with other rights,[119] and the African Commission emphasised that the right to health includes non-discriminatory access to health services to all.[120] Hence, there must be a balance between the rights of health professionals and those of the clients

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[113] *R.R v Poland* (2011) ECHR 828.
[114] R Cook & B Dickens 'Human rights dynamics of abortion law reform' (2003) 25 *Human Rights Quarterly* 11 .
[115] Rome Statute on the International Criminal Court, UN Doc A/Conf 183/9 (1998), art. 7 (1) (g).
[116] *R v Morgentaler v The Queen* 44 D.L.R (4th) 385, at 402 (1998).
[117] NK Kubasek, DC Tagliarina & C Staggs 'The questionable constitutionality of conscientious objection clauses for pharmacists' (2008) 16 *Journal of Law and Policy* 226.
[118] W Chavkin, L Swerdlow & J Fifield 'Regulation of conscientious objection to abortion: An international comparative multiple-case study' (2017) 19 *Health and Human Rights Journal* 66.
[119] E Durojaye 'Litigating the right to health in Nigeria: Challenges and prospects' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 149.
[120] Durojaye (n 119) 153.

since the right to conscientious objection of health practitioners must not affect the right to the women's health.[121] Thus, if a doctor objects to provide a client with EC, she/he must ensure that the client will get the prescription at the right time through a referral.[122] A clear and publicly known referral system must be in place and rolled out to all stakeholders who provide or need administration of EC.

Further, health professionals as experts are supposed to apply their special skills and care to prioritise the interests of their clients rather than theirs.[123] Since conscientious objection happens between the woman and the doctor, it could cause problems in a situation of urgency if the doctor is an objector.[124] Thus, the doctor as a duty-bearer has an obligation of ensuring that a raped woman as a rights-holder avoids possible adverse consequences of rape. It is argued that the right to conscientious objection is not absolute,[125] and therefore, it can be overlooked in certain circumstances where people's lives are in jeopardy. Although the constitution protects individuals' conscience, their actions may be controlled.[126] An objection must be correlated with its effect it on other people.[127] Hence, conscientious objection is less compelling when the patient requests an urgent intervention.[128] Public health care facilities that deny women access to EC discriminate against poor women in their access to care.[129] Denying women access to emergency contraception exposes them to unintended pregnancy and illegal abortion; it can further affect a child negatively and put pressure on the well-being of the family.[130] That is why there is a need to address the burdens that women would encounter if they fail to procure EC from objecting health practitioners.[131]

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[121] JL Neyro-Bilbao, M Ángel Elorriaga & J Lira-Plascencia 'Contraception and bioethics: between the conscientious objection and the autonomy principle' (2015) 83 *Ginecologia y Obstetricia de México* 127.
[122] Montari Vergallo and others (n 83).
[123] J Cantor & K Baum 'The limits of conscientious objection – May pharmacists refuse to fill prescriptions for emergency contraception?' (2004) 350 *The New England Journal of Medicine* 2009.
[124] C Ciallella, A Riccioni & E Bottoni 'New anethemas: Conscientious objection and freedom to access drugs in emergency contraception' (2012) 2 *Prevention and Research* 261 http://www.preventionandresearch.com [accessed 2 May 2019].
[125] RB Cook, MA Olaya and BM Dickens 'Ethical and legal issues in reproductive health: Healthcare responsibilities and conscientious objection' (2009) 104 *International Journal of Gynecology and Obstetrics* 249.
[126] LH Tribe *American Constitutional Law* 2nd edition (1988) 1183.
[127] Frader & Bosk (n 91).
[128] Frader & Bosk (n 91).
[129] Shaw & Cook (n 46) 58.
[130] Weisberg & Fraser (n 45) 163.
[131] JP Kelleher 'Emergency contraception and conscientious objection' (2010) 27 *Journal of Applied Philosophy* 301

Moreover, conscientious objectors must respect other's rights and freedoms as they require for their own rights.[132] They must respect the rights of the survivors of rape by accommodating their urgent need of having access to EC. Diniz posits that the claim of conscientious objection should depend on minimising risks for the woman who is in need of medical care.[133] As a consequence, a raped woman must have access to EC in order to avoid health risks she is susceptible to.

Lastly, FIGO guidelines could be used as a guiding tool to balance the effects of conscientious objection on the survivors of rape and service providers, as well as strategic actions to be taken by claimants of conscientious objection during the emergencies. They provide that in emergency situations, health practitioners must provide clients' chosen sexual and reproductive health care services despite their conscientious objection.[134] Furthermore, health practitioners must give their clients timely care if referrals to other practitioners are not possible because delay would negatively affect the clients' health and well-being, for instance, the clients might experience unwanted pregnancy.[135] Most importantly, health professionals are entrusted with a duty of ensuring provision of medical care to the clients who are in need of it. Therefore, the primary duty of health care providers is to provide their clients with medical care in order to prevent harm or health risk; ergo, any conscientious objection to providing a client with health care services is secondary to the primary duty.[136] Consequently, the International Federation of Gynecology and Obstetrics Committee has developed and rolled out guidelines for health professionals who primarily work on sexual and reproductive health.

According to the FIGO Committee, any health practitioner whose preference of conscientious objection overrides patients' interests, they have a conflict of interest.[137] Therefore, failure to provide the survivors of rape with EC due to conscientious objection implies appreciation of conflict of interest which must be worked out in the health sector, particularly in the protection of sexual and reproductive rights. Further, FIGO Committee

[132] Dickens (n 82).
[133] D Diniz 'Conscientious objection and abortion: rights and duties of public sector physicians' (2011) 45 *Rev Saúde Pública* 4.
[134] International Federation of Gynecology and Obstetrics guidelines (n 108).
[135] As above.
[136] As above.
[137] FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health 'Ethical issues in obstetrics and gynecology' (2015) 37.

provides health professionals with the following specific guidelines on ethical guidelines on conscientious objection[138]:

- To provide health care services to clients with urgency, and consider conscientious objection as a secondary duty to the provision of services to the clients;
- To abide by scientifically or professionally standardised definitions of reproductive health services by providing health care that does not mischaracterise health professionals on the basis of conscientious objection;
- In emergency situations, health care service providers are supposed to provide medical care to their clients regardless of the service providers' personal objection in order to save life.

These guidelines expound the role and responsibilities of all health professionals in relation to the promotion and protection of sexual and reproductive rights of the survivors of rape. They implicate that health professionals who deny the survivors of rape access to EC are committing secondary perpetration of violating human rights of women. Additionally, the guidelines provide that health care service providers must be more clients oriented than being sensitive to conscientious objection. As a consequence, they should have conscientious commitment. Conscientious commitment provides health practitioners with courage to address barriers to delivery of sexual and reproductive health care services in order to advance women's and girls' health[139] without prioritising conscientious objection.

The above sub-section has discussed the status quo about conscientious objection as a barrier to access to emergency contraception for the survivors of rape and the balance between conscientious objection and addressing unmet needs of the survivors who seek medical care. FIGO guidelines have been cited as a guiding tool in realising sexual and reproductive rights against conscientious objection. However, there has not yet been an exploration of what makes Catholic health care facilities claim conscientious objection against provision of emergency contraception to the survivors of rape. Some Catholics believe that the provision of EC is an act of abortion. Faúndes and others point out that

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[138]As above.
[139]BM Dickens & RJ Cook 'Ethical and legal issues in reproductive health: Conscientious commitment to women's health' (2011) 113 *International Journal of Gynecology and Obstetrics* 163.

the Catholic Church hierarchy argues that emergency contraception prevents implantation of the embryo which has the rights as a living person, and therefore the administration of EC is equivalent to murder or abortion.[140] Although abortion is an offence in Lesotho, the Penal Code guarantees the survivors of rape a right to abortion.[141] Therefore, the Catholic Church is in contravention with the law by not preventing unplanned pregnancy resulting from rape because the church is expected to draw its policies in conformity with the laws of Basotho land. There is a debate if emergency contraception is an abortifacient. Accordingly, the next sub-section discusses whether EC is an abortifacient.

2.4.4 Is emergency contraception an abortifacient?

Montanari Vergallo and others posit that 'conscientious objection can be applied in situations which may potentially infringe the right to life of the unborn.'[142] Thus, conscientious objection against the administration of emergency contraception to the survivors of rape should not be claimed because there is no right to life that has been violated. Emergency contraception should not be confused with Mifeprex which is used to terminate an established pregnancy.[143] Consequently, many religious groups believe that EC is not similar to abortion,[144] except the Catholic Church.

It then follows that EC is not an abortifacient.[145] It only inhibits ovulation or creates an unfavourable condition for a blastocyst.[146] Accordingly, this duality made the Catholic Health Association support the provision of EC to rape survivors.[147] The association states that sole prevention of conception is not against Catholic teachings and state law.[148] This raises a question as why the Catholics are persistent in maintaining that use

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[140] A Faúndes and others 'Emergency contraception under attack in Latin America: Response of the medical establishment and civil society' (2007) 15 *Reproductive Health Matters* 132.
[141] Pena Code of 2010, sec 45(2)(c)
[142] G Montari Vergallo and others 'The conscientious objection: debate on emergency contraception' (2017) 168 *ClinTer* 116.
[143] JP Kelleher 'Emergency Contraception and Conscientious Objection' (2010) 27 *Journal of Applied Philosophy* 292.
[144] J Cantor & K Baum 'The limits of conscientious objection – Many pharmacists refuse to fill prescriptions for Emergency Contraception' (2004) *The New England Journal of Medicine.*
[145] Faúndes and others (n 140).
[146] A Glasier 'Emergency postcoital contraception' (1997) 337 *The New England Journal of Medicine* 1059
145 Dickens & Cook (n 139).
[148] As above.

of contraceptives is an act of terminating pregnancy in Lesotho. It is important to establish the perception of the Catholics towards the administration of EC to the survivors of rape. If their perception is established, they could be well sensitised in order to make them classify EC related medications differently from the abortifacient since a blanket and arbitrary limitation placed on the enjoyment of EC care and services in rape situations may grossly undermine or compromise the health and socio-economic wellbeing of the survivor of rape seeking a medical attention.

We are therefore prompted to look into the intersection between science and religion, as well as human rights. In the scientific world, pregnancy only occurs when an embryo is implanted in the womb.[149] Hence there would not be conscientious objection to be claimed when a survivor of rape has been provided with EC because there is no embryo *destroyed* or *terminated*, the words that could be regarded synonymous to abortion.

Montari Vergalla and others posit that conscientious objection is applicable where the right to life that the law recognises and guarantees to the unborn might be infringed.[150] Thus, conscientious objection claim is only justiciable in the justice system provided that there are restrictive abortion laws and abortion has been performed illegally. Accordingly, different courts upheld that EC is not within the parameters of abortion.[151] In *Margaret S v Edwards*, the court concluded that abortion does not include EC.[152] After the case of *Margaret v Ewards*, there was another one where a rape survivor brought a lawsuit against a Catholic hospital that failed to educate her about emergency contraception. The Court of Appeal of California concluded that EC prevents pregnancy rather than terminating it. Consequently, a rape victim could have a cause of action for malpractice damages.[153] Thus, a survivor of rape has additional health risks on top of rape, such as unwanted pregnancy.[154] This case shows that it is woman's right to receive needed medical care from the health professional attending to her.[155] The principles of autonomy,

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[149] Montari Vergallo and others (n 142).
[150] Montari Vergallo and others (n 142) 116.
[151] YF Schaper 'Emergency contraception for rape victims: A new face of the old battleground of legal issues in the bi-Partisan abortion politics in the United States' (2005) 29 *Rutgers Law Record* 8.
[152] *Margaret S v Edwards* (3 March 1980) 488 F.Supp. 181.
[153] *Brownfield v Daniel Freeman Marina Hospital* (2 March 1989) 208 Cal. App.
[154] M Sloboda 'The high cost of merging with religiously-controlled hospital' (2001) 16 *Berkeley Journal of Gender, Law & Justice* 152.
[155] Ciallella, Riccioni & Bottoni (n 124) 9.

non-maleficence and beneficence are in favour of protecting the interests of women who are prone to unintended pregnancy due to denied access to EC on the basis of religion of health professionals.[156]

The scientific evidence reveals that emergency contraception must not be linked to abortion because EC does not interfere with the development or life of the unborn. From the human rights perspective, different courts held that the administration of emergency contraception does not contravene any law that protects a right to life of the unborn; rather, it is the protection of women whose life might be at risk due to failure to receive medical care. Therefore, the survivors of rape are entitled to access to emergency contraception because they do not terminate pregnancy but they protect their health against risks. It then follows that Catholic health facilities have a role of facilitating access to EC for the survivors of rape in Lesotho. That is why universal access to emergency contraception is defended and that defence is outlined in the following sub-section in accordance with universal access to sexual and reproductive health in the Sustainable Development Goals, of which Lesotho has adopted.

2.4.5 Defence of universal access to emergency contraception

WHO includes emergency contraception on the Model List of Essential Medicines[157] to show its significance in the sexual and reproductive health of women. Thus, Faúndes and others have identified three points in defence of universal access to emergency contraception:

- There is no proof that EC is abortifacient since there are neither studies nor experiments undertaken to substantiate the argument that an embryo is a human being. Conversely, science proves that emergency contraception is ineffective after conception.
- Prevention of unwanted pregnancy is a universal right to decide whether and when to have children and the right to access to essential medicines and benefits of the scientific progress.

[156] DM Hester, T Schonfeld & J Amoura 'Gatekeeping and personal values: misuses of personal role' (2007) 7 *The American Journal of Bioethics* 27-8.
[157] Shaw & Cook (n 129).

- 80% of women who have timely access to EC after unprotected sex prevent unwanted pregnancy.[158]

The defence is primarily based on the premise that there is lack of evidence to support those who claim conscientious objection with regard to the provision of emergency contraception. There is no scientific proof that EC is an abortifacient. Moreover, universal access to EC contributes to the promotion of women's right to health. Thus, universal access to EC reduces a number of unintended pregnancies, thereby eliminating incidences of illegal and unsafe abortions. Therefore, factors that facilitate access to emergency contraception will be discussed in the subsequent sub-section.

2.5 Factors that facilitate access to emergency contraception

Schiappacasse and Diaz identified the following factors in facilitating access to EC: acceptability, involvement of multiple stakeholders and health services factors.

Acceptability**:** For any method of contraception to be successful in its use, it must be accepted by users and service providers. Acceptability is defined in terms of the provision of services which abide by medical ethics, individuals' culture, confidentiality and sensitivity to gender and life-cycle requirements of clients.[159] Many studies that examined the acceptance of EC by potential users and health providers show acceptance of EC.[160] It is most importantly accepted in cases of rape.[161] Furthermore, different studies reveal that EC is accepted as an integral part of sexual and reproductive rights[162] that must fully be realised by states. Therefore, acceptability of EC implicates that it is needed by the survivors of rape and health care service providers who are willing to provide EC to the clients. Availability of emergency contraception and absence of restrictive laws on its use within a country show the acceptability of EC by relevant authorities and consumers. Relevant state agencies have a role of dispensing EC and regulate its dispensation. Hence, even when Catholic health facilities do not provide EC, state agencies can facilitate its access to the survivors of rape.

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[158] Faúndes and others *(*n 140) 133-134.
[159] CESCR (n 36).
[160] V Schiappacasse & S Diaz 'Fulfilling women's reproductive intentions: Access to emergency contraception' (2006) 94 *International Journal of Gynecology and Obstetrics* 303.
[161] Concluding Observations on the Fifth and Sixth Reports of Peru (n 35 above).
[162] Schiappacasse & Diaz (n 160).

Multiple stakeholders: Communication and coordination among stakeholders on the introduction of emergency contraception have shown success in the improvement of access to EC in different countries.[163] Thus, involvement of different stakeholders would result in looking into the issues of conscientious objection against the provision of EC and how to assist clients in a coordinated provision of services. The role of state agencies is coordination in this involvement through the adoption of human rights-based and results-based management approaches. Such involvement significantly refuted the opposition of Catholic Church.[164]

Health services factors: To ensure consideration of regulation of health issues in a country is crucial to the access of emergency contraception. Advocacy for including EC in the national guidelines related to reproductive health, family planning and sexual violence, particularly in developing countries could facilitate access to emergency contraception.[165] The guidelines must specify if all stakeholders are bound to dispense emergency contraception to the survivors of rape.

2.6 Conclusion

History on the provision of emergency contraception for the survivors of rape in health facilities affiliated with the Catholic Church shows that there are special cases where contraceptives are acceptable to be used as a medical attention. Rape was considered to be unacceptable act of which women need to defend themselves against, and the Bible condemns rape. Moreover, administration of EC should not be linked to abortion because EC is administered before conception. Besides the history, Catholic health care directives promote right to health and life. Thus, this could be invoked in the administration of emergency contraception in cases of rape. Further, the directives provide guidelines on married couples and procreation; they are silent about unmarried people or forced sex. Therefore, the administration of EC to the survivors of rape is neither prohibited by the directives. The debate on conscientious objection vis-à-vis access to emergency contraception expounds pro-life and pro-choice concepts, as well as strategies of establishing a balance between conscientious objection and EC. Finally, the justification

[163] As above.
[164] As above.
[165] Schiappacasse & Diaz (n 160) 304.

of universal access to emergency contraception and factors that facilitate access to EC were discussed in relation to the realisation of the right to access to emergency contraception by the survivors of rape.

CHAPTER 3: LESOTHO'S OBLIGATIONS TO FACILITATE EMERGENCY CONTRACEPTION FOR THE SURVIVORS OF RAPE

3.1 Introduction

The previous chapter explored the role of the Catholic Church in facilitating access to emergency contraception for the survivors of rape and conscientious objection as a barrier to access to EC. It has been noted that it is essential to provide the survivors of rape with emergency contraception in order to avoid unbearable consequences of rape such as severe suffering from psychological pain due to forced motherhood and likelihood to attempt suicide.[166] Further, as denial to abortion may prompt unsafe abortions that can result in severe illness, disability or death,[167] the same consequences can be experienced by the survivors of rape who have been denied access to EC. Accordingly, Lesotho is obliged to promote access to EC as a reproductive right of the survivors of rape through the implementation of state human rights obligations entailed in human rights treaties.

International human rights treaties are binding. Nevertheless, the application of treaties is determined by the type of a legal system of a country: monism in the civil law or dualism in the common law. In monist states, application of treaties is executed hereupon the ratification of a treaty.[168] In dualist jurisdictions, international law can only be applicable when its articles have been domesticated into a national law.[169] Lesotho is a dualist. Hence, treaties are not self-executing but they must be domesticated into national laws and administrative regulations so as to enforce them.[170] Consequently, the CEDAW Committee expressed its concern of no direct domestic application of CEDAW in Lesotho.[171] However, Shale argues that the jurisprudence of the courts of Lesotho reflects a mixture of dualism and monism in practice.[172]

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[166] *LC v Peru*, Communication 22/2009, CEDAW Committee (4 November 2011),CEDAW/C/50/D/22/2009.
[167]Mavundla & Ngwena (n 14) 62.
[168] J Dugard *International Law: A South African perspective* (2011) 46; G Simpson *The nature of international law* (2001) 1; JL Brierly *The law of nations: An introduction to the law of peace* (1967) 1.
[169] M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic rights litigation in Africa* (2010) 9.
[170] CMW Committee *The initial state party report of Lesotho* (1 December 2015) UN DOC CMW/C/LSO/1 para 1.
[171] Concluding Observations on the Initial to Fourth Reports of Lesotho, CEDAW Committee (8 November 2011) UN Doc CEDAW/C/LSO/CO/1-4 (2011) para 10.
[172] IM Shale 'Domestic implementation of international human rights standards against torture in Lesotho' PhD thesis, University of the Witwatersrand, 2017 130.

This chapter will analyse state's obligations in realising access to emergency contraception for the survivors of rape of different groups. The analysis will be based on the provisions of international and regional human rights instruments such as International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of Persons with Disabilities (CRPD), Convention on the Rights of the Child (CRC), African Charter on Human and Peoples' Rights (ACHPR), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), African Charter on the Rights and Welfare of the Child (ACERWC) and SADC Protocol on Gender and Development. The chapter will begin with the description of the typology of human rights obligations.

3.2 Human rights obligations typology

The UN human rights treaty bodies use a tripartite typology of how the states should secure human rights obligations: respect, protect and fulfil human rights.[173] The obligation to respect the human rights obliges states to avoid taking measures that can consciously violate the rights of citizens, either through states organs or agents.[174] Thus, the sexual and reproductive rights of the survivors of rape require the state and its employers to desist from restricting women's autonomous choices regarding health care,[175] and therefore states are expected to indicate how both public and private health-care providers comply with their duties of respecting women's right to have access to health care[176] such as emergency contraception.

The obligation to protect requires the state to proactively ensure that third parties do not violate human rights within its jurisdiction.[177] Therefore, a state is bound to protect reproductive rights of women by ensuring that its agencies and officers take actions to prevent human rights violations committed by private individuals and organisations.

[173] F Mégret 'Nature of obligations' in D Moeckli, S Shah & S Sivakumaran *International Human Rights Law* (2013) 101.
[174] Mégret (n 173) 102.
[175] RJ Cook & M Fathalla 'Duties to implement reproductive rights' (1998) 67 *Normadic Journal of International Law* 4.
[176] CEDAW (n 39) para 14.
[177] Mégret (n 173) 102.

Hence, a state cannot avoid its human rights obligations by delegating powers to private entities[178] like privately owned health facilities. A state must ensure that women and girls who are victims of gender-based violence have access to appropriate health care services.[179]

The obligation to fulfil human rights requires states to create enabling environment for the enjoyment of sexual and reproductive rights of women and girls such as having access to emergency contraception. Thus, a state must take different measures to ensure the achievement of women's full realisation of their human rights,[180] and a state cannot delegate or transfer this obligation to private sector agencies.[181]

The discussed tripartite typology will be used to explore the realisation of the right to life and right to health as well as the rights of women with disabilities and the rights of children in the context of access to EC. The right to religion will be a concomitant of the two rights in relation to access to EC for the survivors of rape.

3.3 The right to life

The right to life is guaranteed in different human rights instruments at international and regional levels. ICCPR recognises the protection of the right to life as it enjoins states not to derogate from prohibition of arbitrary deprivation of anyone's life.[182] Accordingly, the Human Rights Committee expounds inherent right to life by urging states to adopt positive measures that can increase life expectancy.[183] Further, the sixth commandment in the Bible states, 'Don't kill.'[184] Hence, the Bible also guarantees a right to life and the Catholics' doctrine is based on the Bible which has this commandment, thereby clarifying that Lesotho is obliged to guarantee a right to life. Accordingly, the High Court of Zimbabwe in *S v Chirembwe* ruled that it is the state's responsibility to protect women against any human rights violations,[185] including a right to life.

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[178] Cook & Fathalla (n 175) 5 – 6.
[179] CEDAW Committee (n 11) para 15.
[180] Cook & Fathalla (n 175) 7.
[181] CEDAW Committee (n 176) para 17.
[182] ICCPR art 6.
[183] Human Rights Committee General Comment 6 HRI/GEN/1/Rev9 (30 April 1982) para 5.
[184] Exodus 20:13.
[185] *S v Chirembwe* (2015) ZWHHC 162, CBR No. R 1006/12 Zimbabwe High Court.

Since human rights are interdependent, a right to life linked to increased life expectancy cannot be realised without the protection and promotion of the right to health. Thus, denying the survivors of rape access to emergency contraception counts for maternal mortalities or other fatalities due to unsafe and illegal abortions or emotional sufferings caused by unwanted pregnancy. In *Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal & Another*, the Indian Supreme Court upheld that the denial of timely medical treatment needed to save human life in government hospitals violates the right to life.[186] Therefore, religion should not override the right to life where public health facilities should protect the life of the survivors of rape by providing them with EC in order to avoid consequences of rape as stated in chapter 2. Rape has long-term effects such as sexually transmitted diseases, post-traumatic stress syndrome and unwanted pregnancy[187] which need to be attended to with urgency. Accordingly, the Ethical and Religious Directives for Health Care Services in directive 36 demonstrate that the protection of the survivors of rape from possible consequences of rape is within the jurisdiction of the Catholic hospitals.[188]

Cook posits that many developing countries are notorious for maternal mortality because religious beliefs mask its occurrences that could have been prevented by available interventions,[189] such as provision of EC. Furthermore, ICCPR provides that freedom to manifest religion is subject to limitation on the basis of protecting health or the fundamental rights of other people.[190] The CEDAW committee explains that women's right to life which must be free from gender-based violence is both indivisible and interdependent with the right to health.[191] Moreover, the Committee on the Rights of the Child is concerned at the killings of children in Lesotho and urges the state to take immediate measures to prevent deaths of children.[192]

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[186] *Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal & Another* (1996) AIR SC 2426, SCC 37, para 9.

[187] KM Raviele 'Levonorgestrel in cases of rape: How does it work?' (2014) 81 *The Linacre Quarterly* 117.

[188] As above.

[189] Cook (n 41) 994.

[190] ICCPR (n 182) art 18.

[191] CEDAW General Recommendation 35 UN Doc CRC/C/LSO/CO/2, para 15.

[192] Concluding Observations on the Second Report of Lesotho, CRC Committee (25 June 2018) UN Doc CRC/C/LSO/CO/2 (2018) paras 20-21.

In *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others,* the Constitutional Court dealt with the issue of balancing religious rights of parents against the best interests of the child by ruling that parents have an entitlement to discipline their children, but any use of violence based on religion is unconstitutional as it has been found that some parents reportedly abused their children under the guise of religion.[193] The court further held that some parents' religious practices have injurious effects on children. Thus, the Court cited *Christian Education South Africa v Minister of Education* where the Court reaffirmed that the best interests of the child are of paramount importance in every matter that concerns a child and the religious rights of the parent do not override the best interests of the child.[194] Accordingly, religious beliefs of the Catholics should not constitute a breach in the best interests of the child in having access to EC in order to prevent unplanned pregnancy and save her life.

Therefore, Lesotho has an obligation thereto to ensure that the survivors of rape are not debarred from accessing EC on the grounds of religion because their health is at risk. They also have fundamental rights that must be protected. It then follows that health facilities which operate under the auspices of the Catholic Church have stake to protect the right to health and the right to life of the survivors of rape under state obligations and Christianity principles.

3.4 The right to health

The right to health is enshrined in ICESCR as it realises the right of 'everyone to the enjoyment of the highest attainable standard of physical and mental health.'[195] States parties thereto are duty-bound to create enabling conditions for the assurance of medical services to all.[196] The Committee on Economic, Social and Cultural Rights (CESCR) clarifies that the right to sexual and reproductive health is an essential part of the right to health enshrined in article 12 of the covenant, and therefore, barriers to access to sexual and reproductive services must be prohibited.[197] Furthermore, states are obliged to address social determinants manifested in institutions and social practices with the aim

[193] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* 2019 ZACC 34
[194] *Christian Education South Africa v Minister of Education* 2000 ZACC 11
[195] ICESCR, art 12 (1).
[196] ICESCR, art 12 (1) para 2d.
[197] CESCR General Comment 22 UN Doc E/C.12/GC/22, paras 1-2.

of preventing individuals to effectively enjoy their sexual and reproductive health in practice.[198]

CEDAW recognises a right to health by obliging states thereto to take appropriate measures that enable women on the basis of gender equality in having access to health-care services related to family planning,[199] including emergency contraception. The treaty further obligates states to ensure that women receive appropriate services related to pregnancy.[200] Moreover, forced pregnancy and ill-treatment of women and girls is equivalent to torture or cruel, inhuman or degrading treatment.[201]

It then follows that the state is not in compliance with article 12 of CEDAW. As a result, the CEDAW committee is concerned about limited access by women to quality sexual and reproductive health services particularly in the rural and remote areas.[202] The state is urged to remove barriers to access to family planning services which include emergency contraception for the survivors of rape in the rural and remote areas.[203] It has been noted that limited access to family planning services exacerbates women's susceptibility to maternal mortality.[204]

The right to health is also recognised and protected in the African human rights system. Article 6(1) and (2) of ACHPR provides that 'every individual shall have the right to enjoy the best attainable state of physical and mental health,' and therefore states should ensure the protection their people's health and the receipt of required medical attention.[205] Moreover, article 14 of the Maputo Protocol realises women's right to access to emergency contraception after rape. Article 23(2) of the SADC Protocol on Gender and Development provides that states parties must ensure accessible health care services that redress cases of gender based violence, including rape, while article 26(b) obligates states to have policies and programmes that address sexual and reproductive health needs of women and men.[206] Sexual and reproductive health of women must be

[198] As above, para 8.
[199] CEDAW, art 12 para 1.
[200] As above, para 2.
[201] CEDAW Committee (n 165) para 8.
[202] Concluding Observations on the Initial to Fourth Reports of Lesotho (n 170) para 32.
[203] As above.
[204] Concluding observations of the Human Rights Committee on Kenya, para 14, UN Doc CCPR/CO/83/KEN (2005).
[205] African Charter, art 16(1) & (2).
[206] SADC Protocol on Gender and Development, arts 23 & 26.

respected and promoted, including the right to decide whether to have children, the number and spacing of children as well as the right to choose any contraception methods; the state must ensure access to health services.[207] This is an essential initiative for African women whose sexual and reproductive health rights have previously been ignored.[208] Accordingly, states must ensure that the survivors of rape have access to EC in order to enable them avoid unwanted pregnancy.[209]

However, Balogun and Durojaye argue that to realise a right to health is still a challenge in Africa as the region is characterised by a 'burden of sexual and reproductive ill-health'.[210] They further affirm that sexual and reproductive health remains a challenge because it is an emerging issue and integral to right to health.[211] However, the African Commission can hold states accountable to their obligation to advance sexual and reproductive health and rights,[212] particularly for marginalised groups such as women and girls. Additionally, Ngwena and Durojaye assert that to realise sexual and reproductive rights domestically in the African context is precarious; as a result, they are denied on a large scale.[213]

There are essentials to consider for realising a right to health. In order for individuals to fully exercise and enjoy the right to health in recognition of sexual and reproductive health rights, the CESCR introduced four minimum core essentials that must be guaranteed by state parties. The state must firstly ensure availability of sexual and reproductive health by having enough functioning health-care facilities that provide SRH services that include emergency contraception.[214] Unavailability of the required services due to the claim of conscientious objection must not be a barrier as there should be effective and efficient referral system in place.[215] Therefore, the state should establish a regulated referral

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[207] Maputo Protocol, art 14.
[208] M Geldenhuys and others 'The African Women's Protocol and HIV: Delineating the African Commission's General Comment on articles 14(1)(d) and (e) of the Protocol' (2014) 14 *African Human Rights Law Journal* 683.
[209] African Commision (n 106) 26.
[210] V Balogun & E Durojaye 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights' (2011) 11 *African Human Rights Law Journal* 369.
[211] Balogun & Durojaye (n 210) 373.
[212] Balogun & Durojaye (n 210) 371.
[213] C Ngwena & E Durojaye 'Strengthening the protection of sexual and reproductive health through human rights in the African region: An introduction' (2014) in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* 1.
[214] ICCPR (188) paras 12 & 13.
[215] ICCPR (188) para 14.

system for the health facilities that operate under the administration of the Catholic Church in order to guarantee the survivors of rape access to EC. Hence, Lesotho must increase women's access to health-care facilities and medical assistance.[216]

Secondly, emergency contraception must be physically, affordably and publicly accessible to all individuals without barriers.[217] Thus, the state has a statutory obligation to ensure that the survivors of rape have access to emergency contraception. Accordingly, the CEDAW Committee urges Lesotho to fortify and increase access to contraceptives countrywide.[218]

Thirdly, a state is obligated to ensure that all health facilities provide sexual and reproductive health services which are gender-sensitive and acceptable in terms of culture of different individuals or groups; however, they do not justify the refusal to provide tailored services to specific groups,[219] such as the survivors of rape.

Fourthly, quality services and goods are essential in the provision of sexual and reproductive health care services.[220] In Lesotho, most of the maternal deaths occur in the rural areas since women's access to quality sexual and reproductive health services is limited.[221] Accordingly, the CEDAW Committee is concerned at the high maternal mortality rates in Lesotho. Therefore, Lesotho does not have compliance to the four core essentials of ensuring access to EC for the survivors of rape.

In the case of *Purohit and Anor v The Gambia*, the African Commission upheld that the right to health is interdependent to the realisation of other fundamental human rights and freedoms as it entails 'access to goods and services to be guaranteed to all without discrimination of any kind.'[222] Nevertheless, many women in African states still experience discrimination on the grounds of religion.[223] That is why the CEDAW Committee is

[216]Concluding Observations on the Initial to Fourth Reports of Lesotho (n 171) para 33b.
[217] ICCPR (188) paras 15-19.
[218]Concluding Observations on the Initial to Fourth Reports of Lesotho (n 169) para 33c.
[219] ICCPR (188) para 20.
[220] ICCPR (188) para 21.
[221] World Population Review 2014 'Lesotho Population 2014' www.worldpopulationreview.com/countries/lesotho-population (accessed 27 May 2019).
[222] *Purohit and Anor v The Gambia* AHRLR 96 (ACHPR 2003) para 80.
[223] M Ssenyenjo 'Culture and the human rights of women in Africa: Between light and shadow' (2007) 51 (1) *Journal of African Law* 39.

bothered about the absence of a specific elimination of discrimination against women as defined by the convention.[224]

Thus, the state is duty-bound to ensure that the survivors of rape are not denied access to EC either by government health facilities or health facilities owned by the third party. The committee is concerned that states relinquish their obligation of protecting and fulfilling sexual and reproductive rights of women and girls and transfer them to private agencies, yet states are expected not to absolve themselves of such responsibility.[225] In a similar manner, Lesotho seems to have transferred state powers related to health sector to Catholic church because the state is not taking any measures against the practice of Catholic owned health facilities when they do not provide the survivors of rape with EC.

Women with disabilities are more vulnerable to rape than other women. The next sub-section discusses the right to health of women with disabilities in the context of access to EC.

3.5 The rights of women with disabilities

The CEDAW committee recognises the right to health of women with disabilities and urges states parties to CEDAW thus, 'special attention should be given to the health needs and rights of … women with physical or mental disabilities.'[226] Their vulnerability to rape makes it necessary for them to have responsive health care services that include provision of EC after rape. CRPD committee is concerned about a violation of sexual and reproductive rights of women and girls with disabilities and thus urges the states to consider this as a main area of concern.[227] Therefore, states parties thereto are obliged to take measures that ensure that persons with disabilities have access to sexual and reproductive health services and prevent discriminatory denial of such services.[228] Thus, Lesotho is duty-bound to ensure that all health facilities are easily accessible to women with disabilities[229] in order to provide them with needed medical treatment so that they can fully enjoy their right to health. However, Basotho women with disabilities are

[224] Concluding Observations on the Initial to Fourth Reports of Lesotho (n 171 above) para 12.
[225] CEDAW General Comment 24 (n 36) para 17.
[226] As above.
[227] CRPD Committee, Draft General Comment 3.
[228] CRPD, art 25.
[229] I Shale 'Sexual and reproductive rights of women with disabilities: Implementing international human rights standards in Lesotho' (2015) 3 *Disability Rights Yearbook* 42.

vulnerable to sexual abuse that increases their susceptibility to HIV and other STIs.[230] They are also denied access to sexual and reproductive services due to attitudinal barriers.[231]

According to the findings of the Living Conditions study, women with disabilities aged 15 years encountered more incidents of infant mortality than women without disabilities of the same age.[232] In the rural areas, they are at higher risk of maternal and infant mortalities due to not accessing sexual and reproductive health services that accommodate their needs.[233] High maternal and infant mortalities identified from teenagers with disabilities imply that adolescent girls with disability, who have been raped, do not have access to emergency contraception. Therefore, Lesotho is failing to comply with its obligations provided in CRPD on the right to health. For women and girls with disabilities, it seems that failure to access to EC is not only due to denial of the Catholic owned health facilities, but it is a societal issue.

Children are another vulnerable group that needs to be explored. The next sub-section dwells on the rights of raped children in relation to access to EC.

3.6 The rights of the child

Sexual violence against children is rife in Lesotho, and there is a need for improved services.[234] Female adolescents are often victims of rape.[235] There are also grave challenges that raped children face in accessing quality medical care at the health facilities.[236] Furthermore, abused children seldom receive health care services that do not meet their needs.[237] Conversely, article 24 of CRC obligates states to ensure that no child is denied a right to access to health-care services[238] while article 34 provides that children

[230] LNFOD 'Situational assessment analysis study of HIV/AIDS and persons with disabilities in Lesotho' (2011) Situational Assessment Study 11.
[231] As above.
[232] Y Kamaleri & AH Eide 'Living conditions among people with disabilities in Lesotho: A national representative study' (2011) *SINTEF Technology and Society Global Health and Welfare* 53.
[233] Shale (n 229) 38.
[234] AIDSTAR-One Report 'Situational analysis on post-rape care of children in Lesotho' (2013) 11.
[235] MP Poirier 'Care of the female adolescent rape victim' (2002) *Pediatric Emergency Care* 53.
[236] As above.
[237] CRC Committee *Shadow report of Lesotho* (2017) para 240.
[238] CRC, art 24 para 1.

must be protected against sexual abuse.[239] Accordingly, the CRC committee is concerned about lack of access to adolescent-responsive sexual and reproductive health services that results in putting adolescent girls at most risk of dying or suffering from lifelong injuries in pregnancy and childbirth. Hence, states are urged to ensure that adolescent girls have access to sexual and reproductive health services that include emergency contraception.[240] In its concluding observations on Lesotho's report, the CRC committee expressed its concern on increasing sexual abuse of school girls and girls who work as domestic workers.[241] Thus, the committee urges Lesotho to ensure that children have access to basic services.[242]

State's failure in ensuring access to EC for female adolescents who are survivors of rape results in negative consequences both to the survivor and her child who was born as a result of rape. Other children's rights are violated due to failure to get access to emergency contraception. For instance, a pregnant girl is no longer considered as a child who needs her parents' care and affection,[243] because of the pregnancy caused by rape. Rape has health effects on adolescent girls such as the rupture of the womb and child mortality.[244] Moreover, younger survivors of rape may experience virginal fistula during the birth because teenage pregnancy may cause virginal fistula.[245] Rape also has socio-economic effects because some pregnant adolescents are unable to continue with school due to fear of stigmatisation and children born from rape are at risk of becoming street children because of being not accepted in the society.[246]

The state's practice of giving Catholic owned health facilities immunity from providing EC to the survivors of rape implicates state's unaccountability in protecting the rights of girl children in Lesotho. Therefore, Lesotho does not fulfil the obligations enshrined in the Convention on the Rights of the Child.

[239] CRC, art 34 para 1.
[240] CRC General Comment 20 UN DOC CRC/C/GC/20 para 59.
[241] Concluding Observations on the Second Report of Lesotho (n 192) para 30.
[242] Concluding Observations on the Second Report of Lesotho (n 192) para 1.
[243] H Liebling, H Slegh & B Ruratotoye 'Women and girls bearing children through rape in Goma, Eastern Congo: Stigma, health and justice responses' (2012) 4 *Itupale Onlline Journal of African Studies* 22.
[244] Liebling, Slegh & Ruratotoye (n 243) 25.
[245] A Ajuwon 'Vesico vaginal fistula in Nigeria: Extent of the problem & strategies for prevention & control' in BE Owumi (ed) *Primary health care in Nigeria* (1997) 27.
[246] Liebling, Slegh & Ruratotoye (n 243) 24.

Mezmur posits that ACERWC customises application of CRC in the African context.[247] The overall goal of ACERWC is based on the best interests of the child principle, thereby integrating the best interests of the child in all interventions geared towards the protection of a child.[248] Hence failure to provide raped girl children with EC suppresses the interest of not wanting to fall pregnant by girl children. Accordingly, in *International Pen and Others v Nigeria*, it was maintained that to force an individual to act against his will or conscience is inhuman and degrading treatment.[249] Thus, it is torture to force girl children who are survivors of rape to be pregnant against their will by denying them access to EC. The CRC committee recommends that Lesotho should strengthen its efforts to realise the right of the child to have his or her best interests taken as a priority.[250]

Furthermore, denying girl children access to emergency contraception after rape directly tempers with evolving capacities of the child because children will be entrusted with a responsibility of carrying pregnancy and parenting. Teenage pregnancy may impede a girl's healthy development and negatively affect her full potential and enjoyment of her fundamental human rights.[251] The impact of teenage pregnancy can be endured throughout a girl's entire life as well as being experienced in the next generation.[252] Thus, the state's failure to provide access to EC for the survivors of rape at the adolescent stage poses more human rights violations and problems for girls. Therefore, a state must be held accountable. *Mildred Mapingure v Minister of Home Affairs & others* case exemplifies a state's failure to protect the rights of young survivors of rape. Mapingure was attacked and raped at home; she immediately reported the matter to the police whom she requested to assist her to go to a doctor to get emergency contraception but her request failed since she went to the doctor alone where she was sent back on the ground that she could be treated in the presence of the police officer.[253] On the following day, Mapingure went to the police station where she was informed that the officer who served her on the previous day was absent. She was therefore attended by a medical practitioner after

[247] BD Mezmur 'The African Committee of experts on the rights and welfare of the child: an update' (2006) 6 (2) *African Human Rights Law Journal* 550.
[248] African Charter on the Rights and Welfare of the Child, article 4.
[249] *International Pen and Others v Nigeria,* 2001 AHRLR 75 (ACHPR 1994) para 79.
[250] Concluding Observations on the Second Report of Lesotho (n 192) para 19.
[251] MAM Suan, AH Ismail & H Ghazali 'A review of teenage pregnancy research in Malaysia' (2015) 70 (4) *Medical Journal of Malaysia* 214.
[252] As above.
[253] *Mildred Mapingure v Minister of Home Affairs & others* HH 452/12 1-2.

sometime when she was accompanied by another police officer. Unfortunately, she could not be provided with EC because the prescribed 72 hours had already elapsed, and she was later confirmed pregnant. Mapingure lodged a case which was eventually decided by the Supreme Court of Zimbabwe where the Court upheld that both the doctor and police had failed to assist the appellant to prevent pregnancy due to their negligence.

The committee on the rights of the child is concerned about high rate of teenage pregnancies and limited access to sexual and reproductive health services for adolescents. As a result, the committee urges the state to ensure access to sexual and reproductive health services geared towards preventing early pregnancy.[254]

3.7 Conclusion

It has been noted that contraceptive services are needed for fulfilling the right to health[255] which is interdependent on the right to life. Lesotho has ratified relevant treaties at African Union and United Nations levels in order to ensure that there is access to emergency contraception for the survivors of rape. Conversely, concluding observations of different human rights treaty bodies show that the state fails to comply with its obligations to ensure access to EC for the survivors of rape.

CHAPTER 4: NATIONAL LAWS AND POLICIES RELEVANT TO ACCESS TO EMERGENCY CONTRACEPTION FOR THE SURVIVORS OF RAPE IN LESOTHO

4.1 Introduction

Laws and policies serve no purpose if they are not implemented nor do they not address the needs of the people. Moreover, it is significant to analyse the legislation and policies

[254] Concluding Observations on the Second Report of Lesotho (n 192) paras 47-48.
[255] CESCR General Comment 14 (n 36) & CEDAW General Recommendation 24 (n 39).

to determine their compliance with the state's human rights obligations under international law with the purpose of assessing the state's commitment to meeting sexual and reproductive health need of the survivors of rape. This chapter will explore the extent at which the Constitution, laws and policies of Lesotho address the issue of access to EC for the survivors of rape.

4.2 The Constitution

According to Fombad, modern African constitutions in Anglophone countries reflect aspirations and desires of the people.[256] Nevertheless, little attention was given to their full implementation, thereby serving no purpose.[257] The Constitution of Lesotho does not have specific provisions relating to the protection of the survivors of rape or their sexual and reproductive health needs. The right to health is non-justiciable because it is socio-economic right in the Constitution of Lesotho. Nevertheless, some of the provisions in the Bill of Rights can be invoked to advance the right to access to EC for the survivors of rape. For example, in the case of *C.P.C v Nyako,* the Supreme Court of Nigeria upheld that any matter that links to the constitutional interpretation of the legal rights of applicants results in the use of a wide interpretation which encapsulates a liberal approach or global view.[258] Thus, the constitutional provisions to be invoked are: a right to life, freedom from inhuman treatment, right to respect for private and family life, freedom from discrimination and right to the equal protection of the law.

The duty to protect the right to life is an obligation of a state to take legislative measures or other measures that protect life from all threats caused by individuals and entities.[259] Furthermore, states should develop and implement legal and administrative frameworks to respect, protect, promote and fulfil the right to life.[260] Section 5 of the Constitution guarantees the right to life. It provides that 'Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life.'[261] Nevertheless, the constitution does not clearly stipulate that women who have been raped have a prerogative to have access

[256] CM Fombad 'Introduction' in CM Fombad (ed) *The implementation of modern African constitutions: challenges and prospects* (2016) 2.
[257] As above.
[258] *C.P.C v Nyako* (2011) 17NWLR (Pt 1277) 458.
[259] Human Rights Committee General Comment 36 UN DOC CCPR/C/GC/36 para 18.
[260] African Commission General Comment 3 para 8.
[261] The Constitution of Lesotho, 1993 sec 5(1).

to EC in order to avoid health risks as the right to life is interdependent on the right to health. The right to health is closely related to and dependent upon the realisation of the right to life.[262] Therefore, violation of the right to health is concurrently a violation of the right to inherent life. For example, in *Pachim Banga Khet Majoor Samity v State of West Bengal*, the Indian Supreme Court upheld that the government hospital failure to provide emergency treatment to a citizen is equated to a violation of the right to life.[263] Moreover, a Nigerian court pointed out that the government violated the right to life protected in the Constitution and the right to health recognised in the African Charter when the state was endangering the health of people in Iwherekan community of Delta State.[264] The case of *International Pen and others (On behalf of Ken Saro-Wiwa) v Nigeria* also links a right to health to the right to life; the African Commission clarified that the protection of the right to life in article 4 of the Charter includes a state obligation of not letting a person die in its custody as one person's life was seriously endangered due to denial of medication during detention.[265]

The above cases implicate that Lesotho must take measures that ensure access to EC for the survivors of rape in order to prevent unnecessary loss of life due to resultant ill-health after rape. Thus, the judiciary is expected to consider denial of access to EC in public health facilities for the survivors of rape as a failure of the state to protect the lives of women and girls. In addition, this shows failure to comply with international norms and standards. The constitution is in accordance with Catholic doctrine as stated in chapter 2 that Pope Paul VI declared that good religion must not cause loss to anyone. The Catholic health care ministry is also committed to protect the right to life. Therefore, religion guarantees a right to life although there are situations where this right is infringed on the basis of religion, particularly when contraceptives are needed for saving the life of a woman. Hence, conscientious objection of health practitioners must not affect the right to the women's health.[266]

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[262]CESCR General Comment 14 (n 36).

[263] *Pachim Banga Khet Majoor Samity v State of West Bangal* (1996) 4 SCC 47.

[264] Gbemre v Shell Petroleum Development Company (2005) Suit No. FHC/B/CS/5305 (unreported) http://www.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbember-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.html (accessed 8 June 2019).

[265] *International Pen and Others (On behalf of Ken Saro-Wiwa) v Nigeria* (2000) AHLR 212 (ACHPR 1998).

[266] Neyro-Bilbao, Ángel Elorriaga & Lira-Plascencia (n 121).

Women's rights entail a right to dignity that encompass sexual and reproductive health.[267] The right to dignity implicates that the status of all people must be acknowledged.[268] Therefore, a state is obliged to secure a dignified life for all.[269] Shale posits that the obligation of the state against torture is to provide redress to victims of torture.[270] In this regard, the Constitution of Lesotho guarantees the right to freedom from torture as a non-derogable right, and Section 8 provides that no one should be subjected to torture or inhuman or degrading punishment or treatment.[271] Failure to facilitate access to EC to survivors of rape is in contravention of CAT, thereby adversely affecting their dignity.[272] Thus, this failure is torture.

Moreover, unfair treatment of women who seek reproductive health services may cause lasting physical and emotional sufferings in institutional settings.[273] The survivors of rape encounter multiple violations of human rights. As a consequence, denying them access to EC is torture and humiliation because they are forced to carry pregnancy, thereby violating a right to human dignity. The right to dignity guarantees the freedom to make personal decisions without interference from the State or third parties.[274] Consequently, to force a woman to keep pregnancy from rape causes further adverse effects on her physical and mental health.[275] Although the constitution guarantees a right to human dignity, the state is not in compliance with its human rights obligations because the survivors of rape are still denied access to EC in health facilities on the grounds of conscientious objection. Thus, the right to conscientious objection must violate other's rights and freedoms.[276] The claim of conscientious objection should accommodate reasonable rights and values for a just society so as to make everyone have freedoms.[277]

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[267] UN Working Group on the issue of discrimination against women in law and in practice.
[268] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1999(1) SA, para 29.
[269] African Commission (n 260) para 6.
[270] Shale (n 172) 2.
[271] The Constitution of Lesotho, 1993 sec 8.
[272] Concluding Observations on the Fifth and Sixth Reports of Peru (n 13).
[273] JE Méndez Report of the Special Rapporteur on Torture, Cruel, Inhuman and Degrading Treatment (2013) A/HRC/22/53 para 46.
[274] African Commission (n 38).
[275] African Commission (n 38) para 37.
[276] Dickens (n 82).
[277] Diniz (n 133).

The right of a woman to decide about her reproductive system is her fundamental right to privacy.[278] According to Durojaye, the right to privacy can be implicated to the right of individuals to be free from different forms of non-consensual interference with their bodies in relation to sexual health.[279] The Constitution of Lesotho guarantees the right to respect for private and family life.[280] Thus, the survivors of rape have a constitutional right to privacy. However, some survivors of rape who receive health care services at the health facilities owned by the Catholic Church do not enjoy this right because they are forced to fall pregnant due to denied access to EC.

The case of *Roe v Wade* could be used to invoke the right to privacy of the survivors of rape with regard to access to emergency contraception because the US Supreme Court justified its decision that a woman has a right to privacy to terminate a pregnancy within its early stage.[281] Furthermore, the Centre for Reproductive Rights and United Nations Population Fund note that failure to access to EC deter women's and girls' ability to make informed and autonomous decisions about their personal lives and health, thereby violating their right to privacy.[282] That is why it has been noted that new Catholic moralists appreciate that the survivors of rape must protect themselves against unwanted pregnancy from rape. Nevertheless, Lesotho partially complies with its obligation to protect the right to privacy related to sexual and reproductive health of women since the state ignores the third party to violate the right to access to EC for the survivors of rape. States are enjoined to prevent third parties from directly or indirectly violating the right to sexual and reproductive health.[283]

Discrimination is generally defined as any distinction, exclusion or restriction made on any ground that result in disrupting the enjoyment of human rights and fundamental freedoms.[284] Accordingly, the survivors of rape experience discrimination when they are restricted and prohibited from accessing EC from the health facilities owned by the

[278] UN Working Group on the issue of discrimination against women in law and in practice.
[279] ET Durojaye 'Realising access to contraception for adolescents in Nigeria: A human rights analysis' PhD thesis, University of the Free State, (2010) 161.
[280] The Constitution of Lesotho, 1993 sec 11(1).
[281] *Roe v Wade* (1973) 410 US 113 (SC).
[282] Centre for Reproductive Rights and UNFPA 'Briefing paper: The right to contraceptive information and services for women and adolescents' (2010).
[283] C ESCR General Comment 22 (n 197) para 42.
[284] United Nations High Commissioner for Human Rights 'The right to health: Fact sheet No. 31' http://www.ohchr.org/Documents/Publications/Factsheet31.pdf (accessed 10 June 2019).

Catholic Church in Lesotho. The constitution provides that no person should be discriminated against by any person or public office.[285] It also guarantees every person equal protection of the law.[286] Nevertheless, the survivors of rape have been discriminated against by being denied access to EC as their medical requirements while other people who seek medical help from all public health facilities get their medical treatment. Additionally, they are not equally protected by law because the state does not entrust the Catholic affiliated health facilities with a statutory-duty of ensuring that their clients who have been raped get access to EC.

The state is expected to prevent any discrimination in the provision of health care services with respect to the obligation of the right to health.[287] However, Lesotho discriminates against the survivors of rape by denying them access to EC. Therefore, the state does not comply with human rights international norms and standards in this regard. Accordingly, the CEDAW Committee is worried about the absence of specific elimination of discrimination against women in line with article 1 of the convention.[288] Therefore, the constitution should have an amendment that prohibits discrimination against women from both direct and indirect discrimination in the public and private spheres.[289]

4.3 Legislation

Legislation is significant in protecting sexual and reproductive rights. This section will analyse the legislation of Lesotho in relation to access to emergency contraception for the survivors of rape and the compliance of the legislation with human rights norms and standards.

4.3.1 Penal Code of 2010

The Penal Code of 2010 can be invoked in the provision of EC for the survivors of rape. Section 45(2) provides that performance of abortion by a registered medical practitioner with a purpose of terminating the pregnancy of a female person who is pregnant as a victim of rape should be a defence to a charge under section 45.[290] This law could be

[285] The Constitution of Lesotho, 1993 sec 18.
[286] The Constitution of Lesotho, 1993 sec 19.
[287]CESCR General Comment 14 (n 36) para 19.
[288] Concluding Observations on the Initial to Fourth Reports of Lesotho (n 171) para 12.
[289] Concluding Observations on the Initial to Fourth Reports of Lesotho (n 171) para 13b.
[290] Pena Code of 2010, sec 45(2)(c) .

interpreted to protect the survivors of rape against unintended and unplanned pregnancy by making a provision of legal abortion for them. Accordingly, the Penal Code implicates that the survivors of rape should have access to EC in order to prevent unwanted pregnancy. The law does not provide that conscientious objection could be a deterrent to access to abortion services in cases of rape. Therefore, the Penal Code, though indirectly, complies with international norms and standards that bind states to take legislative measures that protect the survivors of rape.

4.3.2 Sexual Offences Act of 2003

The Sexual Offences Act provides that a victim of a sexual act must be referred for medical examination.[291] The referral for medical examination is intended to prevent unwanted pregnancy. The act is in compliance with African Commission's guidelines that provide that the survivors of rape should have access to EC. It also complies with different UN human rights treaties that obligate states to ensure that the survivors of rape are not denied access to emergency contraception. Therefore, health facilities that operate under the auspices of Catholic Church breach section 21(1) of this law by denying the survivors of rape access to EC, and the state is ignorant of this commission.

4.3.3 Children's Protection and Welfare Act of 2011

The Children's Protection and Welfare Act upholds the right to health of children because it proscribes the denial of medical treatment to children on the basis of religion.[292] Hence the act safeguards raped girl children against denial to access to EC. The act also protects the interests of children, and therefore, it complies with the provisions of CRC and African Charter on the Rights of the Child. However, health facilities owned by the Catholic Church contravene this act by forcing raped children to carry pregnancy from rape when they deny them access to EC, yet the state does not act upon these public health facilities which do not comply with its obligations in the health sector.

4.4 Policies relevant to access to emergency contraception

This sub-section will explore policies which are relevant in the provision of emergency contraception, and their realisation in the access to EC for the survivors of rape will be

[291] Sexual Offences Act of 2003, sec 21(1).
[292] Children's Protection and Welfare Act of 2011, sec 11(2).

examined. They are: Lesotho Health Policy, National Reproductive Health Policy and National Family Planning Guidelines.

Lesotho Health Policy of 2011 stipulates that the government should provide comprehensive sexual and reproductive health services for 'victims/survivors' of gender based violence.[293] National Family Planning Guidelines provide that EC is meant to be used when the woman has been a victim of sexual assault as it conveys a sense of urgency.[294] National Reproductive Health Policy of 2009 seeks to ensure that all individuals have access to sexual and reproductive health services, which include EC.[295] The policy also intends to engage religious and traditional leaders in ensuring access to sexual and reproductive health services to all.

Despite these relevant policies in ensuring access to emergency contraception, the survivors of rape are denied access to EC at the health facilities which are affiliated with the Catholic Church. Thus, the state fails to ensure that the policies are implemented in accordance with its obligations.

4.5 South African legal framework for realising access to EC

All South Africans have a constitutional right to access to reproductive health care, and the state is duty-bound to ensure to achieve the progressive realisation of this right.[296] Therefore, access to emergency contraception for the survivors of rape is guaranteed constitutionally. Accordingly, Ngwena points out that section 27 of the Constitution of the Republic of South Africa is significant in advancing formal equality and substantive equality in the provision of reproductive health care by reducing social barriers to access to health care.[297] The constitution further guarantees everyone access to emergency medical treatment.[298] Hence, a health care provider who claims conscientious objection should inform a woman of her reproductive rights according to legislation and refer her to

[293]Ministry of Health and Social Welfare 'Lesotho Health Policy of 2011'.
[294] Ministry of Health and Social Welfare (n 11) 69.
[295] Ministry of Health and Social Welfare 'National Reproductive Health Policy of 2009'.
[296] The Constitution of the Republic of South Africa, 1996 sec 27(1)&(2).
[297] C Ngwena 'The recognition of access to health care as a human right in South Africa: Is it enough?' (2000) 5 *Health and Human Rights* 29.
[298] The Constitution of the Republic of South Africa, 1996 sec 27(3).

another provider who does not object.[299] Moreover, EC is available over the counter in pharmacies in South Africa.[300]

Lesotho can adopt a good practice from South Africa in order to ensure access to EC for survivors of rape who receive health care services from Catholic health facilities. Access to reproductive health care should be a constitutional right so that all health care providers will be obliged to provide EC to the survivors of rape. Furthermore, Catholic health facilities should be obliged to refer rape survivors to institutions which do not claim conscientious objection and educate the survivors about their sexual and reproductive rights in accordance with law. Finally, Lesotho can copy from the clinical guidelines of South Africa on availing EC over the counter so that survivors of rape can access it without barriers.

4.6 Conclusion

It has been noted that Lesotho has appropriate legislation and policies that guarantee the survivors of rape access to emergency contraception. Failure to implement policies and enforce laws results in state's failure to ensure the respect and protection of the right to access to EC for the survivors of rape. Survivors are left in vulnerability to secondary violation of their rights in the hands of the state. Therefore, the state is not complying with international human rights norms and standards. However, South Africa can serve as a good model that Lesotho can learn from in order to ensure access to EC for the survivors of rape.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusion

The study established whether there is an intersection between religion, state human rights obligations and survivors of rape in realising access to emergency contraception in

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[299] J Harris and others 'Health care providers' attitudes towards termination of pregnancy: A qualitative study in South Africa' (2009) 9 *BMC Public Health* 2 http://www.biomedcentral.com/content/pdf/1471-2458-9-296.pdf (accessed 23 September 2019).

[300] Department of Health Republic of South Africa 'National Contraception Clinical Guidelines' (2012) 41.

Lesotho. The findings show that religion, state human rights obligations and survivors of rape have an intersection. The right to religion intersects with other human rights.[301] Therefore, Catholics hospitals should ensure that the survivors of rape are protected against rape.[302] Accordingly, Peoria has developed a rape protocol for Catholic hospitals.[303]

Christianity implicates that the survivors of rape must be protected against unwanted pregnancy that may result in maternal mortality. Furthermore, religion promotes a right to life, thereby creating enabling environment that prevents health hazards to the lives of the survivors of rape. The only challenge is the interpretation of teachings that seem to be against the provision of emergency contraception to the survivors of rape. Moreover, the Ethical and Religious Directives for Catholic Health Care Services do not condemn provision of EC to the survivors of rape.

Laws and policies can promote or hinder service delivery interventions on sexual and reproductive health.[304] Therefore, the study answered this question: Does the legal framework relevant to the protection of survivors of rape comply with international human rights norms and standards relating to access to EC in Lesotho? It has been found out that the Constitution of Lesotho can be invoked to protect and promote the right of the survivors of rape to access to EC. If sexual health and rights are reinforced in law, lived health experiences of people would be strengthened.[305] The constitution upholds the right to life, human dignity, privacy, equality and freedom from discrimination for all individuals, including the survivors of rape; all these rights are linked to access to EC for the survivors of rape. Human rights bodies and national Constitutional courts have increasingly applied the right to non-discrimination and dignity as human rights standards related to sexual health issues.[306] These have been applied in cases of rape.[307] Besides the Constitution,

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[301] A Donald & E Howard 'The right to freedom of religion or belief and its intersection with other rights' (2015) https://www.ilga-europe.org/.../the_right_to_freedom_of_religion (accessed 10 July 2019).
[302]Raviele (n 187).
[303] GJ McShane 'Postcoital anovulatory hormonal treatment: An overview of the medical data' in EJ Furton, P Cataldo & AS Moraczewski (eds) (2009) *Catholic health care ethics: A manual for practitioners* 131.
[304] S Gruskin and others 'Sexual health, sexual rights and sexual pleasure: meaningfully engaging the perfect triangle' (2019) 27 (1) *Sexual and Reproductive Health Matters* 1 4.
[305] Gruskin and others (n 304) 1.
[306] Gruskin and others (n 304) 5.
[307] E Kismödi and others 'Sexual rights as human rights: a guide for the WAS Declaration of Sexual Rights' (2017) 29 *International Journal of Sexual Health* 22.

the Penal Code of 2010 and Sexual Offences Act of 2003 indirectly proscribe denial of access to EC for the survivors of rape. Furthermore, all policies which are relevant to the provision of emergency contraception guarantee the survivors of rape access to EC.

The first sub-question of the study was to explore the role of Catholic Church in facilitating access to EC for rape survivors. History of the church reveals that Catholic Church prevented unwanted pregnancy in cases of sexual assault since rape is against natural act of sexual intercourse.[308] Hence, prevention of pregnancy in such cases was not considered immoral. Accordingly, Catholic moralists approve administration of EC to the survivors of rape.[309] Moreover, the Ethical and Religious Directives for Catholic Health Care Services guarantee to protect the fundamental human rights, including a right to life of all individuals. However, Catholic owned health facilities of Lesotho are incompliance with the directives because they deny access to EC for the survivors of rape. Conversely, the directives provide for individual, not institutional conscience. The findings indicate that EC is not an abortifacient, and the rights of patients override those of objectors. Health practitioners are ethically not expected to impose their religion upon their patients; otherwise they will be infringing women's reproductive rights.[310]

The second sub-section examined how the interpretation and implementation of conscientious objection impact access to EC for survivors of rape. The findings reveal that Catholic health facilities' interpretation of conscientious objection is that health institutions can claim conscientious objection because it is absolute. Therefore, religion fuels conscientious objection in the provision of EC.[311] The interpretation and implementation of conscientious objection are not in compliance with international human rights norms and standards because they deter access to EC for the survivors of rape. African Commission urges states to oblige objecting institutions to refer their clients to accessible health providers.[312] FIGO guideline 6 also emphasises that objectors must refer clients to non-objectors and there should be no delays on the grounds of religion.[313]

[308] Sulmasy (n 2) 306.
[309] As above.
[310] L Casas 'Invoking conscientious objection in reproductive health care: evolving issues in Peru, Mexico and Chile' (2009) 17 (34) *Reproductive Health Matters* 78.
[311] Dickens (n 82)
[312] African Commission General Comment 2 (n 38)
[313] CEDAW General Recommendation 24 (n 39) para 21

The third sub-question which has been addressed by the study was to determine state's obligations to facilitate access to emergency contraception for the survivors of rape. It has been found out that the state has similar human rights obligations to facilitate access to EC for the survivors of rape: respect, protect and fulfil the rights of the survivors of rape under international law, although, the practice of the state is in contravention of this law. Countries have appropriate laws though many people do not have access to SRH care services and this questions government accountability for realising SRHR.[314] Therefore, meaningful concern for realising sexual health requires political will.[315]

In a nutshell, the study has discovered that the legal framework of Lesotho complies with international human rights norms and standards relating to access to EC. However, there is no enforcement of the legal framework in order to protect the rights of the survivors of rape due to conscientious objection by Catholic health facilities. Accordingly, denying access to EC violates the obligation to respect women's rights.[316] Therefore, there is a need to have implementation plan of legal framework of Lesotho. Further, the right to conscientious objection must be understood in such a way that it is subject to interrelated duties which are imposed on conscientious objectors and the state so as to accommodate women's reproductive rights.[317]

5.2 Recommendations

In order to protect and promote a right to access to EC for rape survivors, the following recommendations have been made.

5.2.1 Recommendations to the Government of Lesotho

- The African Commission urges states to ensure enabling legal and policy framework that promotes access to sexual and reproductive health services.[318] Therefore, Lesotho must have clear provisions on emergency contraception vis-à-vis conscientious objection and referral in the legislation so that the right to sexual

[314] V Boydell *et al* 'Building a transformative agenda for accountability in SRHR: lessons learned from SRHR and accountability literatures' (2019) 27 *Sexual and Reproductive Health Matters* 1.
[315] S Gruskin and others 'Sexual health, sexual rights and sexual pleasure: meaningfully engaging the perfect triangle' (2019) 27 (1) *Sexual and Reproductive Health Matters* 1.
[316] CESCR General Comment 22 (n 197) para 57.
[317] Ngwena (n 89) 183.
[318] African Commission (99).

and reproductive health services will be enforceable in courts. The provisions will also protect the survivors of rape who are denied access to EC on the basis of religion.

- The government should devise strategies to dispense emergency contraception over the counter at the licensed pharmacies in order to ease and widen access to EC for the survivors of rape. The survivors of rape can opt to get EC over the counter if they are faced with barriers to access to EC at public health facilities.
- There is a need to challenge religious perceptions towards access to emergency contraception. Therefore, the government should embark on awareness raising campaigns on the rights of survivors of rape and interpretation of conscientious objection under international law. The campaigns should target religious and traditional leaders.
- In line with Abuja Declaration on improving the health sector through availability of required resources,[319] the government should increase spending for health by ensuring that all health facilities have trained village health workers on the provision of EC so that they can administer EC to the survivors of rape where there is a challenge of timely access. Further, the government must have clinics that provide contraceptives nearby the health facilities that do not provide such services so that the survivors of rape can be provided with EC after being examined in the facility.

5.2.2 Recommendations to the Catholic Church

- The Catholic Church should permit its health facilities to partner with non-Catholic health facilities and establish a referral system that will benefit survivors of rape who receive health care services at Catholic health facilities. From this strategic partnership, a referral pathway could be drawn and made known to clients.
- Catholic health facilities should provide communities they serve with information about health services they are not providing, including provision of EC. The communities can also be made aware of the referral pathway to follow if a woman has been raped.

[319] Abuja Declaration para 26.

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