

Too Many Black Women are in Pain: International Human Rights Law and the Right to Health of Black Women

UNIVERSITY OF ESSEX

DISSERTATION

SCHOOL OF LAW

LLM/MA IN: International Human Rights Law LLM

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DISSERTATION TITLE: Too many Black Women are in Pain: International Human Rights and the Right to Health

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LLM International Human Rights Law

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- Make constructive and straightforward comments using the learning outcomes and assessment criteria for the assignment.
- Students often need examples of good practice in order to improve their writing style. Please try to reference or highlight some of these when correcting work.
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- If the English is corrected, explain what is wrong with it and why the correction is better; do not correct everything.
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Introduction

Serena Williams and Beyoncé are two women who are no doubt at the top of their professions and are seen as strong women who are having a profound impact on modern culture. Both individuals have a number of things in common: they are women, they are Black and they have both experienced life-threatening complications within their pregnancies.¹ These real-life Superstars are facing the same issues that millions of Black women are facing all over the world. The contention as backed by research is that Black women and their Health is undervalued. The pain of Black women is treated as less important than other races, and such individuals are finding that their pain is often dismissed and ignored by health care professions within a system that is able to provide their White counterparts better outcomes and protections.² Due to racism, sexism and other systematic barriers Black women are facing a type of discrimination that is complex and can be linked to many different social, institutional and legal issues within society.

Human rights law has changed the way that international law operates and the scope of its power. International Human Rights Law has also given individuals and groups access to the international legal system. International Law provides an opportunity allowing citizens to make international legal claims and expands the State discourse towards global issues. International Human Rights Law was the result of a Post -World War II consensus amongst sovereign states. The United Nations Charter recognized the importance of protecting human rights.³ The Universal Declaration of Human Rights (UDHR) was the key in defining what a human is and the protections humans should have .⁴ This has

¹ <https://www.heart.org/en/news/2019/02/20/why-are-black-women-at-such-high-risk-of-dying-from-pregnancy-complications>

² <http://www.nationalpartnership.org/our-work/health/reports/black-womens-maternal-health.html>

³ U.N. Charter, arts. 1, 55 and 56

⁴ Theodor Meron, ed., Human Rights in International Law (Oxford: Clarendon Press: 1984).

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allowed for a wide range of general and specific international instruments to ensure protections within the International system. The creation of international law was viewed as a hope for women, especially with the creation of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).⁵

The notion of equality is indistinguishably linked to the definition of human dignity.⁶ It is seen as a fundamental right for any person regardless of gender, skin colour, ethnicity, class, religion or belief, migration status or other grounds of discrimination.⁷ Upholding this principle of equality and rejecting discrimination is the basis of the UDHR and all International Human Rights treaties. However, many women and girls with a Black origin face intricate webs of oppression in regards to their human rights.⁸ Urgent measures need to be taken to put an end to the injustices which Black women and Black girls have to face on a daily basis. The intersect between how well their rights are protected and how the law understands or protects them under the law is arguably not strong enough. Especially in relation to Black women's health. More than ever, States have a responsibility to see reaffirm their commitment to protecting all their citizens and the only way that they can truly fulfil their obligations to the citizens within their borders is to take a cross-disciplinary approach to gender and race in all public policies that are passed with, and to provide suitable protection to those people who are most disadvantaged or are disproportionately affected by the laws that are currently in place. At first look, it is understandable why International Human Rights Law was seen to offer protection to women and had the power to be an successful tool, but with further analysis it is clear that the domestic power structures still show a role within the international structures. With many of the international instruments lacking enforcement from States, it does beg the question, does International Human Rights Law has the power to be an effective tool for protecting women's rights? The principle foundations of human rights do not tolerate discrimination and as a result they demand equality in law and in its application, but this is not being translated into the experiences that Black women are having in regards to their sexual, reproductive, physical and mental health.

⁵ 1979

⁶ Becker, A., De Wet, A., & Van Vollenhoven, W. 'Human rights literacy: Moving towards rights-based education and transformative action through understandings of dignity, equality and freedom.' (2015)

⁷ *ibid* [6]

⁸ Rao, A. 'The politics of gender and culture in international human rights discourse. *Women's Rights, Human Rights: International Feminist Perspectives*,' (1995)

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The World Health Organization (WHO) was the first to recognize and attempt to understand the concept and importance of a human right to health under International Law. WHO identified how important health is in regards to human dignity: *“the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”*.⁹ Since its identification of importance, the Right to Health has become enshrined in both conventional and customary international law, with Article 25 of the UDHR recognizing the right to health as part of an adequate standard of living closely linked with other economic and social rights such as *“food, clothing, housing and medical care and necessary social services.”*¹⁰ The standard of the Right to Health in international law is also found in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides that State Parties recognize *“the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”* and that steps are to be taken by States in order to realize this right in the areas of *“(a) reduction of the still-birth rate and infant mortality; (b) improvement of environmental and industrial hygiene; (c) prevention, treatment and control of diseases; and (d) creation of conditions assuring to all medical service and attention in the event of sickness.”*¹¹

Thus, under International Human Rights Law, the Right to Health consists of a set of social structures, norms, institutions, laws and an enabling environment that can better ensure that everyone enjoys this right. The UDHR and other international instruments that encourage that States should respect the principle of equal rights and ensure that all have access to adequate health care. Applying equal rights to all should also include Black Women. A study in 2000 from Emory University found that at a hospital emergency department in Atlanta, 74 percent of White patients with bone fractures received painkillers compared with 50 percent of black patients.¹² Then a paper from 2015 found that Black children with appendicitis were less likely to receive pain medication than their white

⁹ <http://origin.who.int/about/mission/en/>

¹⁰ Article 11 International Covenant on Economic, Social, and Cultural Rights, Article 25 Universal Declaration of Human Rights

¹¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*

¹² Josefson D. Pain relief in US emergency rooms is related to patients' race. (2000).

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counterparts.¹³ Furthermore, another study in 2007 study found that physicians were more likely to underestimate the pain of black patients compared with other patients.¹⁴ This could show that physicians' have difficulty in empathizing with patients whose experiences differ from theirs. It is clear that researchers who study health disparities are finding that there is an unconscious stereotype about those of Afro-Caribbean decent and this has likely led and contributed to the inequalities that Black Women face when it comes to the health care system. Black women, despite being one of the most largely dispersed groups in the world geographically have been disproportionately affected by poverty, unemployment, discrimination and violence.¹⁵ Some groups or individuals, such as women, face specific hurdles in relation to the right to health. These can result from biological or socio-economic factors, discrimination and stigma, or, generally, a combination of these. It is vital to assess the global discourse in relation to this group due to the unique experiences and perspectives as they are clearly a group that needs special protections. This concern is especially in relation to health because as a group. They have higher levels of suffering in comparison to White people.¹⁶ States have a duty to adopt positive measures so Black women are not discriminated against.

This paper will outline feminist theory and the importance of intersectionality protecting in vulnerable communities. It will also assess Black feminist thought alongside the importance of its principles which have been adopted by feminists of colour all over the world. Black women, often at the hand of inadequate levels of health care, face bigger issues when it comes to attaining the highest standard of health. A spotlight on the concerns needs to be in place at an international level so that the global campaign for women's human rights can take further steps in the right direction. Although it is clear that Black women face higher levels of social injustice within western societies, for the purpose of this paper there will be more of a focus on the United States of America as the majority of the critical research was carried out within the United States which has historically had a white supremacist influence on society. Assessments on the United States' obligations under the International Convention on the Elimination of all forms of Racial Discrimination (CERD) help display how social

¹³ Goyal MK, Kuppermann N, Cleary SD, Teach SJ, Chamberlain JM. Racial Disparities in Pain Management of Children With Appendicitis in Emergency Departments.

¹⁴ Staton, L. J., Panda, M., Chen, I., Genao, I., Kurz, J., Pasanen, M., ... Cykert, S. "When race matters: disagreement in pain perception between patients and their physicians in primary care." (2007)

¹⁵ Levitt J 'Black Women and International Law: Deliberate Interactions, Movements, and Action' (2015)

¹⁶ Ibid [15]

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inequalities may filter into the application of health and then be ignored by States. This would present a huge issue for Black women and would be a violation of International Human Rights Law. States have an obligation to protect the Right to Health and this has been broadened to explicitly include sexual and reproductive health.¹⁷ Discrimination is defined as the unjust or prejudicial treatment of a person or group, on the grounds of characteristics such as race, age or gender.¹⁸ Although intersectionality offers potential benefits to improving Black women's access to health. There are different social factors that can have an impact on Black women and therefore their health. The legal implications behind the Right to Health are based on a broad concept. States have a duty to promote health, social and related services and also prevent or remove any barriers that can hinder the realization and maintenance of physical, mental and social elements of health. The Right to Health contains freedoms that ensure all health services and goods without discrimination, as it can hinder access to basic health services and all services and goods must be accessible and of good quality.¹⁹

Chapter 1: Feminism and International Human Rights Law

Virtually all areas of the law have been influenced by the feminist movement. From the beginning of the movement, when the feminism was introduced, it had an immediate effect on direct concerns to women's issues, such as reproductive rights, employment discrimination and issues within family law.²⁰ This then led to a better understanding of gender and how it can affect other areas of the law such as criminal law and constitutional law. All areas were then viewed through the feminist lens which led to a broader understanding of the gender bias that is inherently entwined into the law. This is due to the fact that the laws were only made with the male experience in mind. The feminist

¹⁷ UN Committee on Economic, Social and Cultural Rights. General Comment No. 22: Right to sexual and reproductive health (Art. 12 of the Covenant (2016)

¹⁸ Lewis, T. T., & Van Dyke, M. E. Discrimination and the health of African Americans: The potential importance of intersectionalities. (2018)

¹⁹ CESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4,

²⁰ Binion, G. Human Rights: A Feminist Perspective. (1995)

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movement has introduced new perspectives on the discourse of human rights throughout the years. It challenges how International Human Rights Law is institutionally understood and presents a spotlight that directly focuses on the analysis of the women's experiences, which allowed critics to investigate if the institutions in place and laws that have been passed are actually capable of completely protecting women and girls.²¹

Feminist critiques of Human Rights aims to highlight issues present in the different hierarchies within current political establishments and systems of law.²² The assessment of the basic assumptions on human rights and the language that was used during the time of its formulation during 1945-1948, show that the certain definitions do not apply to men and women the same way, hence the importance of the feminist lens. Historically, socially, culturally and economically women have had a disadvantage in comparison to men which has led to the unseen bias when it comes to relationships with the State, their rights and protections that they offer. In recent years, women have had to deal with unjust laws that infringe on their access to their sexual and reproductive health. In the United States, harsh abortion laws have disproportionately affected women of colour and poorer women.²³ Women with means are able to travel to receive the procedure, whereas research shows that those without the means are more likely to use alternative methods that can have negative implications on their health.²⁴

One of the main pillars of the feminist critique is identifying discrimination between men and women within society. The theory seeks to remedy such social inequality with principles of inclusion and equality for all. Feminist theory highlights the unseen biases within infrastructures and shows how when operating within a system that is supposed to offer inclusion for all in theory, the reality is that it is only offered to some. This highlights an issue both domestically and internationally as the legal protections offered are weakened by default due to underlying biases. Thus, the law becomes disproportionately applied to women and girls, creating further disadvantage. When justice is not

²¹ Ibid [19]

²² Parisi, L. Feminist perspectives on human rights. (2010)

²³ Durkin E " 'Women will die': how new abortion bans will harm the most vulnerable" The Guardian 19/06/2019 < <https://www.theguardian.com/us-news/2019/may/19/abortion-ban-alabama-women-of-color-poor> > [accessed 17/08/2019]

²⁴ Ibid [22]

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legalised, it becomes open to interpretation which can cause further harm towards certain groups of women as they must then rely on courts, judges, lawyers and other actors that are unable to afford them the same safety and inclusion that men have. There are many different strands and schools of feminist thought. This paper will mainly relate to fundamental feminist theory and notions that have developed from Black feminism, alongside important philosophies that its creation has led to. The use of the term feminism and feminist theory will be mainly used in the broad sense to indicate a shared goal of achieving gender equality.

Feminism within International Human Rights Law influenced the human rights discourse both internationally and domestically. Many of the debates took place at first during the process in which the United Nations was being formed and during the drafting of the UDHR.²⁵ The movement championed in recognising men and women as being the same in regards to ability and capacity as individuals, and sought to establish the full right to self-determination as stated in Article 1 of the UDHR.²⁶ This has been further recognised as a right of all people in the International Covenant on Civil and Political Rights (ICCPR)²⁷ and the International Covenant of Economic, Social and Cultural Rights (ICESCR).²⁸ This ensures that all are equally afforded full citizenship and the associated rights, protections and opportunities when this right is fully exercised. Feminist theory helps to highlight how women are a vulnerable group within patriarchal power structures. However, what the law does not recognise is the subsections of women that are also vulnerable and marginalized within society. Research has shown that women of colour bear an undue proportion of health problems in comparison to White women.²⁹ The majority of the health inequalities are rooted in fundamental social structural inequalities, which are inextricably related to racism and other forms of discrimination in society. This is why International Human Rights Law, in a sense, has failed Black women; as it fails to create laws and spaces in which Black women can be provided with the proper help. Mortality and health in general rarely diverge far from economics and social relations, which leads to the conclusion

²⁵ 1948

²⁶ *Ibid* [24]

²⁷ 1966

²⁸ 1966

²⁹ Williams D. R. Racial/ethnic variations in women's health: the social embeddedness of health. (2002)

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that to eliminating differentials in health outcomes requires addressing the underlying social inequalities that so consistently produce them.³⁰

The liberal idea of 'sameness' laid the groundwork for the present and future of women's rights within International Human Rights Law. Throughout history men and women have had different experiences that have impacted behaviour and attitudes in civil society. For example, '*sameness feminism*' is grounded in the male narrative and will only succeed if women have equal rights to men.³¹ But because being a man posed as neutral, the need to understand gendered oppression was vital in ensuring that 'sameness' does not allow for the male objectivity to change how the law interacts with women.³² It is imperative that women are treated equally and the same as men, as being a woman is not an adequate justification for discrimination against them. The UDHR does not specifically address women's rights but does mention sexual equality within Article 2 where it outlines that everyone is entitled to all the rights within it, regardless of '*race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*.'³³ The inclusion of 'sex' could arguably be included with the hope that it would address and deal with the inequality that women were facing and provide them with a more equal footing with men. However this was not the case.

The use of language within the International Human Rights instruments is important due to the significance of how language is used. Debates regarding the inclusion of 'sex' in Article 2, surround the use of the word 'everyone' as that should have made it clear that women also were included within its protection. The language that is used within the law plays an important role in proving the sexist nature of International Human Rights Law, as it often mirrors a male perspective within hidden biases which manifest in the application of the law.³⁴ Equality before the law is one of the most important doctrines in understanding human rights. Preventing discrimination within Human Rights law is paramount in ensuring that everyone is treated equally. However, the "norm" within the western

³⁰ Crombie, I. K., Irvine, L., Elliott, L., Wallace, H., & World Health Organization. (2005). *Closing the health inequalities gap: an international perspective* (No. EUR/05/5048925)..

³¹ B E Hernández-Truyol, Out of the Shadows: Traversing the Imaginary of Sameness, Difference, and Relationalism - A Human Rights Proposal,(2002)

³² Ibid [31]

³³ Udhr art 2

³⁴ Charlesworth, H., Chinkin, C., & Wright, S. (1991). *Feminist Approaches to International Law*. (1991)

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state establishments often reflects a white middle-aged man and his experiences making decisions for women.³⁵ Many international documents have a focus on discrimination, for example in the UDHR, Article one it states;

*“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”*³⁶

This declaration is believed to reinforce the fact that human rights are for all people and that all humans should act in a *‘spirit of brotherhood’*.³⁷ Using gendered words within the first few lines of the UDHR is problematic. Brotherhood is a bond between men and can be interpreted differently between cultures. Sisterhood is not used the same way, and the use of the word often refers to a community of women. Brotherhood is based on the literal use of the word ‘brother’, and although the brotherhood can describe a community of people linked by a common interest, brotherhood primarily refers to the relationship between men and the kinship that they often have. Women in most cases are unable to relate to a brotherhood, further establishing that the language is not inclusive.

The notion of sameness has played a vital role in the fight for women’s rights. Many of the international documents such as the Convention on the Political Rights of Women emphasized the necessity of women’s access to political rights so that they can attempt to achieve sexual equality. Although this is a step in the right direction, there is a fundamental issue with the concept of ‘sameness’. It does not acknowledge that men and women have different experiences within the public sphere. Habitually, the structures that operate within the public sphere perpetuate the male experience. Most societies are often ‘Male-Supremacist’ and by default *‘the male standpoint dominates civil society in the form of the objective standard...The state incorporates these facts of social power in and as law.’*³⁸ Since the male standpoint becomes the objective *“two things happen: law becomes legitimate, and social dominance becomes invisible. Liberal legalism is thus a medium*

³⁵ Durkin E Benwell M ‘These 25 Republicans-all white men- just voted to ban abortion in Alabama’ 15th May 19 <https://www.theguardian.com/us-news/2019/may/14/alabama-abortion-ban-white-men-republicans> <accessed 19.08.2019>

³⁶ 1948

³⁷ MacKinnon CA. Are women human?. Harvard University Press; 2007 Nov 30. Pg 42

³⁸ MacKinnon, C. A. (Toward a feminist theory of the state. (ed Harvard University Press, 1989) pg 237

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*for making male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society*³⁹ International Human Rights mechanisms alongside many of the institutions found domestically have had an inherently androcentric nature.⁴⁰ This entails that International Human Rights is a sexist institution which does not protect women properly as it was not written with women in mind, especially not Black women. Mackinnon claims that *“the state, through law, institutionalizes male power over women through institutionalizing the male point of view in law. It ... see[s] women from the standpoint of male dominance; [then] act[s] to treat them that way”*.⁴¹ The androcentric nature of human rights is rooted in the patriarchy that is often found in many different cultures and societies. The patriarchy refers to the male domination both in public and private spheres.⁴² It can be defined as a system of society or government in which men hold the power and women are routinely excluded. It is not something that is a *‘temporary imperfection’* that has had an effect on the Law. It is a part of the social structure of a system that reinforces the subordination of women.⁴³ It unintentionally reinforces the androcentric nature of human rights. The State is supposed to be a genderless construction that treats everyone the same, however when one look at the presentation of society throughout history, men have been in control of politics, government and monarchies. For example, the gendered nature of politics has made it harder for women to infiltrate the realm.

It is not that the political discipline has become gendered but has been fundamentally influenced by social norms that are linked to sex and gender. UN Women was able to identify that the percentage of women within Parliament since 1995 has increased by 11.3 percent⁴⁴ and globally there are 27 states where women account for 10% of international Parliaments.⁴⁵ Based on information that the World Bank has collected, women make approximately 49 percent of the global population.⁴⁶ Yet the representation of nearly half the population is not illustrated in areas such as law or other public areas in society. This is problematic as the outcome of laws in most cases will have an effect on the majority

³⁹ Ibid[39]

⁴⁰ Wolper, A., & Peters, J. *Women's Rights, Human Rights: International Feminist Perspectives*. (1995).

⁴¹ MacKinnon, C. A. (1989). *Toward a feminist theory of the state*. Harvard University Press. pg169

⁴² Sultana A. *Patriarchy and Women's Subordination: A Theoretical Analysis*.. (2010) pg1-8.

⁴³ Sultana, A. (2012). *Patriarchy and Womens Subordination: A Theoretical Analysis*.

⁴⁴ Ibid , Inter-Parliamentary Union and UN Women. "Women in Politics 2019 Map" Available at <http://www.unwomen.org/en/digital-library/publications/2019/03/women-in-politics-2019-map>.

⁴⁵ <https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS>

⁴⁶ <https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures>

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of the population which is made up by both men and women. Women have started growing in numbers of representations within previously male dominated areas of influence such as medicine, business and politics, and this makes it possible for women to be able to use their experience to create laws that do not negatively impact them because of their gender. This has the added benefit of combatting how the current systems masks legal equality in the public sphere that is directly linked to the gender hierarchies within the private sphere.

The impacts of patriarchy has become central to understanding the manifestation and institutionalization of male dominance over women and children in the family and by extension how the male experience dominates women in civil society. The perception that “*men hold power in all the important institutions of society*” and that “*women are deprived of access to such power*” plays a role in the understanding of international law and how it furthers the patriarchal structures of oppression.⁴⁷ The age-old stereotypes have been filtered into the neutrality of the law that can leave cracks in the protection of women under the law. It is clear that although women are treated differently, “*women are neither totally powerless or totally deprived of rights, influence, and resources*”.⁴⁸ The Law is a social construct and reinforces the patriarchy. As a result of State institutions historically being male, it has allowed for the biases and experiences that exists within the law makers to create laws that apply differently to everyone. The “[I]nternational legal structures and principles masquerade as ‘human’-universally applicable sets of standards. They are more accurately described as international men’s law.”⁴⁹ Due to the sovereign nature of States and International Human Rights Law’s dependency on State consent, often the representatives come from national governments which are made up of mostly men. This inherently helps prove the sexist nature of human rights and its institutions. An effect of the patriarchy is that the current established hierarchies are directly affected, allowing for the subordination of women to men to seem ‘natural’. This helps explain the notion of a ‘*public/private divide*’, which is a concept that describes how life is split into these different spheres; one is known as the public sphere and the other is known as the private sphere. This dichotomy has served to ensure the oppression of women by entrenching the patriarchal system. This is a central theme to the feminist perspective as there are different behaviours and power struggles within each sphere. The

⁴⁷ Ibid [44]

⁴⁸ Lerner G. ‘The Creation of Patriarchy’ (Oxford University Press, USA) 1986.

⁴⁹ Charlesworth, H., Chinkin, C., & Wright, S. Feminist approaches to international law, *pg 644* (1991).

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'Public Sphere' is where the Government and most of civil life happens. States have claimed the public sphere as their own and so it is considered as male-dominated.

The way in which the private and public sphere deal with discrimination differs from one and other. The example of violence within the public sphere can reveal certain double standards within the law. For example, if you hit someone on the street you could be prosecuted at bare minimum for assault, however, when cases of violence within the home arise the consequences and legal proceedings are different. The 'Private Sphere' is where women, their issues, their bodies and the family are often regulated. The Private Sphere is a realm where the government is hesitant to act as it could be seen as an invasion of privacy. The principle of Privacy, historically, was introduced with efforts to stop Kings and powerful people from just walking into a home and claiming it as their own or taking items within the home.⁵⁰ Hitting an individual within the confines of the home is not considered assault, but instead is labelled as domestic violence, which is much harder to prove as State officials are hesitant to act on matters within the home. The separation of the home is central to the 'private sphere' as having a separation of the spheres has made it difficult for those who suffer injustice within the sphere to raise issues that affect them. Women are more likely to be affected, but it can also have a profound effect on men.⁵¹ The same age-old stereotype of the man being masculine and dominant in the family and women being the feminine and submissive has an unconscious effect on how they are treated. For example, men are less likely to report domestic abuse due to reasons of embarrassment⁵² and women are less likely to report due to both personal and societal reasons such as victim-blaming attitudes.⁵³ In recent years there have been higher numbers in the rates of suicide amongst men, and more men have reported feeling a pressure to succeed so they can provide for their families. The notions that have been attached to being masculine and to being feminine have had a domino effect on how men and more often women interact with the protections that are currently in place. The separation of the two spheres has made it more difficult to be protected within the home as once the

⁵⁰ B Bratman, 'Brandeis and Warren's the Right to Privacy and the Birth of the Right to Privacy.' (2002) pg 629

⁵¹ Charlesworth, H. . Human rights as men's rights. *Women's rights, human rights: International feminist perspectives*, (1995)

⁵² Barber, C. F. Domestic violence against men. *Nursing Standard* (through 2013),.(2008)

⁵³ Gracia, E. . Unreported cases of domestic violence against women: towards an epidemiology of social silence, tolerance, and inhibition.(2004)

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principle of privacy has been evoked, States are hesitant to get involved. This allows the system to continue to protect men and their actions, while failing in protecting women from oppression. By default, women are more likely to be affected by the separation due to their biology. Women and their bodies have long been policed and a part of the public discussion for many years. Arguably the way men and women's bodies and their choices are governed, are not treated in the same way.⁵⁴ This is further evidence of the gendered bias that the law entrenches, and therefore its sexist nature. It can thus be argued that the patriarchal systems in place ensures the oppression of women.

The Law has a duty to remain impartial and apply fairly to all. Legal discourse 'informs' and teaches people about themselves and how to treat others.⁵⁵ Due to the patriarchal systems in place, unconscious biases are then filtered into law under the guise of equality. The outcome often neglects to understand the experience of women as men often dominate the law-making space. Social constructs have contributed towards disparities in the protection that women -and in particular Black women - have access to and must face. The importance of the feminist critique's deconstruction of classical language allows individuals to confront the systematic discrimination that has the power to marginalise their access to their full human rights. States have a duty to protect their citizens, but by neglecting to protect the 'private sphere', the law-makers have left women facing barriers that men are not subjected to. Because International Human Rights falls within the operation of the public sphere as a system of government, it has acquired the same sexist nature as a regional or domestic government often reflects. Social constructs are not only applicable to gender and sex but also impact how an individual will interact with the world. It can affect multiple aspects of how a person is interpreted by others and therefore the treatment that they will be given in comparison.

Chapter 2: Sexist yes, but is it Racist?

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⁵⁵ Cook, R. J '*Human rights of women: National and international perspectives*.' (Ed, 2012, University of Pennsylvania Press.) page 92

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Stereotypes do not just affect perceptions of gender or sex, they can also have an impact on how race is considered by others and how perceptions of certain racial groups are being indirectly filtered into the public space as legitimate and unbiased. This unconscious bias seen in public institutions like the government or the medical field can have a profound impact on the treatment that an individual can receive. There have been movements within the International Human Rights system to combat the effects of these social constructs. The use of International Covenants could be seen as an acknowledgement of how public institutions have prejudices that are filtering into the law. In an attempt to make equality a truly universal principle, the international covenants are able to provide better protections by implementing the needed measures to remedy discrimination.

The United Nation plays an important role in providing spaces where discrimination can be handled in the most democratic manner. While dealing with issues such as poverty, population and malnutrition, it was also responsible for incorporating the shift of thinking that the feminist lens provided. The United Nations then went on to attempting to ensure that women not only have access to their civil and political rights, but also economical social and cultural rights needed for their equality. It became clear that for women to truly benefit from civil and political rights they needed adequate services, as those who lack food, shelter, education, property and health services cannot fully enjoy civil and political rights.⁵⁶ International law requires States to adopt 'appropriate and effective legislative and administrative procedures' for 'fair, effective and prompt access to justice'.⁵⁷ The start of the United Nation's decade for Women (1975-85) is when an examination of the discriminatory structures that allowed for inequality began at an international level. During the United Nation's Decade of Development, the slogan was 'Equality – Development – Peace'.⁵⁸ This motto became the sophisticated base for the improvement of women's rights. These contributed towards the establishment of CEDAW addressing discrimination under the law and within political life, education, employment, marriage, the family and traditional customs.⁵⁹ CEDAW became known as the 'Women's

⁵⁶ Chinkin, C. The protection of economic, social and cultural rights post-conflict. *Report commissioned by the Office of the High Commissioner for Human Rights (OHCHR)*, (2008).

⁵⁷ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, 16

⁵⁸ <https://www.un.org/en/sections/issues-depth/gender-equality/>

⁵⁹ Reilly N 'Women's Human Rights- Seeking Gender Justice in a Globalising Age' (ed Polity Press 2009) pg 59

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Bill of Rights' as it is the leading modern instrument on ensuring women have equal rights. Its creation was an attempt to acknowledge the sexist nature of human rights law and was doing something productive to combat it. By extending the current provisions already established in other international instruments such as UDHR, CEDAW played a role in deconstructing the classical language within the structural indivisibility of the law. One of its main purposes was to define and help address all forms of discrimination against women to highlight issues. CEDAW deeply challenged the beliefs held about the role of women within societies everywhere. Structural indivisibility focusses on the *'interconnections between the political, economic, environmental and security priorities of the international order and violation of human rights'*⁶⁰ Having an international document concerned with social, economic and cultural rights of women gave a better framework to tackle non-discrimination adequately, therefore becoming in-line with the principle of equality before the law.

An important outcome of the creation of CEDAW is that it provides specific obligations on governments, guaranteeing that private citizens including husbands, partners and fathers, and enterprises are not in a position to abuse women's rights.⁶¹ International Human Rights Law has a responsibility that involves ensuring that States take all appropriate measures to ensure that women are able to fully enjoy their human rights and other fundamental freedoms. This includes pledging that legislation and temporary special measures are in place to help properly access rights for women. CEDAW focusses on the effects of culture and tradition. It does this because both have been seen as prominent forces that are linked to shaping gender roles and family relations. It supports a women *'rights to acquire, change or retain their nationality and the nationality of their children.'*⁶² A criticism of CEDAW is that there is no explicit reference to provide better protections when it comes to violence against women. This was brought to the attention of the CEDAW committee and they clarified that gender-based violence impairs and can nullify women's enjoyment of human rights. Under the 'Women's Bill of Rights', State parties have an obligation to prevent, punish and ensure reparations for any issues under International Human Rights Law that hinder the fundamental freedoms entitled to

⁶⁰ Binion, G. Human rights: A feminist perspective. (1995) page 8

⁶¹ Cook, R. J. Women's international human rights law: the way forward. (1993)

⁶² Amnesty International, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women - Weakening the Protection of Women From Violence in the Middle East and North Africa Region*, pg 3

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all.⁶³ This is the attempt of International Human Rights Laws to protect the private sphere and those that operate within it.

Equality is enshrined in the constitutional traditions within the public international law instruments. But it has failed to alleviate patterns of discrimination and prejudice. Sandra Fredman within her work explores the practices of institutional racism and the gap between the legal prohibition of racial discrimination and the reality of what racism is like for those who are affected by it.⁶⁴ The history behind human rights principles have left an impact on how discrimination is faced. Fredman explains how there are different levels of equality. The enforcement of equality involves ensuring it is consistent, that the results it yields and the opportunity it can present are also accessible to all regardless of socio-economic disparities. The combination of all these concepts are the only way to ensure that equality is as central to human rights as it claims. Traditional human rights has the power to create equality that affirms diversity but can be hindered when you become part of a racial, religious group that the treatment becomes inferior. This is often the case when it comes to special groups because the individualised nature of human rights decisions fails to take into account the group dimensions. This is not to dismiss the positive duties within CERD, CEDAW, ICCPR and other international documents that ensure similarity in treatment regardless of differences. The biggest issue that racial discrimination faces is the denial of its severity, as victims of racial discrimination face a different perception than that assumed by the attitudes within society. The denial of racism at an individual level manifests itself in State ideologies that then play a role in how people are treated.

This use of International Law in this manner has provided a diplomatic means to providing a spotlight on issues in society. The International Convention on the Elimination of all forms of Racial Discrimination (CERD) offered a similar but separate protection for those who were discriminated against due to their race. CERD has a central aim to accelerate equality and provide safeguards against discrimination on the basis of race. As aforementioned, equality is a main pillar in the success of the human rights discourse. In many of the International Human Rights Law documents such as

⁶³ *ibid*

⁶⁴ Fredman S, Substantive equality revisited, *International Journal of Constitutional Law*, (2016) Pages 712–738, <https://doi.org/10.1093/icon/mow043>

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the UDHR, ICCPR and ICESCR, it is clear that equality is important, as is the Right to Health and ensuring that all have access to the highest attainable standard of it.⁶⁵ All of the abovementioned documents have open clauses on discrimination to further emphasize the importance of equality within the discourse. CERD is another means to ensure that all are treated equally. International Human Rights discourse and the mechanisms that work within it aim to ensure that no individual is treated differently or unjustly due to uncontrollable circumstances of an individual's life, such as ability, race, sexual orientation or gender.

Racial discrimination is not something new and is often dealt with on a daily basis. Even within the early beginnings of the UN charter, human rights were established to be enjoyed without distinction regardless of race, sex, religion or language, all of which can differ from society to society.⁶⁶ The underlying cannons of equality means recognising those in society that were deemed unequal as equal human beings within the world. CERD continues to be the foremost among global instruments in regards to protecting race and ensuring that individuals are not discriminated because of it. The Race Convention (as it is also known) still plays a distinctive role in making States aware of '*the ubiquity of discrimination*'.⁶⁷ This involves acting under the obvious assumptions that problems cannot be solved until they are recognised. The unconscious biases that women face can mirror to how unconscious racial biases can filter into the public sphere.

Although having CERD in place can play a role in working towards the end of racial discrimination, having laws and policies in place signed by a global community is a crucial step in tackling the structural causes, and supply a form of empowerment to disadvantaged groups. Many States signed and ratified CERD including the United States. This is important as the United States did not ratify CEDAW. By acknowledging CERD it acted as a method for ensuring that people of colour have access to the same liberties as the White community that suppressed them. The American Civil rights

⁶⁵ Hunt P 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (2007)

⁶⁶ Narayan, U. Essence of culture and a sense of history: A feminist critique of cultural essentialism. *Hypatia*, 13(2), 86-106. (1998).

⁶⁷ Cohen, Denial and Acknowledgement — The Impact of Information about Human Rights Violations (Jerusalem: Hebrew University of Jerusalem, 1995); and Cohen, States of Denial: Knowing about Atrocities and Suffering (Cambridge: Polity Press, 2001).

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movement in the 1950s-1960s was arguably a motivating reason that the United States implemented CERD. However, there have been reports that the United States is not fulfilling their obligations under CERD.⁶⁸ This is not an issue that is exclusively reserved to the United States. The trials of securing States' active participation in resolving the struggle against racism is another challenge. The comprehensive antidiscrimination legislation in the criminal, civil and administrative fields that have developed over the years is a crucial step to promote equality. Other appropriate methods to encourage equality also include the adoption of special measures and the establishment of national institutions. If the relevant bodies took into consideration how the unconscious biases hinder victims of racial discrimination, then the procedures to help eliminate discriminatory practices could be more effective.

International Covenants can sometimes be used in a diplomatic nature when it comes to Human Rights. Documents such as CEDAW and CERD show in more detail the lack of willingness for nations to tackle racial discrimination effectively and grant women the same equality that men have. The need for both international conventions is evidence that the institution of International Human Rights is both Sexist and Racist. As if it was not, there would be no need for either document as all would be adequately protected under the UDHR, ICCPR and ICESR. The perceived discrimination that both women and people of colour face is deemed to have been handled effectively by the legal structures in place. Both CEDAW and CERD were introduced at the same time. There was more enthusiasm to have CERD passed, which one could assume was a form of human rights diplomacy, which can be defined '*as the use of foreign policy instruments in order to promote human rights as well as the use of foreign policy aims*'.⁶⁹ However, it is clear that racial discrimination is still a prominent problem in most communities and cultures.

CEDAW took profoundly longer to sign and ratify. Women's rights and what they were legally able to do without a man was debated amongst the international community. To date, CEDAW has the

⁶⁸ Evans D P 'Interpreting the right to health under the International Convention on the Elimination of all forms of Racial Discrimination'
http://www.lse.ac.uk/humanRights/aboutUs/articlesAndTranscripts/Conference07_Evans.pdf, A Report to the Committee on the Elimination of Racial Discrimination on: U.S. CERD Obligations and Domestic Implementation—Article 2— submitted 10th December 2007

⁶⁹ Müllerson R 'Human Rights Diplomacy' (Routledge London and New York) 1997 Pg2

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greatest number of reservations attached to State ratifications.⁷⁰ Reservations in International Human Rights Law is a declaration made by a state party to exclude or alter the legal effect of certain provisions of a treaty in application to their States.⁷¹ The only States that have not ratified CEDAW are Iran, Oman, Qatar and the United Arab Emirates, but most of the States that ratified the Convention have submitted reservations and/or made declarations that have limitations on the application of CEDAW within their countries. The impact does have a limiting power on the scope of the document and in some cases the individual State reservations have the ability to allow states to avoid some of the most basic requirements of the convention. Some of the reservations made completely defeat the purpose of the treaty and therefore the obligations under the convention. This also has an element of diplomacy within the human rights community as States are able to say that they have signed CEDAW and look as if they are taking steps to better resolve discrimination based on gender and sex. But in practice they have hindered and limited the legal protection women have access too. For example, Israel made a reservation to article 16 of the CEDAW which provides for the elimination of discrimination against women at the inception of marriage, during marriage and at its dissolution by divorce or death. Their reservations states that "The State of Israel hereby expresses its reservation with regard to article 16 of the Convention, to the extent that the laws on personal status which are binding on the various religious communities in Israel do not conform with the provisions of that article."^{72 73} In general, reservations pose a serious issue throughout the international treaty system. CERD has far less compromising reservations and arguably some of the reservations to CEDAW are problematic and impact fundamental issues such as nationality, legal capacity, and equality in the family.⁷⁴ But nonetheless certain reservations are a particular threat to the universality of human rights. Reservations to CEDAW reveal that while it is widely ratified in the region, it is also subject to reservations that substantially hinder its implementation

Reservations often weaken the protections that women are offered under International Human Rights Law. In comparison to the ICCPR there is far less jurisprudence. Women in general are often made to

⁷⁰ Ibid [25] pg 60

⁷¹ Goodman, R. Human rights treaties, invalid reservations, and state consent. (2002)

⁷² UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979,

⁷³ Brandt, M., & Kaplan, J. A. (1995). The tension between Women's rights and religious rights: reservations to Cedaw by Egypt, Bangladesh and Tunisia. (1995).

⁷⁴ Freeman, M. A. (2009). Reservations to CEDAW: An analysis for UNICEF. *Police and Practice*. (2009)

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choose between being protected under ICCPR and ICESCR or being protected by CEDAW. A similar decision between CERD and CEDAW happens when women of colour face complex discrimination that the creation of the treaties does not offer. The protections under the ICCPR and ICESCR are considerably stronger and have better international mechanisms that can protect fundamental freedoms. The creation of CEDAW causes a marginalizing effect and pushes women's issues into a domain that cannot fully protect the issues. Reservations have had a negative impact on core provisions and the very purpose of the Convention. When there are situations that affect more than one part of a woman's identity then reservations can have a double effect in working against the aim to eliminate discrimination both internationally and domestically. State sovereignty allows for a lack of commitment in regard to legal practices that can be made to benefit women in their goal of achieving equality. But, Black women often find that in most public institutions in comparison to White women they face more disadvantages due to not only their sex and gender but the colour of their skin. The laws in place are influenced by stereotypes based on gender, sex and race. The experiences that usually have an impact on laws, especially in western culture, are more often reflecting a white supremacist version of the world that has been impacted by patriarchy. Women's issues and their experiences are being protected by men who not only do not understand women's experience but are making laws based on their judgement of what that is. But just like men, women come in all shapes, colours and sizes. The lack of diversity within international and domestic structures show this flaw as often those who intersect amongst categories fall through the cracks and are unable to seek protection adequate for their needs.

Chapter 3: What is Intersectionality?

Intersectionality is a term that was coined by American professor Kimberlé Crenshaw in 1989. However, the concept already existed prior to this and Crenshaw was the first to apply this concept to Black Women's rights. There still is no widely agreed-upon definition of intersectionality, but it has been defined *'the view that women experience oppression in varying configurations and in varying degrees of intensity. Cultural patterns of oppression are not only interrelated but are bound together and influenced by the intersectional systems of society. Examples of this include race, gender, class,*

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*ability, and ethnicity.*⁷⁵ Specifically, Crenshaw introduced this concept to discuss issues that Black women face when it comes to employment within the United States of America.⁷⁶

The importance of understanding this theory as a means to protect Black Women and their health is vital in improving the current status in inequalities in women's health.⁷⁷ Intersectionality moves beyond seeing individuals in one category and attempts to consider them beyond one defining element of their identity but instead as a simultaneous combination of different aspects within ones social identity (e.g., race, ethnicity, Indigeneity, gender, class, sexuality, geography, age, ability, immigration status, religion).⁷⁸ It can also be used to impact current systems of oppression as it has the ability to transform laws, gender studies, politics, sociology and so many other areas that are affected by systems which by their nature could be identified as sexist, racist or classist.⁷⁹ Often, social factors play a crucial part in shaping the outcome of health and access to health services.

Black women are subjected to indirect racism by the mainstream white feminist movement.⁸⁰ As a group, Black women realised that issues that were of immediate concern to them were not being spoken about in the mainstream movement. This differentiation in their aims is what led to the Black feminist movement, as they felt like there was no place for them to address issues that affected both race and gender. 'Black feminism', as it became known, emerged as a response to feminist theories and their white-washed version of the movement. Their version omitted a serious examination of racism, and the general concerns of Black women. As of yet, there is not a unifying black feminist movement as even within this sub-section there are other versions of the theory. For example, Black-British Feminism, highlights the difference of culture and how the intersections of race, class and gender has much less attention in Britain than in the United States.⁸¹ Nonetheless, there is overlap in the different versions as they still recognise that a Black Woman's experience and the treatment she

⁷⁵ <https://www.telegraph.co.uk/women/womens-life/10572435/Intersectional-feminism.-What-the-hell-is-it-And-why-you-should-care.html>

⁷⁶ Yuval-Davis, N. (2006). Intersectionality and Feminist Politics. *European Journal of Women's Studies*, 13(3), 193–209.

⁷⁷ McGibbon, E., & McPherson, C. Applying intersectionality & complexity theory to address the social determinants of women's health. (2011)

⁷⁸ Hankivsky, O., & Cormier, R. Intersectionality: Moving Women's Health Research and Policy Forward. (2009)

⁷⁹ Ibid [74]

⁸⁰ Collins, P. H. *Black feminist thought: Knowledge, consciousness, and the politics of empowerment*. Routledge. (2002)

⁸¹ Young L What is Black British Feminism?, *Women: A Cultural Review*, (2000)

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will often face is based on both their race and their gender. The mainstream feminist movement largely focuses its agenda on matters that predominantly affect white middle-class women. However, Black activists in America who were women and unable to join the civil rights movement needed a platform to raise issues also, which provided a catalyst as there was a need for a black feminist lens. This separation of the feminist movement is an example of the importance of intersectionality as a theory in working towards a method that could protect all women. As the mainstream movement still had flaws and blind spots as it assumed that all women have the same needs. Each concept of an individual's identity needs to be considered independently while also understanding that each part of their identity reinforces another. Social impacts such as lack of access or income have played a vast role in why there are inequalities in Black women's health. Black women are disproportionately affected by social issues such as poverty and low income, which is then affected by the division of the public and private sphere, as often the work carried out in the home is ignored. Black women are statistically more likely to be a lone parent and have less disposable income. In 2019, it was published that in the United Kingdom 24.4 percent of Black families were lone parents compared to the 10.3 percent of white lone-parent households.⁸² Simply by acknowledging the different dimensions which Black women and their families exist, it is possible to use intersectionality to approach research and practices to tend to the unique needs currently ignored which could lead to better outcomes of their health.

Crenshaw eventually was invited to introduce the notion before a special session in Geneva and in the 58th session of the UN commission on Human Rights. Within the first paragraph of the Resolution on the Human Rights of Women it was made clear that intersectionality is important as it examines *'the intersection of multiple forms of discrimination, including their root causes from a gender perspective'*.⁸³ Presenting intersectionality at an international level is a great achievement for the movement. Most feminist scholars have considered intersectionality as a revolutionary concept which has helped them to redefine theoretical, political and methodological approaches in achieving equality

⁸² <https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/demographics/families-and-households/latest>

⁸³ (Resolution E/CN.4/2002/L.59)

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of the sexes.⁸⁴ It is both a method of observation and an action-oriented practice that aims to uncover different privileges and oppression that remain hidden from the single classical view of discrimination and inequality.⁸⁵ The theory is not limited to race and or sex and can be applied whenever people recognize that they need a better framework to deal with the discrimination that they may face. Intersectionality's insight can be helpful in dealing with the major axes of social division and create a system which works in many different forms.⁸⁶ It can be linked to any inequality that has therefore been overlooked, denied or excluded.⁸⁷ Rather than to simply ignore the different parts of an individual's identity, there is greater benefit to integrate their complexity as part of the discussion so that policies can be put into action. This would be helpful in ensuring States fulfil their obligations to Black women's human rights.

Intersectionality has a history within critical race feminisms and post-colonial studies.⁸⁸ It is a way of understanding and analysing the complexity of the world, and the experiences that humans have. Life cannot be understood within just one category. Yet laws only have the means to protect one aspect of an identity. This theory represents how many factors affect how individual experiences can impact how they are treated within society. Intersectionality is often as an analytical tool that allows people to better access the complexities of the world and therefore themselves.⁸⁹ The well documented roots of intersectional analysis stems within black feminist theory and the oppression they face within the United States of America as stated before. Intersectionality was able to assess the complex interrelations of race, gender and class.⁹⁰ Researchers and decision makers have attempted to use intersectionality theory to help those who have been marginalised. To succeed, there needs to be an approach which is '*grounded in a lived experience*' and has the ability to provide a theoretical foundation for social justice.⁹¹ Intersectionality is particularly relevant to Black women given the

⁸⁴ Disch L, Hawkesworth M 'The oxford handbook of feminist theory' (ed Oxford university press 2016) page 104-107

⁸⁵ Ibid [80]

⁸⁶ Collins, P. H., & Bilge, S. *Intersectionality*. John Wiley & Sons. (2016). pg4

⁸⁷ Ibid [82]

Mackinnon, C. A. 'Intersectionality as method: A note. *Signs: Journal of Women in Culture and Society*,' 38(4), 1019-1030 (2013).

⁸⁸ Truscan, I., & Bourke-Martignoni, J. International Human Rights Law and Intersectional Discrimination. *Berkeley Women's Law Journal*, 10, 16 (1995).

⁸⁹ Ibid [82]

⁹⁰ Ibid [82]

⁹¹ Hankivsky, Olena & Cormier, Renée. Intersectionality: Moving Women's Health Research & Policy Forward. (2009)

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multiple layers of oppression they face. The different layers have an overwhelming impact on their health concerns and outcomes as they “*suffer...the burdens of prejudice and mistreatment that fall[s] on anyone with black skin and as women they bear the additional burden of having to cope with black and white men*”.⁹² There are studies that exist to support the idea that race and class have an effect on health. In Canada, Aboriginal women face discrimination on the basis of race, class and gender and this all impacts their health negatively. The study also showed that Aboriginal women with low income face higher risks for poor health.⁹³ Studies such as these contribute to painting a picture that emphasises how women of colour and the multiple layers of oppression they face create a combination of factors that determines the treatment that they receive.⁹⁴ International Human Rights Mechanisms often have remedies for individual cases that have tended to strengthen the concept that discrimination can only happen on one level. Intersectionality ‘*highlights how lived identities, structural systems, sites of marginalisation, forms of power and models of resistance ‘intersect’ in dynamic shifting ways*’.⁹⁵ The theory of intersectionality focuses on awareness on people and their experiences that are often overlooked. Moreover, Intersectionality has shown that women of colour suffer from subordination that the margins of a single axis politics offers.⁹⁶

Conventional discrimination mirrors the power relationships that are present in current hierarchies within society and they have an effect in regards to defining inequalities. However, this does not challenge or equalize the inequalities. This is one of the reasons that intersectionality is often suggested as a tool in relation to women’s rights as it understands that stereotypes and categories can hinder the equal application of the law. This approach recognises that there are unique forms of discrimination that can occur to different people within different systems of oppression and hopes that by being able to identify what they are, measures can be put into place to prevent them. Intersectionality is deeply rooted in the feminist literature of women of colour and critical race theory. The development of the two theories contributed to the thinking of Critical Race Feminism. As a theory, it examines the legal status of women of colour regardless of if they are part of the majority

⁹² King, D.. Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology. (1988)

⁹³ Veenstra G ‘Race, gender, class, and sexual orientation: intersecting axes of inequality and self-rated health in Canada (2011)

⁹⁴ *ibid* [76]

⁹⁵ Truscan, I., & Bourke-Martignoni, J. International Human Rights Law and Intersectional Discrimination. (*Berkeley Women’s Law Journal*, 10, 16. (1995).

⁹⁶ *Ibid*[91]

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within that culture. Feminism plays an important role in recognising that women are disproportionately at the bottom of the power structures and hierarchies within society. However, women of colour seem to suffer more economically, socially and politically and Critical Race Feminism can help provide better understanding so that the law and other public institutions can ensure that all are treated equally.⁹⁷ Women of colour experience an even lower position in the hierarchies due to multiple aspects of their identity. This is also reflected in regards to how they are treated for their physical, mental,⁹⁸ sexual and reproductive health. Critical Race Feminism allowed for a broader range of legal and social movements to work towards better experiences and outcomes. More research on critical legal studies and critical race theory formed, and by taking inspiration of critical legal studies, critical race feminism became able to challenge the idea that the law is neutral and objective. Using this perception, it was possible to show how the current framework is actually a tool that perpetuates class distinctions and other stereotypes which impede protections both domestically and internationally.

The legal framework that is currently in place separates sex discrimination (with the creation of CEDAW) and race discrimination (with the creation of CERD) into separate categories. When in reality there are whole group of people who fit into both categories yet are unable to be protected by both legal instruments. It erases the conception that a woman has been discriminated against because of her race. Within Crenshaw's article '*Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Colour*',⁹⁹ she extends her use of intersectional theory beyond anti-discrimination law and uses it to address how the law marginalizes subjects. Her delivery was never intended to be limited to legal reforms but that it should be used to '*grant greater inclusion to differently defined subjects*'.¹⁰⁰ However, having laws in place is one of the necessary tools needed to protect the interests of citizens, especially those who are vulnerable to mistreatment. It is a crucial reason why the obligations and duties that States assume should be respected and enforced. Although International Human Rights Law is formed on the basis of consent, once States do consent, it then becomes the Governments responsibility to take domestic and regional measures to protect

⁹⁷ Levitt I J 'Black Women and International Law; Deliberate interactions, Movements, and Actions' (ed, Cambridge univerisy press, Cambridge 2015) pg 40

⁹⁸ Lewis, J. A., Williams, M. G., Peppers, E. J., & Gadson, C. A.. Applying intersectionality to explore the relations between gendered racism and health among Black women. (2017)

⁹⁹ Crenshaw, K. Mapping the margins: Intersectionality, identity politics, and violence against women of color. (1990).

¹⁰⁰ibid

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against human rights abuses so that all can enjoy the Right to Health alongside all other basic human rights.

The organisation of power paints a picture that everyone is on a level playing field and the messages of the Law is supposed to further advertise the notion of fairness. But, what happens is that the pattern of those who benefit from the system compared to those who do not further proves the need for such theories. For example, the ethnic make-up of the prison population does not reflect what society looks like. Within prisons in England and Wales, ethnic groups make up 26 percent of the population which is disproportionately high in comparison to the 14 percent that ethnic groups accurately make up within the general population.¹⁰¹ In particular, Black men are 26 percent more likely than White men to be reprimanded into custody, and 53 percent more likely to be given a custodial sentence as per research from the Lammy Review. It shows a direct association between race and sentencing.¹⁰² International Human Rights discourse and the discourse that takes place at a regional and national level must also take into consideration how stereotypes affect people of colour. Assessing the media and it's the presentation of White criminals compared to Black criminals further proves how legalisation and application within a system that is supposed to be impartial is actually stimulated by stereotypes, which has had an undeniable impact on public institutions such as prisons and the criminal justice system. This is not a reality that only those in England and Wales face. In the United States, Black-Americans are not only more likely to be incarcerated but 87 percent of them feel that they are treated less fairly than other races.¹⁰³ It has recently been reported that Black women in the UK and Ireland are five times more likely to die than White women from complications in relation to pregnancy and/or childbirth.¹⁰⁴ This requires and explanation because although Death in pregnancy and childbirth is rare, Black women face a higher risk and need to be better protected.¹⁰⁵ In fact “on

¹⁰¹ <https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/national-and-regional-populations/population-of-england-and-wales/latest>

¹⁰² Lammy, D. The Lammy review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System. *HM Government*. (2017)

¹⁰³ <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/>

¹⁰⁴ Knight M, Bunch K, Tuffnell D, Jayakody H, Shakespeare J, Kotnis R, Kenyon S, Kurinczuk JJ (Eds.) on behalf of MBRRACE-UK. Saving Lives, Improving Mothers' Care - Lessons learned to inform maternity care from the UK and Ireland Confidential Enquiries into Maternal Deaths and Morbidity 2014-16. (2018)

¹⁰⁵ E Kasprzak 'Why are black mothers at more risk of dying?' BBC News 12/04/2019
<<https://www.bbc.co.uk/news/uk-england-47115305>>
<https://www.bbc.co.uk/news/av/stories-49607727/black-women-five-times-more-likely-to-die-in-childbirth>

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almost every major indicator of physical health [In the United States] African-Americans fare worse” than others from different racial backgrounds.¹⁰⁶ There have been discussions about why this has been happening. Reasons suggested have included that health care professionals are acting on an unconscious bias that has impacted the way that they treat people who do not look like them. The growing need for a diverse health care workforce is an issue that many countries face. There are different types of health care professionals needed, all of which play a critical role in the public's access to an adequate standard of health care. A major limitation on the research regarding Black women and the disparities they face with their health is that most of the research has been exclusive to the United States. The fact that it is currently exclusive to the experience of African-Americans can create difficulties as it may seem like a problem that only those in the United States must manage. But, other western societies such as the United Kingdom have displayed similar trends which can act as even more evidence of unconscious biases within white-dominated societies.¹⁰⁷ Regardless, international, regional and domestic legal systems are not giving enough attention to the diversity within the Black community.

These statistics show how ethnic groups, and especially Black Women are affected disproportionately by stereotypes. Events of people's lives are not shaped by one thing but in fact are shaped around different social and political factors that all exist equally within each individual's complex lives.¹⁰⁸ The multiple layers of oppression that women face, especially women of colour, can hinder other areas of their lives more than the average person. Many use this theory to ‘*create a more expansive understanding of individual and collective identities*’.¹⁰⁹ A better understanding of Intersectionality within the realms of International Human Rights Law in respect to the Right to Health could be one of the first important steps in having legislations and practices that can better protect Black women and their health. Intersectionality is a way of understanding the complexity of the world and the citizens that inhabit it. There are many different parts to the human experience and therefore it can be difficult to implement. When applied correctly intersectionality allows for more diversity and inclusion

¹⁰⁶ Discrimination and the health of African Americans ; the potential importance of intersectionalities

¹⁰⁷ Black women ‘five times more likely to die in childbirth’ <https://www.bbc.co.uk/news/av/stories-49607727/black-women-five-times-more-likely-to-die-in-childbirth>

¹⁰⁸ Collins P A and Bilge S, ‘Intersectionality’ (ed, Polity Press, 2016) pg 25

¹⁰⁹ Ibid [104] pg 114

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frameworks. The type of the discrimination that one can face based on a single identity trait is not enough to adequately protect individuals and communities as the intersecting nature of the different aspects of one's identity can lead to complex, smaller sub-groups that could lead to an '*infinite regress problem*'.¹¹⁰ The approach that the intersectional theory provides does have its issues and is often challenged as being unable to take the nuanced and complex reasons as to why anyone, especially women, with an intersectional identity are more likely to experience disadvantages that are often not protected within legal and political systems.

Chapter 4: The Black Woman

A Black woman who goes to the doctor and is complaining about pain that they are experiencing, expects and trusts that the medical expert who has undergone all the required training will be able to correctly assess the pain they have described. From then, the medical expert takes the necessary measures to treat the suffering so that she is able to get back to her daily life.¹¹¹ But research shows that when the patient is Black, the standard of care that one expects to receive may actually be conditional to his or her race and ethnicity. Women are affected by similar health conditions as men, but women experience them differently. The prevalence of poverty and economic dependence among women, their experience of violence, gender bias in the health system and society at large, discrimination on the grounds of race or other factors, the limited power many women have over their sexual and reproductive lives and their lack of influence in decision-making are social realities which have an adverse impact on their health that the majority of men will not have to worry about. The Black body has always been perceived by White people as biologically different to their own.¹¹² History shows how scientific racism by White men was used to justify enslaving black people with claims of lesser intelligence.¹¹³ The past can also show how some have a perception that Black bodies are stronger, which may lead to the belief that it is therefore stronger than their own.¹¹⁴

¹¹⁰ Grabham H, Cooper D, Krishnadas J and Herman D 'Intersectionality and Beyond; Law, power and the politics of location' (ed Routledge-Csvendish USA, 2009) page 124

¹¹¹ Hoffman, K. M., Trawalter, S., Axt, J. R., & Oliver, M. N. Racial bias in pain assessment and treatment recommendations, and false beliefs about biological differences between blacks and whites. (2016).

¹¹² Ibid [107]

¹¹³ Nott J C, "*Types of Mankind*" (1854)

¹¹⁴ Hoffman KM, Trawalter S, Axt JR, Oliver MN. Racial bias in pain assessment and treatment recommendations, and false beliefs about biological differences between blacks and whites. (2016)

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Stereotypes play a prominent role in how they are interacted with in society. These narratives only contribute towards the racial bias that downplays their pain and creates an environment that hinders on their access of The Right to Health due to the current health care system being sexist and racist similar to the legal institutions in place. Black women are living within systems that have developed from a white supremacist history and the result has led to an unconscious bias that is based on false ideals of pain. Research has shown that in relation to white patients, Black patients are significantly less likely to be given painkillers, regardless of their age or gender.¹¹⁵ In a similar manner to how the patriarchy intercepts the law and fashions it in a manner that makes it appear to be neutral when it is not, is how this unconscious racial bias within the health care system allows for Black women and their pain to be ignored. As aforementioned, Black women were often subjected to indirect racism by the mainstream white feminist movement. As a collective, this was the thinking that led them to realise that things that were of immediate concern to them were not being spoken about in the mainstream movement and supported the need for Black Feminism. This evolution is an example of the importance of intersectionality, seeing movement that was supposed to protect all women still had flaws and blind spots. Each concept of an individual's identity needs to be considered independently while also understanding that each part of their identity reinforces another.

Intersectionality recognises that individuals can experience discrimination on the basis of various and intersecting identities. Both the ICESR and CEDAW require the elimination of discrimination against women in health care as it guarantees of equal access for women and men to health-care services. Addressing discrimination in all its forms, including in the provision of health care, and ensuring equality between. However, due to the effects of the patriarchy, the separation of the private sphere and how majority of societies have formed, it is clear that the nature of these institutions both nationally and internationally, have been affected by the patriarchy and has inherently perpetuated stereotypes of race and gender that have negative impacts on women of colour and in particular black women. Institutions such as the Media also further marginalise women often they paint women of colour as poor silent victims.¹¹⁶ Understanding the intersectionality theory gives insight into the demarginalization to women of colour and especially black women in relation to their health. Although

¹¹⁵ Ibid [110]

¹¹⁶ Levitt J L "Black women and international law deliberate interactions, movements and actions" pg38

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Feminist theory has helped with understanding how International Human Rights and its institutions have negatively affected women, not many women are provided with better protections because of it.

It is important to understand that due to the structural inequalities in the United States and many other countries, there is proof that racism, sexism, and economic inequality, have had a discriminatory effect on access to the Right to Health.¹¹⁷ Hence, when such policies that make it difficult, if not impossible, for Black women to access the same services/rights as white, wealthy women would have. States are then in direct violation their obligations under CERD; one of the few human rights treaties that the United States has actually ratified. The lack of access to sexual and reproductive health services has been documented in shadow reports to the CERD Committee. The CERD Committee has consequently recommended that the United States address persistent racial disparities in sexual and reproductive health to comply with the treaty in its Concluding Observations. The lack of willingness from Governments to protect Black women and their health is why International Human Rights Law needs to have an understanding of intersectionality and ensure their protected, as without it Black women, have to face inferior services and the status of their health is often affected.

As a theory, intersectionality contributes to helping describe what occurs when a woman from a minority group attempts to pilot life but also must deal with different types of oppression all at once. Crenshaw gave the analogy of crossroads. Picture a woman of colour trying to cross the road in a busy city, *'the main highway is Racism Road; One crossroad can be colonialism, then another Patriarchy Street.'*¹¹⁸ White women in most scenarios only have to cross Patriarchy Street, whereas women of colour have to deal with not just Patriarchy Street but all the other roads which can 'link together causing a double, a triple, multiple, a many layered blanket of oppression.'¹¹⁹ Social divisions exist in the way that people experience inclusion and exclusion within their daily lives. It can also affect the way that the theory could be understood and applied on the different levels of oppression.

¹¹⁷ Krieger, N.. *Embodying inequality: a review of concepts, measures, and methods for studying health consequences of discrimination.* (1999)

¹¹⁸ Crenshaw K , "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics," *University of Chicago Legal Forum*, 1989, 139–67

¹¹⁹ Yuval-Davis, N. (2006). *Intersectionality and European Journal of Women's Studies* pg 196

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Crenshaw describes the idea that the legal system has generally defined sexism based upon an unspoken understanding of the injustices confronted by all women. She further explores how racism is understood by the current power structures as something men and women face due to the colour of their skin and race. This discourse has led to black women and their struggles being 'legally invisible' and without remedy within the legal system.

Intersectionality and Feminist Theory have the power to help contribute to better laws and international mechanisms that actually have the ability to protect Black women, especially when it comes to their right to Health. When assessing the women's movement over the years many different denominations have formed, and black feminism was one of them. Black feminist thought, was defined by Patricia Hill Collins as "*a fundamental paradigmatic shift that rejects additive approaches to oppression [and identity]*."¹²⁰ That "[i]nstead of starting with gender and then adding in other variables such as age, sexual orientation, race, social class, and religion, Black feminist thought sees these distinctive systems of oppression as being part of one overarching structure of domination."¹²¹

The idea evolved due to the power structures that were in place. Slavery was one of the main power structures that have hindered the progress of those of African-Caribbean decent. Women of colour's critique of conventional feminism, emphasized the disconnect between feminisms claims to speak for all women and feminism's recurrent negligence to racial, ethnic, class, and sexual difference.

A Black woman's identity is complicated, and therefore so is the discrimination they face. The innate racial bias of the Health care system further justifies and proves this. If it can be accepted that the legal systems in place are sexist and racist, then the same can be thought of many Healthcare Systems.¹²²

Often Black Women go to the doctors and feel misheard, unseen and therefore misdiagnosed.¹²³ As if their pain does not matter as much or the issues that you're facing aren't as important. The United States is where most of the research to do with the disparities in health care of Black Women is

¹²⁰ P Hill Collins, Black Feminist Thought. Knowledge, Consciousness, And The Politics Of Empowerment 222 (1990).

¹²¹ Ibid[118]

¹²² Black women 'five times more likely to die in childbirth' <https://www.bbc.co.uk/news/av/stories-49607727/black-women-five-times-more-likely-to-die-in-childbirth>

¹²³ Ibid [120]

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found. Race plays a big part of a person's identity and how they interact with and in a society. Often, and not exclusive to the United States, Black people live in poorer communities with less funding which can make health services harder to access as the hospitals within the communities are often, overcrowded, underfunded and with out-of-date or non-functional equipment. In Countries such as the United States health care professionals indirectly act on stereotypes that assume African-Americans are unable to pay for the health care services they need or do not have the adequate health care insurance leading to maltreatment from staff which has the ripple effect of creating an environment where Black Women are reluctant and/or hesitant in seeing health care professionals as when they do go to see them their pain is often dismissed or ignored. Without intervention from family members the delay in seeking medical attention can lead to even bigger complications with the individuals health.¹²⁴ Statistically it has been proven that women are more likely to use health care services than men. Studies have shown that this is due to a number of reasons such as traditional views on masculinity¹²⁵ or that they are uncomfortable with the exam which can lead to a fear of diagnosis.¹²⁶ Although men not seeking care is a concern as this can have a detrimental impact on men's health, it is also an issue that when Black women are trying to seek health care they are often hindered or face a delay in treatment even though they are also more likely to go into the doctors for health care concerns.

One of the major issues that women face in regards to their health in their lives, is often to do with their sexual and reproductive health. In particular ,their reproductive rights are often debated within Government. Around the world, every single day 800 women and girls die from preventable causes

¹²⁴ Black women 'five times more likely to die in childbirth' <https://www.bbc.co.uk/news/av/stories-49607727/black-women-five-times-more-likely-to-die-in-childbirth>

¹²⁵ K Branson 'The Tougher Men Think They Are, the Less Likely They Are to Be Honest with Doctors' 23/06/16 <https://news.rutgers.edu/news/tougher-men-think-they-are-less-likely-they-are-be-honest-doctors/20160321#.XXEcai5KiUm> [accessed 05/09/2019]

Noone, J. H. and Stephens, C. Men, masculine identities, and health care utilisation. (2008) 'Mars vs. Venus: The gender gap in health.' Updated 26/08/2019 http://www.health.harvard.edu/newsletter_article/mars-vs-venus-the-gender-gap-in-health [accessed 05/09/2019]

¹²⁶ A Almendrala ' Here's Why Men Don't Like Going To The Doctor ' 13/06/2016 https://www.huffingtonpost.co.uk/entry/why-men-dont-go-to-the-doctor_n_5759c267e4b00f97fba7aa3e?guce_referrer=aHR0cHM6Ly9jb25zZW50LnlhaG9vLnNvbS8&guce_referrer_sig=AQAAAMzf-AR2KxQ7tl2ceFGacLWxmg_YwFKSrAikletWIN8q_w9XgdhZhucgcqCgTd815kNPXjm6Gvu55xFLTXwF8_9gHP_Ls5yTaU0zImmm3TpP8nZqbGXWTUd2l155U9Gdmwli3ZbeUtzGE_hO6PMaMaNdaMI3BL6IMTKjviiqTpCXXgZ&guce_ounter=2 [accessed 05/09/2019]

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during and after their pregnancy.¹²⁷ Human Rights Watch has documented that one of the main reasons that so many women are dying includes and is due to the lack of accountability of health professionals to poor quality of services and considerable cost barriers to care.¹²⁸ In cases where women's lives are affected by pregnancy, laws still offer inadequate protection as seen in *Geduldig v. Aiello* In the United States.¹²⁹ Aiello and other disabled women who were denied benefits challenged the national statute as it presented a violation of the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court, made up of all male judges, upheld the statute as rectifying the discrimination that these women were facing would be 'extraordinarily expensive'.¹³⁰ The United States is one of the world's richest countries, but protecting women and their lives does not seem to be a priority and sadly there is not only evidence that displays the discrimination that women face but there is also evidence that Black women are more than three times likely to die than white women during a pregnancy.¹³¹ Accountability for Black women's health has not been when ensuring that all citizens are able to access the highest attainable health care services. Black women and medical issues in pregnancy are often told to calm down and are dismissed under the 'angry black women' stereotype which can have a real impact on the outcome of the how their pregnancy is treated.¹³² Often negligence from doctors and other medical professionals not giving the right information or not enough information can lead to still-births or other complications that were preventable. In 2016 charts showed that Black women in the United States with an advanced degree was more likely to lose her baby than a white woman without a high-school diploma.¹³³ Infant mortality has created a crisis in the lives of their Black mothers. Advocacy groups have testified to the CERD committee saying that the United States is violating the international treaty but not addressing this crisis that Black women face. Racial disparities in the field of reproductive health need to be

¹²⁷ Klasing A 'Valuing Black Women's and Infants' Lives in the US'
<https://www.hrw.org/news/2018/04/13/valuing-black-womens-and-infants-lives-us>
[accessed 30/09/19]

¹²⁸ Ibid [137]

¹²⁹ *Geduldig v. Aiello*, 417 U.S. 484 (1974)

¹³⁰ Ibid [126]

¹³¹ Centre for Disease Control and Prevent 'Pregnancy Mortality Surveillance System'
https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-mortality-surveillance-system.htm?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Freproductivehealth%2Fmaternalinfanthealth%2Fpmss.html [accessed 30/09/19]

¹³² <https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html>
[accessed 25/09/19]

¹³³ Ibid [129]

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eliminated so that Black women can have access to a better standard of living.¹³⁴ For this to be successful there needs to be effort to standardize the system so that all women are accessing the best available services to all their healthcare needs.

This demonstrates how the institutions in place are failing Black Women in accessing the highest attainable standard of health which directly infringes on their Right to Health. There are two main theories to which racial disparities in health care can arise. The first possibility is that medical physicians and other professionals are unable to identify black physical pain. What might be the case is that White doctors are unable to recognise Black pain in the same way that they recognise white physical pain, making them unable to treat it effectively. The second possibility is that medical professionals do in fact recognise the pain that their Black patients experience, but are less likely to treat their pain, due to unconscious stereotypes that they have, such as Black people being poorer and therefore being unable to afford health care. This bias has contributed to some medical professionals being unwilling to treat Black people.¹³⁵ The racial bias could stem from a combination of both possibilities, but it still remains that Black women are paying the consequences as often their pain and issues are ignored, especially in relation to their Sexual and Reproductive Health.

Chapter 5 – Building on Intersectional Theory

Race-based events over the last centuries has had a lingering effect on the impact of the current health of Black women especially in relation to their sexual and reproductive health and rights. African American women and Black women in general face higher levels of maternal mortality, infant mortality, complications during pregnancies, sexually transmitted disease (STIs) and are more likely to struggle to access education to improve their personal knowledge about their sexual and

¹³⁴ Centre for Reproductive Rights 18/11/16

https://www.ohchr.org/Documents/HRBodies/CERD/ConsultationCivilSociety/NGOs/Centre_Reproductive_Rights.pdf

¹³⁵ McGibbon, E., & McPherson, C. Applying intersectionality & complexity theory to address the social determinants of women's health. (2011)

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reproductive rights.¹³⁶ Racism still persists within public institutions such as the criminal justice system and it is no shock that the healthcare system or those who work within it have attitudes that continue to marginalise Black women and affect their Right to Health, as outlined in Article 25 of the UDHR¹³⁷ and General Comment 14.¹³⁸ This is why it is so important to understand intersectionality and its history. It is an approach that offers a theoretical lens that can assist in developing a critical understanding of the connections between these concepts and realities and attempt to find solutions.

Crenshaw's research notes that Black women are frequently ignored and absent from the analysis in regard to gender, race and the oppression that they face. There has been more media attention in Black women's access to health but this is not enough to change how they are treated. Legal instruments have an impact on improving the conditions that Black women are facing. Understanding external factors such as unconscious biases of law makers and socio-economic factors like income and lifestyle could contribute to a better understanding of how to start remedying the issue within laws. Intersectionality recognises that the multiple oppressions that Black women face are not suffered individually but in a synthesized experience.¹³⁹ The power of intersectionality allows for a better understanding in of all these factors. Access to health care and services all contribute to a person having good physical, social and mental health. Any system that does not have measures to promote this in place contribute to the detriment of Black women's health. Simply being able to understand what is going on is important for an individual's sense of autonomy. Access to language can also be crucial in the quality of health care that is received. Immigrants are regularly at an increased risk for disease and injury, particularly those who lack fluency in English and familiarity with the U.S. health-care system or who have different cultural attitudes about the use of traditional versus conventional medicine.¹⁴⁰ In the case of *Vo v France*, a French doctor caused the termination of the pregnancy after confusing two patients with similar names and piercing the amniotic sack of the applicant by mistake as it was assumed an IUD was being removed.¹⁴¹ Vo did not speak French and

¹³⁶ Prather C, Fuller TR, Jeffries WL 4th, et al. Racism, African American Women, and Their Sexual and Reproductive Health: A Review of Historical and Contemporary Evidence and Implications for Health Equity. (2018)

¹³⁷ 1948

¹³⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)

¹³⁹ Ibid [115]

¹⁴⁰ Timmins, C. L. The impact of language barriers on the health care of Latinos in the United States: a review of the literature and guidelines for practice. (2002)

¹⁴¹ *Vo v France* Application no. 53924/00, Council of Europe: European Court of Human Rights, 8 July 2004.

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the fact she was not given a translator or offered more understanding on what was happening to her has been argued to be discriminatory. Positive difference in treatment would have spared Vo having to go through a therapeutic abortion as she would have understood what was happening to her body and declined the treatment and corrected the doctor before the error. The state and medical bodies have to take situations like this into consideration as it contributes to the standard of health care these women have access too. Not having measures in place can violate human dignity.

The nature of Gendered Racism (which refers to the simultaneous experience of both racism and sexism at the same time) has developed into microaggressions that have become neutral in the law.¹⁴² The intersectionality framework offers many benefits in regard to improving Black women's access to adequate treatment and the protection of their Health. This theoretical lens has the ability to strengthen the human rights perspective on healthcare access. The typecasts that are attached to Black people have had a detriment on the wellbeing of Black women as their health is undervalued when medical professionals are unable to react to their pain effectively. This is why ensuring that they have access to health care is so important. The maternal mortality in the United States is highest amongst Black mothers and it affects all women across the income spectrum and from different walks of life. The issues they face are often preventable, yet they are always more likely to die. Disparities in maternal and infant mortality are rooted in racism. Structural racism in health care and social service delivery means that Black women have been receiving a poorer quality of care than white women. The denial of care when Black women seek help when enduring pain or that health care and social service providers fail to treat them with dignity and respect. The structural racism that is present perpetuates racial inequality and ensures that public policies and practices reinforce the treatment they face.¹⁴³ Gendered racism can manifest in differ structural forms, this can mean that people of colour, due to lack of income live in communities with less wealth as they do not have the means, have to use services that lack adequate health facilities. So many social factors that are protected under the Human Rights discourse seem to be ignored and effect Black women negatively. The right

¹⁴² Lewis, J. A., Williams, M. G., Peppers, E. J., & Gadson, C. A. Applying intersectionality to explore the relations between gendered racism and health among Black women.. (2017)

¹⁴³ Taylor J Novoa C Hamm K and Phadke S ' Eliminating racial disparities in maternal ad infant mortality; aA Comprehensive Policy Blueprint' 2nd May 19 <https://victimsofcrime.org/our-programs/past-programs/dna-resource-center/untested-sexual-assault-kits/about-sexual-assault> [accessed 30/09/19]

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to Health¹⁴⁴, the right to Education¹⁴⁵ all have been tainted by structural imbalances that discriminates against people of colour that has further affected how their Black women's health is managed. Studies from 2015 and 2017 have shown that Black women, and non-binary people are hyper-vulnerable and more likely to suffer a form of sexual assault in the United States.¹⁴⁶ Forty percent of them will experience intimate partner violence and Black women make up 22 percent of those who have experienced rape.¹⁴⁷ These statistics can be used to illustrate the need for an examination of women of colour as the current legal systems they exist within are underperforming in their protection. International Human Rights Law has the ability to improve women's health, but measures need to be taken to ensure that States are doing all that they can to protect them. The right to be free from discrimination safeguards that all people should have liberty and security, ensuring this can contribute to fixing issues that women face in each individual country but special measures for Black women within western and white societies is vital.

CEDAW was intended to liberate women and allow them as a collective to realise the potential they have as individuals and a group. Its functions includes not merely being brought to the same level as men but that they enjoy the same protections between the sexes. CEDAW required that the State assess social issues that are directly linked to inequalities and this scrutiny of systems should also include health care. Article 12 in CEDAW is where the convention prohibits all forms of discrimination. Laws governing women's health care need more scrutiny to ensure that they are not discriminating against women. The health care system based on different statistics shows how women, in particular Black women, face structural inequalities that come from negative stereotypes that trivialise race and sex-roles which have an impact on the quality of treatment. Laws that deny or restrict women's access to health care services have an impact on their lives. They impair women's rights and although that may not be the law's intention, it is often the outcome. For example, globally the topic of abortion is heavily debated. Sometimes laws are put into state legislation with good intentions but actually creates a disadvantage to groups that do not have the same access as middle-class white

¹⁴⁴ Article 25 UDHR

¹⁴⁵ Article 26 UDHR

¹⁴⁶ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M.. The Report of the 2015 U.S. Transgender Survey. (2016)

¹⁴⁷ Petrosky E, Blair JM, Betz CJ, Fowler KA, Jack SP, Lyons BH. Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014. (2017)

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women. Prior to the recent changes, Northern Ireland abortion legislation was among the strictest in the world. It was illegal to have one except in very strict circumstances. The circumstances where an abortion was legal is if the pregnancy threatened the mother's life or there was serious risk to her mental or physical health. Fatal foetal issues, rape and or incest did not qualify as a legitimate circumstance for an abortion under the law. This was ruled as incompatible with the human rights of women. However, before that women with means who did not want a child from choice were able to fly to England and pay for an abortion where the laws are more lax and not have to worry.¹⁴⁸ This clearly discriminates those without the means to travel who may then turn to back-alley abortions that can result in further complications in their health. Similar trends can also be seen in the United States where abortion laws are more strict, there is a disproportional impact on people of colour and those with lower incomes.¹⁴⁹

Intersectionality has become a leading analytical tool that feminist and anti-racist scholars employ for theorizing identity and oppression. In cases such as *Lovelace v Canada* applying an intersectional framework would have changed the outcome of the case.¹⁵⁰ Although this case is not about a Black woman it shows how women of colour are often faced with the reality of having only one aspect of their identity protected. Men of colour tend not to have to deal with the same issues as their cultures often have patriarchal or misogynistic undertones, therefore favouring men over women. In *Lovelace* if the case was reviewed with a framework that understood intersectionality and how it can be used within a legal framework to help protect people, then the outcome would have been very different. The law reduced *Lovelace* to only one aspect of her identity as it created competing interests between her indigenous rights and her women's rights. While 'intersectionality' has become a knowledgeable buzzword, the conception that identity is moulded by interlocking and mutually reinforcing vectors of race, gender, class, and sexuality has been present in Black feminist scholarship for decades.¹⁵¹ Legal frameworks in their current state are only able to process one aspect of a Black woman or any

¹⁴⁸ Kelly J 'Why are Northern Ireland's abortion laws different to the rest of the UK?' 8th April 16 <https://www.bbc.co.uk/news/magazine-35980195> [accessed 5/10/19]

¹⁴⁹ Sherman RB 'Recent abortion bans will impact poor people and people of color most' 18th May 19 < <https://www.vox.com/first-person/2019/5/18/18630514/missouri-alabama-abortion-ban-2019-racism> > [accessed 25/09/19]

¹⁵⁰ Sandra Lovelace v. Canada, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977.

¹⁵¹ Nash, J. C. Re-thinking intersectionality (2008)

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woman of colour's struggle. Without International Human Rights Law ensuring that at least at an international level the law is not binary there will still be a gap in the protection it can offer.

The type of discrimination that women of colour face when it comes to racial issues does not technically upset the principles of formal equality and fits into the language and expression used in anti-discriminations laws that are found within International Human Rights Law. Courts have failed to recognise Black women as a special class in the past that needed to be protected from discrimination. Linking to why International Human Rights Law cannot protect them adequately in it's current state. There is a large body of work that show that perceived racism affects both mental and physical health outcomes.¹⁵² In cases from the United States that were highlighted in Crenshaw's article, it is clear that Black women's complaints repeatedly fall in between the crack because they are discriminated on the basis of being both a woman and being black. In the case of *DeGraffenreid v. General Motors*¹⁵³ the issue with this framework was highlighted vividly by the facts of the case. In 1976 five Black women filed a case against General Motors as all of the Black women hired after 1970 lost their jobs. Although General Motors attempted to argue the validity of the dismissals by saying termination was on the basis of seniority. This only further extended the companies connection to the discriminatory practices of the past. In this case the court did not accept the new classification of 'Black women' as a special class. It was as if the courts feared the prospect of the creation of new classes of protected minorities. Crenshaw describes her observation of the ruling stating that when it comes to legal relief of Black Women, they are unable to be adequately protected as the case law within the states showed that the notion of a 'super category' was not accepted. Leaving issues that happen to Black women neglected even though International Human Rights Law has an obligation to protect all equally and fairly under the law. Black women are still dealing with the '*unfinished business*' of slavery today which is having effects on the quality of health that they are given.¹⁵⁴

Intersectionality allows for an understanding that shows despite its complexities, the framework can work both conceptually and methodologically in complex environments within society. The nuances of

¹⁵² Lewis, J. A., Williams, M. G., Peppers, E. J., & Gadson, C. A. Applying intersectionality to explore the relations between gendered racism and health among Black women. (2017)

¹⁵³ *DeGraffenreid v. General Motors As Sembly., ETC., (E.D.MO) 1976*

¹⁵⁴ Division of HIV/AIDS Prevention, National Center for HIV, Hepatitis, STD and TB Prevention, Centers for Disease Control and Prevention, Atlanta, Georgia

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intersectionality illustrate the need for human rights to be mindful of the past, present and future. For Black people in the United States, health disparities can lead to earlier deaths within the community, decreased quality of life, loss of economic opportunities, and perceptions of injustice. For society, these disparities translate into less than optimal productivity, higher health-care costs, and social inequity. It has been estimated that by 2050, 61 million people who identify as Black will reside in the United States, amounting to approximately 15% of the total U.S. population.¹⁵⁵ All of those people will become subjected to discriminatory experiences both in and out of the health care system unless methods are taken to ensure a better outcome for them all. The importance of understanding the theory behind women's struggle for equality and how the system indirectly oppresses them is significant for finding solutions to help Black people within the health system. Critical Race Feminism can also be incorporated into intersectional frameworks to combat unjust race and gender structures that contribute to the issues that women of colour are more likely to face. Critical Race feminism is a body of writing that attempts to integrate race and gender together in structuring social inequality which can have benefits in improving how Black women experience the health care system.¹⁵⁶

Challenging the conventional nature of the law, makes it possible to distinguish the unique differences in everyone's experience especially in relation to women of colour. There have been some criticisms of Critical Race Feminism, such as the fact that it does contradict the notion of a single '*essential female voice*' within the feminist ideology but by assessing the multiple consciousness of a person the law can better adopt legal practices to protect collectives and individuals.¹⁵⁷ But nonetheless Critical Race Feminism can work towards contributing to a framework that can offer better International Human Rights protections within the current mechanisms that already exist, or work towards creating new ones that benefit Black women.

Intersectionality has the ability to help bring a better understanding to the problems Black women face despite their progress Black people have made since abolishing slavery. It helps explain how they deal with negative stereotypes that impact their experiences within society. There are many potential

¹⁵⁵ Health Disparities Experienced by Black or African Americans—United States. *JAMA*. 2005;293(8):922–923. doi:10.1001/jama.293.8.922

¹⁵⁶ Dua E.. *Scratching the Surface: Canadian Anti-Racist Feminist Thought*. Toronto, ON, Canada: Women's Press; 1999

¹⁵⁷ Few, A. L. (2007). *Integrating Black Consciousness and Critical Race Feminism Into Family Studies Research*. (2007)

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benefits to using intersectionality in explaining the detriment that Black women face in regard to their health. However, there are still challenges, such as choosing which social factors would have the most impact within a model that includes intersectionality. Intersectionality is generally used to explain inequalities and allow for marginalized groups such as Black women to have a better understanding of the structural oppression that they face with public institutions. Conversely, despite the benefits of the intersectionality theory, it does present limitations. Leslie McCall notes that ‘...*there has been little discussion of how to study intersectionality, that is, of its methodology*’.¹⁵⁸ It is still considered quite a new school of thought, and scholars have had to decide how to use it without a solid understanding of the theory Ann Garry suggests that it should be used more as a framework than methodology and it would be more successful to act as a guide as methodologies can become complex and confusing.¹⁵⁹ Intersectionality can encompass a wide range of factors such as sexual orientation, wealth, race, gender, ability and other social factors. Having a finite methodology can lead to an infinite regress which could open the floodgates to legal circumstances where everyone who is not White ascribes themselves to a special category. Not all situations need the full extent of the understanding that intersectionality offers. The theory also does not always provide all the information to provide the most accurate analysis.¹⁶⁰

Initiatives need to be put into place socially to help combat the social factors that contribute to Black women’s health disparities. At a minimum, it is important that States adopt a national strategy to ensure that all are enjoying the right to health, based on human rights principles which define the objectives of that strategy. Setting indicators and benchmarks will be decisive in the formulation and implementation of such a strategy. Indeed, the right to health being subject to progressive realization, what is expected of a State will vary over time. States needs a device to monitor and measure these variable dimensions of the right to health. By fulfilling the obligation to protect the right to health can include adopting and implementing A human rights-based structured approach that addresses the intersecting systems of oppression that do not allow for Black women and other marginalized women to achieve complete bodily autonomy and dignity. By recognising a woman’s ability to determine her

¹⁵⁸ McCall, L. *Intersectionality and beyond*. Routledge-Cavendish. (2008)

¹⁵⁹ Garry, A *Intersectionality, Metaphors, and the Multiplicity of Gender*. (2011)

¹⁶⁰ Smith S ‘Black feminism and intersectionality’ <https://isreview.org/issue/91/black-feminism-and-intersectionality>

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actions are intrinsically linked to the conditions within her community such as access to healthcare, affordable housing and economic opportunity then within the formations of policies and laws there must be a priority that fully address the disparities that women are facing within the public institutions.

¹⁶¹ For example, the Black Women's Health Imperative within the United States is a leading health education, research, advocacy, and leadership institution whose mission is to target the most pressing health issues and promote optimum health for Black women across their lives.¹⁶² The organization has an aim to strengthen the public's determination to invest in health prevention strategies and research that contributes to Black women leading healthier and longer lives. The goal of the Black Women's Health Imperative is to be the fundamental resource in the United States for accurate and trusted health information for Black women, while also being a centre for Black women's health and issues for women's organizations, healthcare providers, researchers, policy makers, and everyone committed to closing the health gaps that exist for Black women.¹⁶³ Efforts to improve Black women's health has to have a focus on both an individual and societal level. The use of special rapporteurs can also be helpful in maintaining a dialogue with States and discuss possible co-operations with any relevant actors within the political system to make the needed recommendations on appropriate measures that promote and protect the right to Health for Black women.

Improving women's health requires changes in governance for health that integrate women's lifelong needs into health policies, health-in-all-policies approaches and intersectoral action. In 2003, the Institute of Medicine produced the first comprehensive report demonstrating that racial and ethnic minorities have less access to quality healthcare.¹⁶⁴ Then in 2008, the World Health Organization announced a new global agenda for health equity, clearly asserting and substantiating that the social determinants of health, fashioned by the distribution of power and material resources, function to produce many avoidable health inequities.¹⁶⁵ Member States have to ensure that policy makers improve the governance that surrounds women's health and well-being by putting into place

¹⁶¹ Taylor J Novoa C Hamm K and Phadke S 'Eliminating racial disparities in maternal and infant mortality; a Comprehensive Policy Blueprint' 2nd May 19 <https://victimsofcrime.org/our-programs/past-programs/dna-resource-center/untested-sexual-assault-kits/about-sexual-assault> [accessed 30/09/19]

¹⁶² <https://bwhi.org/>

¹⁶³ Ibid [159]

¹⁶⁴ Caiola, C., Docherty, S. L., Relf, M., & Barroso, J. Using an intersectional approach to study the impact of social determinants of health for African American mothers living with HIV. (2014)

¹⁶⁵ Ibid [162]

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mechanisms and incentives that can help. For example, earlier in the paper there were two potential reasons as to why Black woman's pain was not recognised. One of them being that White doctors are unable to identify Black pain. This could be combated by creating more scholarships for Black men and women so that there are more Black doctors who can identify Black women's pain. Research has demonstrated that having a Black Doctor has led to more effective care. The lack of diversity amongst medical staff can be linked to how Black people and people of colour are treated as patients.¹⁶⁶

Sharing a racial background can promote communication and trust. Race is relevant in modern day health care for this exact reason. In a similar way in poorer communities having more healthcare centres and more Black doctors within the areas that Black men and women live would provide more interpersonal connections than current doctors are experiencing of a different racial background. The Black community has a wide range regarding income, education and age. Having more people that they can trust at all levels could lead to better practices for their health. Many people of colour actually seek out doctors from the same or similar cultural backgrounds so pushing for diversity in the health care workforce can allow for them to access doctors that understand them.

Conclusion

International Human Rights Law are not worth much to women if they have no intention of ensuring that duties of the State are being enforced. International, regional and national legal instruments need to establish standards and hold States accountable to ensuring that the human rights of women and the level of respect their human rights receive are always maintained. Black women are facing unequal health care in fractured systems that are threatening their lives and those of their children. This kind of institutional racism and sexism means that Black women are suffering disproportionately in regards to their health. A right that has been understood as essential to ensuring that human dignity is in place. Despite the research that shows the difference in treatment that Black women have to face when it comes to their health, there have been few efforts to address the problem and solutions are yet to materialize. Black women have hit a 'glass ceiling' in terms of their health.¹⁶⁷ There is a barrier

¹⁶⁶ Moy E, Bartman BA. Physician Race and Care of Minority and Medically Indigent Patients

¹⁶⁷ Kimberly R. Arriola J , Christina P. C. Borba, & Thompson W. The Health Status of Black Women: Breaking through the Glass Ceiling. *Black Women, Gender Families*, (2007)

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that they need to break through to ensure that they are kept healthy. Research is the first step in rectifying this, allowing for a basis for changes to be made with legitimate findings to justify it. A review of literature is just one step in bringing awareness and understanding to the complex relationship that affect Black Women. Intersectionality allows identification of the multiple factors and dimensions that influence the lack of protection that Black women face. Understanding the history and factors that contribute to the health disparities experienced by Black women and how International Human Rights law can work towards eliminating the discrimination that Black women receive.

There is no question that an intersectionality analysis has the ability to be useful in exploring the different planes of inequality relating to Black women in the health care environment. As established the main social detriments of health disparities, are racism, poverty, education, housing, access to healthy foods, environmental exposures, violence, and criminal justice. Traditional antidiscrimination laws are currently inadequate in protecting the profound complexities of Black women's inequality in white supremacist societies. There are many benefits of implementing an intersectional framework. However, despite the overlapping axes of discrimination and disadvantage, *"there is a lack of gender or vulnerability awareness, analysis, or mainstreaming in policy formation in the region which can properly inform anti-discrimination law or labour law"*.¹⁶⁸ It is clear that research has been successful in identifying the issues that Black women face when it comes to bettering their health problems. International Human Rights Law can be helpful in ensuring that States fulfil their obligations to ensure that women are not facing discriminatory practices. Other methods can also be supplemented into society to ensure that there is less barriers to Black women's health. Having women, and in particular Black Women, in male spaces has allowed for a spotlight to be put onto women's issues and experiences, therefore presenting an alternative on how they would have been protected better. If women were included in these spaces, then their experience could have brought awareness to inadequacies in the protections available in the first place. States accountability has the power to compel States to do as much as possible to work towards the realization of the right to health for all. States have a primary obligation to respect, protect and promote human rights for their citizens. The right to Health can be realised and mentioned for Black women through other mechanisms.

¹⁶⁸ Atoine, R. M. B. An Intersectional Approach to Addressing Gender and Other Forms of Discrimination in Labour in the Commonwealth Caribbean. (2018)

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Administrative and political mechanisms are complementary or parallel means to judicial mechanisms of accountability. International Human Rights Law can only have helpful relevance if there are enforceable duties that ensure they are being effective. Intersectionality allows for legal instruments to establish standards for States to meet. Although there are current initiatives to help improve women's health, more specific measures need to be in place for the promotion of Black women's health.

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