

**PROTECTING WOMEN MIGRANT WORKERS' RIGHTS IN SOUTH AFRICA:
THE NEED FOR A GENDER-RESPONSIVE FRAMEWORK**

by

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DECLARATION

I declare that this thesis is the product of my independent research carried out under the guidance of my supervisor. The thesis has not been submitted or presented, either in whole or in part, for the award of any degree in any university or institution of learning. I further declare that all anti-plagiarism rules have been complied with, and all sources consulted or referred to have been duly acknowledged as appropriate.

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ABSTRACT

This study, titled “Protecting Women Migrant Workers’ Rights in South Africa: The Need for a Gender-Responsive Framework,” addresses the critical issue of the increasing feminisation of migration and the unique vulnerabilities faced by women migrant workers, particularly in South Africa. Despite migration offering opportunities, these women often encounter exploitation, discrimination, and abuse. The study highlights how South Africa’s historical exclusionary policies and current gender-neutral legal frameworks fail to adequately protect these workers, leading to issues like inadequate pay, lack of contracts, long working hours, and gender-based violence. The core problem lies in the inadequacy of existing legal and policy frameworks to address the intersectional vulnerabilities of women migrant workers, resulting in a significant gap between theoretical legal protections and practical realities. Enforcement mechanisms are weak, especially in informal sectors where these women are concentrated, exacerbating their precarious situation and limiting their access to justice. The central research question guiding this thesis is: What factors contribute to the violations experienced by women migrants in South Africa, and how can a gender-responsive legal framework be developed and implemented to protect their rights effectively? Drawing upon feminist legal theory, intersectionality theory, and migration theories, the research critically examines international, regional, and domestic legal instruments to assess their gender sensitivity and effectiveness. A significant contribution of this study is the application of the Gender Legislative Index (GLI) as a methodological tool to evaluate the gender responsiveness of South African legislation. Through a comparative analysis of international and regional instruments against domestic laws, the findings highlight a substantial disparity between theoretical legal protections and the lived realities of women migrant workers, necessitating the urgent need for a transformative approach. The findings demonstrate that South African legislation, although formally inclusive, does not address the intersectional vulnerabilities of women migrants and fails to align with international laws. The study recommends using the GLI to ensure gender-responsive migration, labour laws, and policies, and to strengthen monitoring mechanisms. It also recommends aligning South Africa’s migration policy with constitutional and international human rights standards.

Keywords: Feminisation of migration, Gender legislative index, Intersectionality theory, Feminist theory, women migrant workers, Immigration Act, Refugee Act, Labour Relations Act, CEDAW, Maputo Protocol, Gender based violence.

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LIST OF ABBREVIATIONS

ACHPR	:	African Charter on Human and Peoples' Rights
ASP	:	Angola Special Permits
BCEA	:	<i>Basic Conditions of Employment Act</i>
CEDAW	:	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	:	United Nations Committee on Economic, Social, and Cultural Rights
COIDA	:	Compensation for Occupational Injuries and Diseases Act
DHA	:	Department of Home Affairs
DOJCD	:	Department of Justice and Constitutional Development
ECHR	:	European Court on Human Rights
FGM	:	Female Genital Mutilation
GBV	:	Gender based violence
GLI	:	Gender Legislative Index
ICESCR	:	International Covenant on Economic, Social and Cultural Rights
ICRMW	:	International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families
ILO	:	International Labour Organisation
IOM	:	International Organisation for Migration
LRA	:	<i>Labour Relations Act</i>
LSP	:	Lesotho Special Permits
OECD	:	Organisation for Economic Cooperation
OHCHR	:	United Nations. Human Rights Office of The High Commissioner

NGO	:	Non governmental organisation
SADC:		Southern African Development Community
SADC (LMAP):		SADC's Labour Migration Action Plan (2020-2025)
SAMP	:	Southern African Migration Project
SANAP	:	South Africa National Plan of Action
SDG 2030	:	Sustainable Development Goals 2030
UDHR	:	Universal Declaration of Human Rights
UNICEF	:	United Nations Children's Fund
WP NLMP	:	White Paper on National Labour Migration Policy, 2025
WPCIRP	:	White Paper on Citizenship, Immigration and Refugee Protection, 2024
WPIM	:	White Paper on International Migration 2017
ZSP	:	Zimbabwe Special Permits
ZEP	:	Zimbabwe Exemption Permits

CHAPTER 1: INTRODUCTION

This chapter introduces the study, which critically examines the protection of women migrant workers' rights in South Africa and advocates for a gender-responsive framework. It begins by outlining the background of the study, highlighting migration as a key global trend of the 21st century and emphasising the importance of the feminisation of migration. The study then presents the research problem, demonstrating how existing laws and policies fail to adequately protect women migrants from discrimination, abuse, and exploitation. Although South Africa has constitutional obligations to promote equality and non-discrimination, and has made commitments under international and regional human rights instruments, its migration and labour laws and policies remain largely gender-neutral. This chapter argues that such neutrality conceals gender-specific vulnerabilities, allowing discrimination, exploitation, and abuse faced by women migrants to continue.

Based on the research problem, the chapter identifies the research questions and sub-questions, which serve as the guiding framework for the study. The primary research questions explore how South African migration and labour laws can be reformed to effectively address the gender-specific and intersecting vulnerabilities of women migrant workers in South Africa. Sub-questions elaborate on this by examining the causes and types of violations faced by women migrant workers, the relevant international and regional legal instruments, the sufficiency of South African laws, and the methodological tool available to lawmakers to aid legislation to become gender responsive legislation.

The objectives of the research are outlined, converting the research questions into specific tasks. These include identifying violations encountered by women migrants in South Africa, mapping the normative frameworks at both the international and regional levels, and assessing the migration and labour laws at the domestic level to propose a methodological tool that aids in reform. The objectives position the study as both descriptive and prescriptive, aiming to generate solutions that can influence law and policy.

The motivation for this study stems from both the theoretical gaps in the existing literature and the author's lived experiences as a woman migrant worker in South Africa. This section highlights the need to address the systemic exploitation faced by women migrant workers in sectors such as domestic work, farm work, and caregiving. By basing the study's motivation in both personal and academic imperatives, the chapter demonstrates the research's originality and urgency.

To ensure strong conceptual and theoretical grounding, the chapter reviews existing literature. It explores different schools of thought on migration, gender, and law. The feminist theorists examined include Radicals, Marxists, Dual systems theorists, Africanists, and those focused on intersectionality, to reveal the multiple layers of vulnerabilities women migrants face. Migration theories, which include push and pull factors and dual labour markets, are utilised to explain the structural forces that drive women into precarious employment. Notably, the literature review highlights gaps in current research. Although there is extensive documentation on the feminisation of migration and the abuses experienced by women migrant workers, no studies in South Africa have suggested a methodological tool to enable the development of gender-responsive laws.

The chapter adopts a methodological approach which integrates not only doctrinal but also socio-legal and comparative analyses. By combining legal instruments with an examination of the practical experiences of women migrants in South Africa, the methodology is both theoretically and practically relevant. Intersectionality and feminist legal theories provide the analytical lens, while comparative insights from other jurisdictions enable the study to replicate lessons for South Africa.

Lastly, the chapter will provide an outline of the subsequent chapters. It illustrates how the study progresses from identifying the problem and reviewing literature to analysing international and domestic legal frameworks, and finally proposing the GLI as a methodological tool for reforming migration and labour laws in South Africa.

1.1 BACKGROUND

Migration is acknowledged as a defining feature of the 21st century, with over 281 million individuals worldwide residing outside their countries of origin.¹ Women have been recorded in the migration streams. In fact, scholars have observed that the rise in women's involvement in global migration flows, often referred to as the feminisation of migration, has become significant.² Women are no longer migrating solely as dependents; they are increasingly stepping into roles as independent economic contributors and primary earners.³ It is essential to acknowledge that while migration may yield substantial economic and social benefits for women, it also introduces distinct challenges shaped by variables such as gender, legal status, and the informal nature of many occupations they often occupy.⁴

On a global scale, women migrant workers are disproportionately found in sectors such as domestic work, caregiving, hospitality, and agriculture, which are often informal, poorly regulated, and lack essential labour protections.⁵ An Amnesty International report noted that these sectors, unfortunately, place them at risk of exploitative working conditions, long hours, inadequate pay, and increased chances of gender-based violence and harassment.⁶ The report further indicated that migrant women in South Africa often experience gender-based violence, sexual exploitation, and harassment, both in their workplaces and in the broader community.⁷ These vulnerabilities are exacerbated when migration governance and labour laws fail to consider gender.⁸ While the above findings from Hennebry, Grass and McLaughlin highlight structural inequalities, they fail to examine how South Africa's legal framework reproduces such vulnerabilities. This thesis builds on their findings but shifts the focus towards evaluating whether migration and labour laws themselves are gender responsive.

¹ United Nations 2020.

² Alexander & Steidl 2012:224; Boyd 2006:2-3; Castles & Miller 1998:37;Le Goff 2016:1-2.

³ Alexander & Steidl 2012:224; Boyd 2006:2-3; Castles & Miller 1998:37;Le Goff 2016:1-2.

⁴ Fleury 2016:23.

⁵ Hennebry, Grass & McLaughlin 2017: 10.

⁶ Amnesty International 2019.

⁷ Amnesty International 2019.

⁸ Hennebry, Piper, KC & Williams 2022:8.

At a global level, migration and gender equality are acknowledged within the 2030 Agenda for Sustainable Development (SDG).⁹ Specifically, the SDGs five and eight aim to achieve gender parity and empower both women and girls, while promoting equitable employment opportunities for all individuals, including migrant workers.¹⁰ Additionally, SDG ten emphasises the need to facilitate migration that is orderly, safe, regular, and responsible.¹¹ However, achieving these objectives necessitates national legal and policy frameworks that are explicitly responsive to gender, ensuring that women migrant workers are both safeguarded and empowered in the realms of migration and employment. Adepoju notes that in Africa, migration is primarily characterised by South-South movement, with individuals mainly relocating within the region due to economic inequalities, conflict, or environmental challenges.¹² South Africa, as a major economic hub, is a popular destination for migrants. Crush, Chikanda, and Tawodzera describe South Africa as a key destination within the Southern African Development Community (SADC) region, attracting migrants specifically from Zimbabwe.¹³ Mbiyozo concurs and further adds that migrants from countries such as Mozambique, Malawi, the Democratic Republic of the Congo, Somalia, and Rwanda are also attracted to South Africa.¹⁴ Mbiyozo further states that migrant women in South Africa not only experience gender-based violence and sexual exploitation, but also harassment, both in their workplaces and in the broader community.¹⁵

Moreover, South Africa has been subjected to persistent occurrences of xenophobic violence, which disproportionately affect migrant women who may encounter increasing challenges in escaping or seeking justice due to fear of arrest or deportation.¹⁶ These social challenges amplify the legal and economic insecurities faced by women migrant workers, thereby contributing to their unwillingness to report abuse or seek necessary assistance.

⁹ United Nations 2015. Transforming our world: The 2030 Agenda for Sustainable Development. adopted by the General Assembly on 25 September 2015, A/RES/70/1. New York: United Nations.

¹⁰ United Nations 2015: SDG 5&8.

¹¹ United Nations 2015: SDG 10.7.

¹² Adepoju 2008:13&21.

¹³ Crush, Chikanda & Tawodzera 2015:364.

¹⁴ Mbiyozo 2018:2.

¹⁵ Mbiyozo 2018:7 &12.

¹⁶ Hiropoulous 2020:106 &113.

Notwithstanding South Africa's obligations under various fundamental international human rights agreements, it has yet to ratify vital instruments that specifically defend migrant workers, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW).¹⁷ Mbiyozo notes, that while domestic labour laws provide certain protections, enforcement is often lacking in the informal sector, where a majority of migrant women find employment.¹⁸ This thesis builds on Makhamisa's work to propose a gender-responsive framework, utilising the GLI, which can address the gender-specific vulnerabilities faced by women migrant workers in informal sectors. Mbiyozo¹⁹ observe that migration policy in South Africa continues to prioritise security and border management, with little focus on human rights or gender-sensitive strategies. The intersection of gender, migration status, and informality highlights the need for targeted legal and policy measures to support migrant women in South Africa. As Crenshaw and subsequent researchers have noted, an intersectional approach uncovers how intertwined systems of discrimination foster distinct forms of disadvantage.²⁰

In this context, migrant women face vulnerabilities that are not merely the result of being “women” plus “migrants,” but instead stem from the specific interaction of these identities within patriarchal and exclusionary frameworks. In light of this context, this study aims to investigate the current legal, institutional, and policy structures that protect women migrant workers in South Africa. This thesis addresses this critical gap by advocating for a GLI to develop gender responsive migration laws and policies that directly cater to the needs and rights of women migrant workers. Such a framework is vital for upholding South Africa's constitutional and international human rights commitments while furthering the aims of the 2030 Agenda for Sustainable Development. By centring gender in migration governance, South Africa can work towards a more inclusive, equitable, and rights-based approach to migration.

¹⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereafter ICPRMW) adopted on 18 December 1990 and entered into force 2003.

¹⁸ Mbiyozo 2018:7.

¹⁹ Mbiyozo 2018:31.

²⁰ Crenshaw 1989:139.

1.2 RESEARCH STATEMENT

Migration is a significant global phenomenon responsible for socio-economic development and demographic changes. As an economic hub within the region, South Africa attracts many migrants from across Africa, with an estimated 2,9 million migrants residing in South Africa by mid-2020.²¹ Over 1,8 million migrants in South Africa are women, and the number has quadrupled since 2001.²² This indicates that migration is a rapidly growing phenomenon, predominantly among female migrants. Most females migrate to South Africa due to economic hardships and limited employment opportunities in their countries of origin.²³ Whilst migration has improved the socio-economic standing of women and empowered them with agency, it has exposed women migrants to multiple layers of vulnerabilities which stem from gender, sex, migration status and concentration in informal and low wage sectors.

Studies have shown that women migrants primarily engage in less regulated informal sectors, such as domestic work, agricultural and care sectors.²⁴ Despite South Africa's commitment to equality and non-discrimination, its migration and labour laws remain gender neutral and are not able to address the gender specific vulnerabilities faced by women migrant workers. This gap leaves them subjected to different forms of exploitation and abuse, which include low wages, no social security, physical and sexual abuse in the workplace. Scholars found that it is the sustained gender norms and institutional flaws that perpetuate the precarious situation in which most women migrant workers find themselves.²⁵ Existing literature has acknowledged that South African migration and labour laws and policies are gender-neutral, and such laws put women migrants at risk.²⁶ In fact, South Africa's migration laws often overlook the rights, needs, and vulnerabilities that are unique to women migrants.²⁷ Current

²¹ Maru "The six trendsetters in African migration and mobility", <https://trendsresearch.org/insight/the-six-trendsetters-in-african-migration-and-mobility> (accessed 24 November 2024).

²² UNDESA "World Population Prospects: The 2017 Revision", <https://www.un.org/en/desa/world-population-prospects-2017-revision#:~:text=The%20World%20Population%20Prospects%3A%20The%202017%20Revision%2C%20published,global%20demographic%20trends%20and%20prospects%20for%20the%20future> (accessed on 2 July 2025).

²³ Farley 2019:11.

²⁴ Bagula 2011:21.

²⁵ Ehrenreich & Hochschild 2003:1-30.

²⁶ Mbiyozo 2019:1-3; Farley 2019:3; Dodson & Crush 2006.

²⁷ Hennebry et al. "Women migrant workers journey through the margins: Labor, migration and trafficking", www.unwomen.org/en/digital-library/publications/2017/2/women-migrant-workers-journey-through-the-margins (accessed on 26 March 2020).

literature in South Africa, however, does not propose a gender responsive methodological tool to reform laws.

It is against this background that the study will examine the causes and types of violations faced by women migrants. It further interrogates whether the international and regional laws sufficiently address the gender specific vulnerabilities encountered by women migrants, especially those related or linked to discrimination, precarious employment and abuse. The study will critically assess whether South African laws on migrant workers align with international and regional standards, more so in addressing the gendered vulnerabilities of women migrant workers. It identifies existing gaps, considers possible remedies and proposes a methodological tool to guide lawmakers in drafting and reviewing legislation that aligns with international law and addresses the gender-specific vulnerabilities of women migrant workers. This research takes a new dimension in that it analyses the role of a GLI, a methodological tool that lawmakers can use to review and formulate laws, providing a framework to protect the rights of women migrant workers. No research study has considered the use of the GLI in South Africa to remedy the underlying inequalities in migration and labour legislation and policies, which make women migrants vulnerable to exploitation and abuse. The proposition is that when laws are formulated well, they can be more easily implemented and their impact is enhanced. GLI can be used in the review and formulation of laws to ensure they are gender-responsive and address gender-specific vulnerabilities.

1.3 RESEARCH QUESTION

The study will be guided by the following primary research question: How can South African migration and labour laws be effectively transformed to address gender-specific and other intersecting vulnerabilities encountered by women migrant workers?

Sub-questions:

- a) What are the causes and types of violations encountered by women migrant workers in South Africa?

- b) What is the normative framework for protecting the rights of women migrant workers under international and regional laws?
- c) What are the South African laws that protect the rights of women migrant workers? Do they meet international standards? Are they sufficient, and if not, is there a remedy?
- d) How can South African lawmakers use GLI to formulate and review laws to ensure that these laws protect the rights of women migrant workers?

1.4 RESEARCH OBJECTIVES

The following are the specific objectives of the study:

- a) To identify the causes and types of violations encountered by women migrant workers in South Africa.
- b) To establish the normative framework for protecting the rights of women migrant workers under international and regional laws.
- c) Identify the South African laws that protect the rights of women migrant workers, determine if they are sufficient, and, if not, provide a remedy.
- d) To establish how South African lawmakers can make use of the GLI in the formulation and review of laws that protect the rights of women migrant workers.

1.5 MOTIVATION

This study is motivated by the lived experiences of women migrant workers in South Africa, as well as the theoretical gaps identified in current literature. Women migrant workers in South Africa constitute a vulnerable group in the country, as they are mostly concentrated in low-wage and informal sectors such as domestic work, caregiving, agriculture and informal trade, where they are exposed to systemic exploitation which ranges from low wages, unsafe working conditions, long working hours, gender based violence and exclusion from social protection. These vulnerabilities are worsened by xenophobia and restrictive migration policies coupled with weak enforcement mechanisms. The need to respond to these violations faced by women migrants is a major motivation for this research.

Protecting the rights of women migrant workers is a fundamental aspect of international human rights legal instruments. Through instruments which include the Convention on the Elimination of Discrimination Against Women CEDAW and Members of Their Families (ICRMWC), which underpin the use of methods sensitive to gender issues in migration, a gap remains in implementing these international standards at the national and municipal levels. This study is therefore motivated by a need to enhance South African migration policies so that they align with global standards on migration and are able to not only protect but also empower women migrant workers. This study acknowledges that, despite some progressive provisions in the Constitution of South Africa and its pledge to human rights, South Africa has not yet fully integrated gender considerations into its migration framework.

Women migrant workers are instrumental in socio-economic development. Whereas the motivation for migration is commonly poverty and a lack of opportunity at the individual level, the financial benefits are recognised as having the potential to positively impact both the sending and receiving countries.²⁸ Migration can be a vital tool for empowering women economically.²⁹ It can also hold critical socio-economic benefits for host and home countries, including gendered remittances and labour market integration.³⁰

In 2019, remittance flows to low- and middle-income countries surpassed foreign direct investment, reaching a record \$554 billion.³¹ The capacity of remittances to contribute to the growth of national economies extends to countries of destination.³² In countries such as the United States of America and Europe, migrant workers impact on growing labour forces is recognised as having both direct and indirect benefits for state economic growth.³³ Whilst it is estimated that women migrants' remittances make up

²⁸ Bastia & Piper 2019:19.

²⁹ Farley 2019:3.

³⁰ Farley 2019:3.

³¹ World Bank Group “Annual Reports 2020. Executive Summary”, <https://thedocs.worldbank.org/en/doc/832891604352590592-0090022020/original/WorldBankGroupAnnualReportsExecutiveSummary.pdf> (accessed on 3 July 2025).

³² Holliday 2020:270.

³³ OECD “OECD Factbook 2014. Economic, environmental and social statistics”, https://www.oecd.org/en/publications/oecd-factbook-2014_factbook-2014-en.html (accessed 31 July 2025).

half of global remittances,³⁴ Holliday notes that there are differences in the manner and impact that the remittances of women migrant workers make to development, both in economic and non-economic terms.³⁵ In particular, while female migrant workers typically earn less than male workers, they remit a higher proportion of their earnings.³⁶ In addition, research indicates that the remittances of women migrant workers are more likely to be directed towards paying for family members' food, education, and health.³⁷ It is important to note that directing remittances towards individuals' health and educational well-being has positive developmental outcomes.³⁸

However, women migrant workers face a significant risk of exploitation and abuse whilst trying to support their families. By proposing gender legislation as a methodological tool to assess laws and policies that impact women migrant workers, this research contributes to the policy framework that recognises and protects women migrant workers' contributions towards improving their socio-economic status and overall well-being.

The study is motivated by the need to close the significant gap between South Africa's commitments to gender equality in its policies and the lived realities of women migrants. The existing literature highlights that migration experiences are gendered in such a way that women encounter unique challenges than their male counterparts. The circumstances of women migrants are complex, as they are most likely to be involved in less visible and less regulated sectors, which makes them more vulnerable to abuse and exploitation. Therefore, this calls for gender-sensitive laws and policies that take into account the specific needs and vulnerabilities of women migrants. As research shows, current South African laws do not cater to this, which then motivates a study of this nature that seeks to bridge this gap and provide insights on how the GLI gender legislation can be utilised to enhance the gender responsiveness of migration laws.

This research is also motivated by my experiences as a female migrant worker. I arrived in South Africa in February 1999 to pursue a Bachelor of Social Science and

³⁴ Ponsot et al. "Sending money home: Contributing to the SDGs, one family at a time. Report to the International Fund for Agricultural Development", <https://www.ifad.org/en/w/publications/sending-money-home-contributing-to-the-sdgs-one-family-at-a-time> (accessed 3 March 2024).

³⁵ Holliday 2020:270.

³⁶ UN Women 2020.

³⁷ UN Women 2013.

³⁸ ILO & UN Women 2015; UN Women 2013b.

Law degree. I managed to graduate from Rhodes University in Grahamstown in April 2002 (with a Bachelor of Social Science) and April 2004 (with a Bachelor of Laws degree). However, I returned to Zimbabwe soon after graduation, where I worked as a Public Prosecutor for the Ministry of Justice. An economic meltdown, characterised by high inflation rates, saw me return to South Africa. Upon my arrival in South Africa, I applied for refugee status, which was granted in April 2009. The asylum document granted me the ability to work and study in South Africa. Obtaining an articulated clerk position in a law firm proved to be challenging. I spent the entire year of 2009 sending job applications, but I was unable to secure employment. In 2010, I secured a job as a waitress at a restaurant in Johannesburg. This shows the desperate measures I ultimately took to survive. Having to deskill was my only option. I discuss deskilling in Chapter Two, section 2.3.5.4, as a key challenge encountered by women migrant workers. Resorting to work as a low-skilled worker came with its challenges, as I was subjected to long working hours, low pay, verbal abuse and gender-based discrimination.

This study is thus motivated by the desire to promote gender equality and, consequently, advance the rights of women migrants. It aims to analyse the intersection of migration and gender, presenting policy advocacy that highlights the unique vulnerabilities faced by women migrants during their migration. The contribution is meant to contribute towards an equitable and just migration framework in South Africa.

1.6 LITERATURE REVIEW

This literature review will explore four research questions: a) What are the causes and types of violations encountered by women migrant workers in South Africa? b) What is the normative framework for safeguarding the rights of women migrant workers under international law and regional legislation? c) What South African laws protect the rights of women migrant workers? Are these laws adequate, and if not, what remedies exist? Do they align with international standards? d) Which methodological tools can South African lawmakers employ to formulate and review laws to ensure the protection of women migrant workers' rights? For each research question, the thesis

examines the inclusion and exclusion criteria, the methodology applied, and provides a synthesis of the literature.

For the first research question, the literature selection for this thesis employed systematic inclusion and exclusion criteria to ensure comprehensive yet focused coverage of the violations encountered by women migrant workers in South Africa. The literature included in this study consisted of research that contributed to the theoretical underpinnings of the research study, including Radical, Marxist, Liberal, Dual systems, and African feminist theories. The intersectionality theoretical framework, as developed by Crenshaw, is instrumental in showing how intersecting identity markers compound discrimination against women migrant workers.³⁹ Secondly, only studies that focused on migration from a gender perspective were selected as relevant. This included examining studies that focus on the feminisation of migration, gendered push and pull factors in migration, and the structural vulnerabilities of women in migration situations.⁴⁰

The thesis prioritised literature relevant to South Africa, followed by the SADC region in general. International comparative literature was included where and when it offered insights which were relevant to the local experiences of women migrants.⁴¹ Literature which engaged with legal frameworks, both international and national, was also included. This included sources focusing on constitutional rights, labour law, and international instruments that protect the rights of women migrant workers.⁴² The study included empirical studies, case law and organisational reports from the ILO and UN Women, which provide evidence of the violations of women migrant workers.⁴³

Literature not relevant to Africa or the Global South was excluded unless it contributed to comparative analysis supporting the research study. Literature that lacked consideration of gendered power dynamics or social context in any statistical analyses was also excluded. The methodological approaches in this literature vary considerably,

³⁹ Crenshaw 1989:139-167.

⁴⁰ De Haas, Castles & Miller 2020:198-224&284 & Vause & Toma 2015:39-63.

⁴¹ Mbiyozo 2018:1-36.

⁴² International Labour Organisation Decent Work for Domestic Workers in South Africa: Gaps Between International Standards and National Laws (2021); Constitution of the Republic of South Africa, 1996; Basic Conditions of Employment Act 75 of 1997.

⁴³ *BS v Spain* (Application No. 47159/08) European Court of Human Rights, Judgment of 24 July 2012 & Firestone S The Dialectic of Sex (1970); Millett K Sexual Politics (1970); UN Women "The Gender Pay Gap Report 2023", <https://africa.unwomen.org> (accessed on 20 October 2024).

including qualitative, quantitative, and doctrinal analysis. Qualitative methods involve semi-structured interviews with migrant women, case studies from NGOs, and ethnographic research on workplace and living conditions. Quantitative methods involve surveys to measure wage violations, hours worked, and the occurrence of gender-based violence. The doctrinal approach is also utilised, involving the mapping of a legal framework of constitutional rights and statutory responsibilities against observed labour practices.⁴⁴

The strengths of the methodology lie in its rich qualitative narratives, which bring statistical data to life, and its intersectional approach, which highlights the interactions of various vulnerabilities. Limitations of these methodological approaches arise from the non-representative nature of snowballing sampling and the under-reporting of gender - based violence (GBV).

The concept of migration has received scholarly interest. Kalitanyi and Visser noted that migration refers to the movement of people across countries and state lines to establish a new place or seek peace and stability.⁴⁵ This was reaffirmed by the United Nations Secretary-General, Antonio Guterres, who described migration as an expression of human aspiration for dignity, safety, and a better future.⁴⁶ It is evident from the existing literature, a quest for safety and security is a significant driver of migration. Existing literature also establishes that the term migrant can refer to two different categories of people that should not be mixed, with the first group being labour migrants who move for employment. The second group consists of refugees who, owing to fear of persecution, war and natural disaster, are not in their country of origin and not able to seek protection from that country.⁴⁷ A migrant worker refers to a person who is employed, or has been employed in a remunerated capacity, within a country of which they are not a national.⁴⁸

Dodson, in her article titled "*Southern Africa: gender and migration*", studied the patterns and processes of migration in Southern Africa, including their gendering, and how these processes were understood in a historical context, including the role of race

⁴⁴ Albertyn 2007:253-270.

⁴⁵ Kalitanyi&Visser 2010:377.

⁴⁶ Remarks given by the United Nations Secretary-General Antonio Guterres at the high-level meeting on gender equality and women's empowerment in Africa, in Addis Ababa on 8 February 2020 <https://www.unwomen.org/en/news-> accessed 23 September 2025 & O'Neil 2016:84.

⁴⁷ UN Convention Relating to the Status of Refugees 1951:art. 1A(2).

⁴⁸ International Convention on the Protection of the Rights of Refugees 1951:art. 2.

and gender.⁴⁹ The paper utilised qualitative analysis of historical and contemporary migration patterns in Southern Africa, examining the gendered dimensions of these movements and how they have evolved in response to political, social, and economic changes within the region and beyond.⁵⁰ It drew on survey data from the Southern African Migration Project (SAMP) to highlight significant sociodemographic shifts in migration flows, with a particular focus on the changing roles and experiences of male and female migrants since the mid-1990s. This included the increasing economic drivers behind female migration and the transformation of household structures.⁵¹ Dodson found that patriarchy influenced the migration patterns of men in Southern Africa by enforcing traditional gender roles that prioritise male mobility for wage labour, particularly in mining and urban sectors. This system historically restricted women's movement, leading to a predominance of male migrants. However, as economic conditions change, men's migration is evolving into a more permanent career path rather than a temporary strategy, reflecting shifts in labour demand and the reconfiguration of household structures, where women increasingly become household heads.⁵²

Dodson's article provides a significant foundation for understanding how migration in Southern Africa has historically been gendered. Her use of qualitative analysis of historical and contemporary migration patterns, supported by survey data from SAMP, offers important insights into changing socio-demographics since the mid-1990s. Dodson emphasises how patriarchal structures historically privileged male mobility for wage labour in mining and urban sectors, thus restricting women's movement. Important to note is the fact that while Dodson's contribution is valuable in linking patriarchy to migration patterns, her analysis tends to highlight gendered social norms, whilst neglecting how state policies, such as pass laws or immigration regulations, play a great role in causing gender disparities. However, contrary to Dodson's views, von Fintel and Moses observed that the apartheid-era migrant labour system perpetuated male-dominant migration, with women remaining at home whilst men moved to urban centres as breadwinners.⁵³ Studies by Crush and Tshitereke found that both the South

⁴⁹ Dodson 2013.

⁵⁰ Dodson 2013.

⁵¹ Dodson 2013.

⁵² Dodson 2013.

⁵³ Von Fintel & Moses 2017:251-254.

African pass laws and the migrant labour system played a significant role in ensuring that men were dominant and excluded women from formal migration streams.⁵⁴ These studies were supported by Boyd and Grieco, who also identified immigration policies as a key factor in the dominance of men in the migration stream, with women only being allowed to enter as dependents of male migrants.⁵⁵ Similar conclusions were reached by Magidimisha who found that migration policies in Southern Africa often favoured male migrants, reinforcing male dominance in migration patterns.⁵⁶ These views reshape the debate from attributing gendered migration patterns to patriarchy to the real cause being laws and policies.

The common themes emerging from reviewing the literature are two dominant explanatory frameworks, one emphasising patriarchal norms (Dodson) and another highlighting laws and policies (Von Fintel, Moses, Crush, Tshitereke, and Boyd, as well as Grieco and Magidimisha). Whilst both show the gendered nature of migration, the debate remains disjointed. This literature is limited and fails to critically interrogate the intersection of gender, race and class, which essentially influenced access to migration opportunities during apartheid and continues to do in the post-apartheid era. This gap is significant for the present study. Chapter 5 of this study examines how South Africa's migration laws have historically contained exclusionary elements and how these features persist in post-apartheid immigration policies. By utilising the GLI, this study provides a framework that extends beyond descriptive accounts of patriarchal norms or exclusionary laws to offer a gender-responsive tool for reviewing and assessing laws. In doing so, this study links two schools of thought, how patriarchy and laws influence migration, with the need for tools such as the GLI that can create gender-responsive laws, which respond to gender-specific vulnerabilities and are better able to protect the rights of women migrant workers.

⁵⁴ Crush & Tshitereke 2001:1-9

⁵⁵ Boyd & Grieco 2003:3.

⁵⁶ Magidimisha 2017:77.

While women were historically seen as “trailing wives”⁵⁷ in migration patterns, Castles and Miller, drawing on demographic trend analysis, observed a global shift towards the feminisation of migration since the 1980s.⁵⁸ Although women’s international migration is not new, early research largely overlooked them or framed them as passive dependents. Vause and Toma, in their article titled “*Is the Feminisation of International Migration Really on the Rise? The Case of Flows from the Democratic Republic of Congo and Senegal*”, examined the scale to which women were increasingly present in international migration flows, especially as independent economic actors.⁵⁹ The paper employed discrete-time event-history analysis to assess the likelihood of female migration over time, particularly towards Western destinations, using data collected from the Migration between Africa and Europe project in Senegal and the Democratic Republic of Congo.⁶⁰

Benefits of this methodology were that it employed rich retrospective information gathered from both current and return migrants to conduct a more in-depth investigation into the nature of women's migration, examining indicators that reveal whether women migrate autonomously or in association with their partners.⁶¹ The research indicates that there has been only a moderate increase in the likelihood of female migration over time, particularly towards Western destinations, with no significant reduction in gender gaps observed in migration flows from the Democratic Republic of Congo and Senegal.⁶² While some evidence of a rise in autonomous female migration was found among Congolese migrants, no notable changes in this trend were detected in Senegal, which is attributed to the more rigid patriarchal system and traditional gender norms prevalent in Senegal compared to the Democratic Republic of Congo.⁶³

Alexander and Steidl adopted a similar view, describing the feminisation of migration as a rise in the proportion of women within migration flows. Alexander and Steidl take the concept of migration a step further by conceptualising it as a dynamic process in

⁵⁷ Kallane & Collins 2023:72 -Trailing wives refers to wives who accompany their husbands when they are relocated for work, military posting or assignments abroad.

⁵⁸ Castles & Miller 1998:37.

⁵⁹ Vause &Toma 2015:39-63.

⁶⁰ Vause &Toma 2015:39-63.

⁶¹ Vause &Toma 2015:39-63.

⁶² Vause &Toma 2015:39-63.

⁶³ Vause &Toma 2015:39-63.

which male-dominated streams become gender balanced or female-majority.⁶⁴ Whilst Vause, Toma and Pophiwa⁶⁵ stressed that the appropriate way in which to measure feminisation of migration was through changes in gender ratios among foreign-born populations, Zlotnik argued that a demographic study found that in post-1974 Germany, increased female representation was driven not by family reunification but by declining male migration.⁶⁶ Women dominated migration streams more than men.

The concept of the feminisation of migration is particularly important for this study as it is the route through which women migrants encounter rights violations. Castles and Miller, Alexander and Steidl highlight the increasing visibility of women in migration streams, challenging older illustrations of women as “trailing wives”. Scholars like Vause and Toma show that women’s rising numerical presence does not necessarily translate into greater autonomy, with patriarchal structures in places such as Senegal which continue to restrict female migration. Similarly, in Germany, Zlotnik demonstrated that the feminisation of migration was attributed to a decline in male migration, clearly showing that demographic changes alone are not adequate indicators of gender equality in migration. This body of literature reveals a recurring limitation: an over-reliance on demographic indicators, while neglecting the role of structural factors, such as migration and labour laws, and entrenched gender norms, in shaping the experiences of women migrants. For this study, feminisation is significant not only as a demographic trend but as the context within which women migrant workers experience rights violations. By presenting feminisation as not only an opportunity for visibility but also a site for vulnerability, this thesis addresses the limitations of existing literature by employing evaluative tools such as the GLI, which aim to address the particular vulnerabilities encountered by migrant women workers. This study actively moves beyond measuring the increase of women in migration streams to assessing whether the legal frameworks are sufficient to protect women migrant workers.

⁶⁴ Alexander & Steidl 2012:224.

⁶⁵ Vause & Toma 2015:41; Pophiwa “The drivers and outcomes of feminisation of migration in Africa”, <https://www.pambazuka.org/gender-minorities/drivers-and-outcomes-feminisation-migration-Africa> (accessed on 26 March 2019).

⁶⁶ Zlotnick 1995:229-235.

It is important to note the causes of women's migration at this stage. Numerous research efforts have aimed to explore the underlying reasons for migration. The findings presented in Lee's Push and Pull model show that adverse conditions, such as conflict, poverty, or environmental catastrophes, push individuals to leave their home countries. Conversely, favourable factors like job opportunities, security, and education attract them to new destinations. A significant contradiction exists between Lee's conclusions and those of Boyd and Grieco, who argue that Lee fails to consider other vital social frameworks, such as gender dynamics, which include gender-based violence as a key factor prompting women to migrate. This view aligns with Fleury and De Hann's observations, who highlighted that Lee's theory overlooks how gender dynamics, including patriarchal systems and gender-based violence, serve as motivating factors for women to seek migration to new countries.

A noteworthy contradiction emerges when comparing the insights of Lee, Boyd, Grieco, Fleury, and De Hann with Piore's dual labour market theory, which explains the systemic demand for migrant labour within the informal economy, thus mainly directing women into caregiving and domestic roles. This demonstrates how the demand for labour in low-paid and insecure jobs leads to women migrating. Dodson, in his recent studies, has shown that women migrant workers predominantly occupy undervalued roles in the domestic and caregiving sectors. Research by Farley indicated that migration can serve as a means of economic empowerment for women. While the feminisation of migration enables women to act as economic agents, Sager, Bastia, Piper, Christou, and Kofmann found that this shift did not eliminate existing inequalities but instead created new gender-specific vulnerabilities. This clearly highlights how the dominant theories either overlook or ignore gendered realities, emphasising the importance of integrating intersectionality into labour market analysis.

The feminist theories assist in understanding the multifaceted oppression faced by women migrants. The theories discussed include radical, Marxist, dual, Africanism and intersectionality; each offers a unique lens through which to view gender inequality and its intersection with other forms of oppression.

Radical feminist theory describes patriarchy as a universal structure of male dominance over women.⁶⁷ Key proponents such as Millet and Firestone, supported by

⁶⁷ Millet 1979:24-25; Firestone 1970:1-5.

Hines and Walby, argue that patriarchy is a historical and cultural system where men exert power over women.⁶⁸ Research shows that this gender oppression manifests in various ways. A study by Hines highlights the nuclear family as a site of oppression, where women are subjected to unpaid domestic labour.⁶⁹ Hines further found that the societal expectation of women as primary givers restricts their access to positions of power and fosters their financial dependence, further reinforced by their reproductive roles.⁷⁰

Other radical feminists, MacKinnon, Grosser and Tyler identified sexual violence, rape, domestic violence, sexual harassment and pornography services as tools through which men maintained control within the patriarchal system.⁷¹ The significance of this theory to the current study is especially important to understanding women migrant workers' experience, as it shows how the patriarchal system creates systemic oppression across all spheres of society and results in women migrants facing gender specific violations in addition to general labour exploitation.

In contrast to radical feminist theorists, Marxist feminists link gender oppression to capitalism.⁷² These findings are consistent with those of Comanne, who argued that the capitalist system exploits women's reproductive and productive labour, effectively creating a reserve army of cheap labour.⁷³ Whilst Hines and Engels⁷⁴ contend that women's oppression can only be abolished if capitalism is overthrown, their critics argue that this view overly simplifies gender inequality by reducing it solely to economic factors, thereby neglecting the independent dynamics of gender.⁷⁵

Feminists supporting the dual systems approach argue that gender inequality results from the interplay of both patriarchy and capitalism.⁷⁶ Hartmann and Walby, key theorists, viewed patriarchy and capitalism as two intertwined yet distinct systems that collectively shape women's experience.⁷⁷ Walby's studies demonstrate that while

⁶⁸ Millet 1979:24-25; Firestone 1970:1-5; Hines 2015:24; Walby 1990:20-24.

⁶⁹ Hines 2015:24.

⁷⁰ Hines 2015:24.

⁷¹ MacKinnon 1988:237; Grosser & Tyler 2022:5.

⁷² Engels 2004:67-70; Marx & Engels 1998:21-25.

⁷³ Comanne "How patriarchy and capitalism combine to aggravate the oppression of women", <https://www.cadtm.org/How-Patriarchy-and-Capitalism-Combine-to-Aggravate-the-Opportunity-of-Women> (accessed on 23 July 2022).

⁷⁴ Hines 2015:24 & Engels 2004:67-70.

⁷⁵ Tong 2006:103-107; Walby 1990:3-8; McRobbie 2009:18-25; Fraser 2013:1-10.

⁷⁶ Hines 2015:24; Walby 1988:5.

⁷⁷ Hartmann 1979:1-2.

capitalism demands cheap labour, patriarchy resists this by preferring to keep women subordinate within the private sphere.⁷⁸ However, Walby concedes that due to capitalism's greater power, patriarchy adapts by allowing women into the capitalist sphere, but primarily in low-paid, women's jobs.⁷⁹ Hines' findings align with this, noting that women often hold dual roles, exploited by employers at work and through unpaid labour at home.⁸⁰ Hartmann synthesises these positions, asserting that patriarchy and capitalism collaborate to channel women into undervalued and insecure employment.⁸¹

A significant divergence emerges between radical and marxist feminists and those of African feminists, particularly concerning the universality of patriarchy. Hines and Wills argue that the radicalists' concept of patriarchy overlooks cultural and historical specificities.⁸² Crenshaw and Hooks further support this view, contending that a universal approach to patriarchy erases the complex and intersecting forms of oppression experienced by women of colour.⁸³ The same view was also supported by Davis and Hooks, who emphasised that a universal patriarchal framework fails to account for the unique cultural and historical experiences of black women and other women of colour.⁸⁴ The theory of Africanism is relevant to the current study as it shows how colonial legacies, race, and ethnic divisions intersect, rendering women migrant workers vulnerable, hence the need for a gender responsive framework.

Research by Crenshaw has found that individuals' experiences of discrimination are not based on a single identity marker, but rather on the convergence of multiple identities, such as gender, race, class, migration status, ethnicity, and nationality, through the concept of intersectionality.⁸⁵ This view was supported by Smith, who added that these identity markers do not exist independently; instead, they are deeply related and form a complex web of oppression.⁸⁶ This means that identities that are different can intersect and coexist within an individual, leading to vulnerabilities.

⁷⁸ Walby 1998:5

⁷⁹ Walby 1998:5

⁸⁰ Hines 2015:24.

⁸¹ Hartmann 1979:1

⁸² Hines 2015:25; Willis 1984:120-122.

⁸³ Crenshaw 1989:139; Hooks 1984:17-20.

⁸⁴ Davis 1981:6-7; Hooks 1984:17-18.

⁸⁵ Crenshaw 1989:139.

⁸⁶ Smith 2016:73.

Studies by McCall described intersectionality theory as one of the most important theoretical contributions to women's studies. This view was supported by the work of Amelina, Lutz, and Anthias, who found that the role of intersectionality theory was to assist in understanding the “interconnectedness, interdependencies and mutual construction of key categories of social marking and positioning.” Intersectionality is particularly relevant for understanding the experiences of women migrant workers, especially in contexts like South Africa. Women migrants often face multiple layers of discrimination, which significantly heightens their vulnerability. This multi-layered oppression intensifies their vulnerability to exploitation in the job market and other spheres of life. To effectively protect women migrant workers, a gender-responsive framework is essential. Such a framework, informed by intersectionality, can address the multiple layers of discrimination that these women encounter, providing a more holistic and effective approach to safeguarding their rights.

The violations faced by women migrants in South Africa have enjoyed scholarly interest. While migration can bring opportunities for economic empowerment, personal growth, and increased independence, it also presents women with a unique and often challenging set of risks and violations. Women migrants frequently face systemic discrimination that affects many areas of their lives. Research by Crenshaw highlights that this discrimination is often intersectional, arising from a mix of their gender, race, nationality, and class.⁸⁷ These insights align with findings from Reilly *et al*, who observed that a considerable portion of the challenges faced by women migrant workers can be linked to discriminatory attitudes and the inability of institutions to tackle the gender-specific aspects of migration.⁸⁸ This study aims to bridge that gap by suggesting a GLI that can help make laws more gender-responsive and ultimately address the gendered aspects of migration.

Scholars have attempted to explain how systemic discrimination manifests. Research by Sager indicates that systemic discrimination often appears when the skills, qualifications, and work experience of women migrant workers are not acknowledged in their new country, which Sager identifies as a primary form of discrimination.⁸⁹ Studies by Sager have pointed out that this situation is referred to as deskilling,

⁸⁷ Crenshaw 1989:139.

⁸⁸ Reilly et al 2021:1&13.

⁸⁹ Sager 2012:2.

resulting in women migrant workers being pushed into low-skilled, low-wage jobs, regardless of their previous professional experiences.⁹⁰ Additionally, Sager's research highlighted that women migrants were disproportionately found in sectors such as domestic work, caregiving, agriculture, and informal trade.⁹¹ Christou and Kofmann argue that this gendered labour market not only limits their job opportunities but also perpetuates wage gaps and reinforces traditional gender roles.⁹²

The high concentration of women migrants in poorly regulated and often unseen sectors of the economy makes them vulnerable to labour exploitation.⁹³ Recent studies by Jinnah have revealed that domestic workers in South Africa often work long hours (sometimes up to twelve hours a day), lack written contracts, do not receive paid leave, and have very limited time off.⁹⁴ Similar conditions were also observed in the agricultural sector, where long hours and tough working conditions prevail.⁹⁵ Studies conducted by Jinnah further revealed that women migrants working as domestic workers earned wages significantly below the minimum wage, which clearly reflects their exploitation as “cheap labour,” as discussed by Marxist feminist theorists.⁹⁶ A study carried out by SAMP also found that Basotho farmworkers were paid below the minimum wage.⁹⁷

Women migrants also face gender-based violence. Recent studies by Sukesi in an article titled “*Work Condition, Gender Relation and Violence Against Women Migrant Domestic Workers*” examine the social conditions of women migrant domestic workers, focusing on their experiences of violence, which includes domestic violence, economic violence, and psychological violence that compel them to migrate for work.⁹⁸ The research methodology employed was a qualitative approach, utilising in-depth discussions, documentation, and focused discussions with household workers during data collection.⁹⁹ This method allows for a comprehensive understanding of the experiences of female migrant domestic workers and their families.¹⁰⁰ Data was

⁹⁰ Sager 2012:2.

⁹¹ Sager 2012:2.

⁹² Christou & Kofman 2022:34.

⁹³ Jinnah 2020:212.

⁹⁴ Jinnah 2020:212.

⁹⁵ Samp 2008:7.

⁹⁶ Jinnah 2020:6

⁹⁷ SAMP 2008:7.

⁹⁸ Sukesi 2018.

⁹⁹ Sukesi 2018.

¹⁰⁰ Sukesi 2018.

collected through interviews with 13 return migrant workers from each of the two villages (Majangtengah and Junjung) and three household members from left-behind families, along with discussions with community leaders. The data collection spanned from 2014 to June 2017, and the analysis was conducted using descriptive qualitative techniques. The research found that women migrant domestic workers experience various forms of violence, including physical, psychological, and sexual abuse, primarily from their employers.¹⁰¹ This violence can occur at different stages, from departure to arrival in the destination country and upon returning home. The entrenched patriarchal gender ideology further exacerbates their vulnerability, positioning them as second-class citizens within their communities. Therefore, the protection of women migrant workers is crucial to mitigate these risks and ensure their safety and well-being. Research by Tekie supported this view and added that women migrant domestic workers were subjected to physical, mental, and emotional abuse by their employers.¹⁰² Such abuses often go unreported, as fear of job loss keeps them from speaking out.¹⁰³

Studies by Ngcakani illustrate that the power dynamics in the employer-employee relationship, particularly in isolated environments like private homes and farms, create a high risk of sexual harassment and abuse.¹⁰⁴ Tekie and Nyoniion shared a similar perspective through his study, which indicated that domestic workers living with their employers were at risk of sexual abuse by male employers.¹⁰⁵ Kouta *et al* also shared the same view when they found the prevalence of sexual violence among domestic workers, especially amongst those living with their employers.¹⁰⁶

Scholarly studies also showed that women migrants, especially those in domestic work, lack or have limited access to legal protection. Koesrianti found that women migrant domestic workers are particularly vulnerable to GBV, including physical, mental, and emotional abuse by their employers.¹⁰⁷ Furthermore to their status and the nature of domestic work, these workers often face various forms of maltreatment, such as verbal abuse, physical abuse, and sexual harassment. The lack of proper

¹⁰¹ Sukesu 2018.

¹⁰² Tekie 2021:11.

¹⁰³ Tekie 2021:11.

¹⁰⁴ Ngcakani 2020:12

¹⁰⁵ Tekie & Nyoniion 2021:12-14.

¹⁰⁶ Kouta et al. 2021:315.

¹⁰⁷ Koesrianti 2015:245-268.

legal protection and support exacerbates their vulnerability, making it crucial for governments and stakeholders to ensure their safety and rights, regardless of their legal status. Health violations are prevalent due to limited access to services, and legal discrimination exacerbates their vulnerability, as many remain excluded from labour protections and social benefits. Recent studies by Mpedi found that refugees in South Africa faced significant challenges in accessing health services, which contributes to health violations.¹⁰⁸ Legal discrimination exacerbated their vulnerability, as many refugees were excluded from labour protections and social benefits.¹⁰⁹ The inefficient public health service, expensive private care, limited enforcement of health rights, language barriers, and xenophobia further created a barrier to accessing the necessary health care, leaving them at a greater risk of health violations and inadequate support.¹¹⁰ White and Rispel adopted a similar view, arguing that the misalignment between inclusive health policies and restrictive immigration laws further complicates access to healthcare for migrants and refugees.¹¹¹ Conjointly, the literature demonstrates that the rights violations of women migrant workers extend beyond the workplace to encompass legal and health rights.

Despite this recognition of legal exclusion, these studies fail to provide evaluative frameworks such as the GLI for assessing whether existing laws are responsive to women migrant workers. The literature identifies multiple types of violations faced by women migrant workers in South Africa, which range from systemic discrimination (Crenshaw, Reilly *et al*, Sager), labour market deskilling and exploitation (Sager, Christou and Kofmann, Jinnah), gender based and sexual violence (Sukesi, Tekie, Ngcakani, Kouta *et al*) and legal exclusion and health violations (Koesrianti,,Mpedi, White and Rispel). While the literature clearly maps the violations, it is, however, limited in that it is only descriptive. The extensive and gendered nature of violations encountered by women migrant workers provides a compelling case for the adoption of a gender responsive framework in migration policy. The GLI offers a concrete tool for transforming migration policy into a gender responsive framework capable of addressing the gender specific and systemic violations encountered by women migrant workers in South Africa.

¹⁰⁸ Mpedi 2020&77-100.

¹⁰⁹ Mpedi 2020&77-100.

¹¹⁰ Mpedi 2020&77-100.

¹¹¹ White & Rispel 2021:1292-1304.

In this part of the study, I interrogate literature on the normative framework under international and regional law.

The rights of women who migrate for work in South Africa are influenced by a complex interplay of international and regional laws. Although international laws establish elevated benchmarks for the evaluation of migration and labour laws, they frequently do not adequately tackle gender-related vulnerabilities. This comprehensive literature review examines the international and regional legal mechanisms that protect women migrant workers in South Africa, highlighting the challenges and limitations that arise in their implementation.

The inclusion criteria for this research question considered binding international treaties, namely the International Labour Organisation (ILO), the United Nations (UN), and the regional treaties of the African and Southern African Development Community (SADC). Inclusion criteria also considered non-binding (“soft law”) frameworks that shape how states operate or interpret laws. The criteria for exclusion ruled out general gender-equality tools that lack any connection to migration, except when the chapter relates them to the experiences of migrant women.

To address the literature review concerning the second research topic, this examination employs a doctrinal legal research methodology, merging a detailed review of primary documents such as international treaties, regional contracts, and local legal records, with secondary sources that feature academic assessments, reports from international institutions, and relevant judicial decisions when available. This technique facilitates an in-depth review of the law's provisions, their meanings, and applicability, particularly highlighting the extent to which the rights of female migrant workers are protected in both official and unofficial job markets. By situating South Africa within the broader context of international and regional legal norms, the framework not only highlights existing obligations but also reveals the disparities between declared commitments and the actual conditions faced by individuals.

The ILO established the earliest and most extensive labour standards applicable to migrant workers through Convention No. 97 on Migration for Employment (1949) and

Convention No. 143 on Migrant Workers (1975).¹¹² These instruments impose an obligation on states to provide equal treatment to nationals in matters of wages, working conditions, and social security, while also addressing state responsibilities for regulating recruitment and overseeing irregular migration.¹¹³ These standards establish a well-defined protective framework for migrant workers in general. Studies by Chinkin found that although the Migration for Employment Convention and the Migrant Workers Convention establish basic protections, they do not adequately cater for gender specific vulnerabilities such as workplace sexual abuse, harassment, and lack of access to social protection.¹¹⁴ The Convention's use of gender-neutral terminology falls short in addressing the distinct vulnerabilities experienced by migrant women.¹¹⁵

Whilst Chinkin argued that the two ILO Conventions did not cater for gender specific vulnerabilities, Marcadent provides a contrasting view in terms of the ILO Domestic Workers Convention,¹¹⁶ which he highlighted that it signified a notable advancement in the ILO framework by acknowledging the gendered aspects of domestic work. The ILO Domestic Workers Convention mandated that states ensure fair contracts, minimum wage coverage, occupational safety and health, social security inclusion, and explicit safeguards against violence and abuse in domestic workplaces.¹¹⁷ The study Marcadent emphasised that the Domestic Workers Convention crucially addressed the precarious circumstances in which many women migrant workers find themselves employed.

Oelz's research indicates that the Convention provides vital criteria for household employment, covering compensation, appropriate working hours, and measures to prevent abuse and exploitation.¹¹⁸ Awareness of the difficulties that domestic workers encounter has surged worldwide, leading nations, including South Africa, to consider

¹¹² Migration for Employment Convention, adopted on 1 July 1949, entered into force on 22 January 1952 & Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (adopted on 24 June 1975, entry into force: 9 Dec 1978).

¹¹³ Migration for Employment Convention 1949 & Migrant Workers Convention 1975.

¹¹⁴ Chinkin 2019:257-279.

¹¹⁵ Chinkin 2019:257-279.

¹¹⁶ ILO Convention Concerning Decent Work for Domestic Workers was enacted on 16 June 2011 and South Africa ratified it on 20 June 2013. 11.5 million (17.2 per cent) of the world's 67.1 million domestic workers are international migrants, and 8.4 million (73.4 per cent) of migrant domestic workers are women or adolescent girls.

¹¹⁷ Art 3,5,6,10,11, &13 of the ILO Domestic Workers Convention 2011.

¹¹⁸ Oelz 2014:143-172.

potential reforms despite not having officially ratified them.¹¹⁹ Blackett and Trebilcock share a similar perspective, noting that although the Convention is not legally binding in South Africa, it has sparked discussions about the rights of domestic workers in legal and policy-making contexts.¹²⁰ This dialogue has led to gradual modifications in labour laws and policies that reflect the Convention's principles, including enhanced working conditions and social security for domestic workers.¹²¹ Meanwhile, Rosewarne (2013) agrees with Oelz, Blackett, and Trebilcock.

Additionally, the established inequities and obstacles that migrant workers face largely persist without adequate attention. These revelations align with the conclusions of Mullally and Prado, who found that even in light of the Convention's impact, entrenched structural factors such as gender, race, and migration status continue to impede the complete realisation of domestic workers' rights in South Africa.¹²² These challenges are deeply embedded within the labour market and necessitate comprehensive policy interventions that exceed the limitations imposed by the Convention.¹²³ This study aims to fill that gap by introducing a GLI which aids laws to become more gender responsive and able to address the gender specific vulnerabilities faced by women migrant workers.

Hainsfurther described CEDAW as a robust instrument that not only empowers female migrant workers but also stands as a pivotal treaty delineating the essential human rights of women, so that all forms of discrimination against them are eradicated.¹²⁴ These findings are consistent with those of Satterthwaite, who observed that the main strength of CEDAW lies in its support for substantive equality rather than merely formal equality. This distinction is crucial because it shows that discrimination can manifest not only through overtly unfair laws but also through policies and practices that adversely affect women in meaningful ways.¹²⁵

This model of substantive equality provides a strong framework for recognising and addressing the systemic disadvantages faced by migrant women. Satterthwaite asserts that women's rights are infringed not solely when laws differentiate between

¹¹⁹ Oelz 2014:143-172.

¹²⁰ Blackett & Trebilcock 2018:141.

¹²¹ Blackett & Trebilcock 2018:141.

¹²² Mullally 2017:498-503.

¹²³ Mullally 2017:498-503.

¹²⁴ Hainsfurther 2009:856.

¹²⁵ Satterthwaite 2005:5.

men and women but also when any law, policy, or action results in a practical disadvantage to them.¹²⁶ This study acknowledges that women migrant workers' rights are violated when laws disadvantage them. The study proposes a GLI that enables laws to be more gender-responsive and advantageous to women.

Whilst the ICPRMW acts as a global charter for the rights and protection of migrant workers and their families and was acknowledged as a “significant achievement” in theory, Piper and Irendale argue that its practical impact is limited by a low ratification rate, particularly among wealthy, migrant receiving countries.¹²⁷ Western *et al.* build on the work of Piper and Irendale and note that contributing factors to low ratification include the financial and political costs of aligning domestic policies with the treaty's requirements and a general lack of political will.¹²⁸

Contrary to research studies which have praised the ICPRMW, Chinkin and Vijayarasa argue that the convention does not adequately address the unique vulnerabilities and forms of discrimination faced by women migrants.¹²⁹ Failing to incorporate an intersectional approach that considers how gender interacts with migrant identity, race, and other factors represents a significant oversight. Omitting a gender-sensitive perspective means that the individual experiences of migrant women are often overshadowed in discussions about migrant rights.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) aim to provide a detailed framework for defending the rights of women migrant workers in South Africa, despite the practical application of these protections facing considerable impediments.¹³⁰ These Covenants subtly emphasise the significance of non-discrimination and equality, which are pivotal for the protection of the rights of women migrant workers. Nevertheless, the effectiveness of these protections seems to be frequently hindered by socio-economic obstacles and the unique legal and policy landscape in South Africa.

¹²⁶ Satterthwaite 2005:21.

¹²⁷ Piper & Irendale 2004:53.

¹²⁸ Western *et al* 2019:10&11;15-16.

¹²⁹ Chinkin 2019:257-279 & Vijayarasa 2019.

¹³⁰ United Nations International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976 & United Nations International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976.

Loedolf conducts a focused analysis of South Africa, noting that while the ICESCR articulates the right to work, this right has not been comprehensively assimilated into the nation's domestic legal structure.¹³¹ Consequently, the protections offered by the Covenant remain largely aspirational rather than practically enforceable. In summary, these analyses reveal a disconnect between international commitments and their implementation at the national level, which ultimately diminishes the practical effectiveness of the right to work. Carney points out that the ICESCR explicitly encompasses social security rights, which hold particular significance for vulnerable populations such as migrant workers.¹³² Nonetheless, in South Africa, access to welfare benefits is predominantly limited to citizens, thereby neglecting migrants, despite prevailing international commitments. This situation illustrates a broader structural challenge: formal ratification of rights does not ensure equal access in practice, especially when states prioritise citizens in their welfare systems.

The existing body of literature collectively highlights a discord between the robust normative framework delineated by international covenants and the constrained practical enforcement at the national level (particularly in South Africa). Álvarez and Bauder emphasise the intersectional discrimination experienced by women migrant workers, stemming from both their gender identity and migratory status. In contrast, Carney and Loedolf demonstrate how legal and welfare exclusions amplify their vulnerability.¹³³ Consequently, the effectiveness of these international standards is influenced not only by their provisions but also by regional and national processes of implementation and enforcement, making the regional African and SADC frameworks vital complements to the international system.

The African Charter on Human and Peoples' Rights (ACHPR)¹³⁴ encompasses provisions related to non-discrimination and women's rights. Research by Sigworth and Kumalo, Banda, and Chirwa concur and argue that it has proven largely ineffective in practice due to its ambiguous language, the recurrent failure of states to implement its provisions at the national level, and its inability to address the specific challenges confronting African women, which include female genital mutilation, marital inequality,

¹³¹ Loedolf 2024:2-3.

¹³² Carney 2010:1-2.

¹³³ Álvarez & Bauder:2024:25 Carney:2010:1-2 & Loedolf 2024:2-3.

¹³⁴ The African Charter on Human and Peoples' Rights was adopted in 1981 in Nairobi, Kenya and came into effect in October 1986. It was ratified by South Africa on 9 July 1996.

and reproductive health rights.¹³⁵ Viljoen, on the other hand, noted that the absence of robust mechanisms for monitoring, reporting, and accountability has significantly diminished its overall efficacy.¹³⁶ Given these challenges, women's advocacy groups in Africa pursued stronger protections, leading to the ratification of the Maputo Protocol,¹³⁷ which Kombo marks as a key development in advancing women's rights.¹³⁸ Mohammed observed that, even with its more extensive and progressive framework, the Protocol grapples with similar challenges in execution, as several states have not fully incorporated it into their local legal frameworks, threatening its potential to evolve into a “paper tiger” that is out of touch with the realities that women encounter.¹³⁹ Ultimately, while both the Charter and the Protocol provide essential normative underpinnings, their success is contingent upon more robust enforcement, greater incorporation into national legal structures, and more precise strategies addressing the intersectional discrimination encountered by African women, including migrant workers. This study builds on the views of the author and proposes the GLI, which can aid laws to become more gender responsive and able to address the gender specific vulnerabilities encountered by women migrant workers.

In their research, Selebogo and Ojakorotu demonstrate that the SADC Protocol on Gender and Development provides a comprehensive equality agenda aimed at tackling gender-based violence, enhancing women's participation in decision-making, and promoting economic empowerment, while clearly endorsing both national and cross-border efforts to combat systemic gender discrimination.¹⁴⁰ However, studies by Forere and Stone highlight that the instrument largely reinforces existing protections rather than expanding them within continental frameworks, such as the Maputo Protocol, thereby limiting its potential for transformative change.¹⁴¹ Supporting this view, Olivier and Vanyoro support regional instruments, such as the SADC Protocol on Employment, which promotes not only fair labour practices but also social security for all workers.¹⁴² This serves as a crucial safety net for vulnerable migrant women

¹³⁵ Banda 2006:72; Chirwa 2004:63-93; Sigsworth & Kumalo 2016:3.

¹³⁶ Viljoen 2007:412.

¹³⁷ Maputo Protocol was adopted on 11 July 2003 came into effect on 25 November 2005.

¹³⁸ Kombo et al. 2013:17-18.

¹³⁹ Mohammed 2014:71-76.

¹⁴⁰ Selebogo & Ojakorotu 2013:5175-5196; SADC Protocol on Gender and Development, adopted on 17 August 2008, entered into force on 22 February 2013.

¹⁴¹ Forere & Stone 2009:434.

¹⁴² SADC Protocol on Employment and Labour, signed on 18 August 2014.

workers across sectors in Southern Africa.¹⁴³ Although South Africa's constitutional promise of social security for “everyone” could serve as a cornerstone for these regional commitments, uneven application and enforcement have exposed numerous women migrant workers to risks of exclusion and exploitation. To summarise, the literature indicates a persistent challenge of strong normative commitments and coordinated initiatives at both regional and constitutional levels, yet shortcomings in implementation, administrative precision, and properly funded enforcement hinder the realisation of secure labour conditions and effective social protection for women on the move. While extensive research has been conducted on international and regional laws, no studies have considered the use of the GLI, a tool capable of integrating gender perspectives into migration governance, aligning regional standards with national legislation, ensuring equitable access to employment and social security, strengthening labour inspections and remedies, and fostering cross-border collaboration with gender-disaggregated monitoring.

In this section of the literature review, I address the third research question, “What are the South African laws that protect women migrant workers' rights? Are they sufficient? And if not, is there a remedy”?

The inclusion criteria in this section of the literature review encompass legislation related to migration and labour in South Africa, covering both historical and current aspects. This includes White Papers (2017, 2024, 2025) and the National Labour Migration Policy (2022). It also considers international and regional agreements such as ICCPR, ICESCR, CEDAW, ICPRMW, ILO Conventions, the Maputo Protocol, and SADC instruments. South African laws and policies are assessed against these international and regional instruments. Court rulings, for example, *Khosa v Minister of Social Development and National Education, Health and Allied Workers Union v University of Cape Town*, are also included. Scholarly analyses by Maharaj, Amit, Crush, and Ramachandran, as well as Chisale, Bloch, Skinner, Twala, and Heard, are reviewed. Excluded from this discussion are non-legal sociological narratives that lack relevance to migration or labour policy, laws that do not pertain to women migrant workers, and global migration debates that fall outside the South African context, unless a comparative illustration is necessary.

¹⁴³ Vanyoro 2019:7 &9 & Olivier 2011:127-129.

The methodology employed in this section of the literature review was both doctrinal and grounded in existing literature. A historical-legal examination of colonial and apartheid legislation is undertaken, including the *Native Land Act*, the *Pass Laws Act*, and the *Aliens Control Act*, illustrating their exclusionary effects. Following this, a review of current South African laws (such as the *Immigration Act* 13 of 2002, *Refugee Act* 130 of 1998, *Labour Relations Act* 66 of 1995, *Basic Conditions of Employment Act* 55 of 1997, *Employment Equity Act* 55 of 1998, and *Occupational Health and Safety Act* 85 of 1993) is provided. The analysis is further informed by lessons learned from other nations, such as Canada, Sweden, and the Philippines, which have implemented gender-aware policies regarding migration. Additionally, the study incorporates intersectionality, utilising Crenshaw's framework, to emphasise how women migrant workers face multiple layers of discrimination due to factors such as gender, race, class, and migration status. This thematic analysis is organised around substantive rights, which include equality and non-discrimination, dignity and freedom from violence, fair working conditions, and access to social security and healthcare.

Colonial and apartheid-era legislation established a migration system that was both racialised and gendered. The *Native Land Act*,¹⁴⁴ restricted black South Africans to designated reserves, while the *Pass Laws Act*,¹⁴⁵ imposed limitations on movement through mandatory passbooks. The *Aliens Control Act*,¹⁴⁶ continued this exclusion, facilitating severe deportation measures against Mozambican refugees. Peberdy and Crush observed that from 1913 to 1986, black individuals could only enter South Africa unlawfully or as contract labourers, as residence permits were unattainable.¹⁴⁷ This legacy of exclusion has significantly influenced the migration frameworks in the post-apartheid era. Important to note is the fact that whilst literature reveals the exclusionary nature of apartheid laws, no literature has discussed why democratic reforms have failed to address these exclusions. This is clearly evident in Amit's studies.

¹⁴⁴ *Natives Land Act* (published on 19 June 1913 and repealed on the 30th of June 1991).

¹⁴⁵ *Native (Abolition of Passes and Co-ordination of Documents) Act* of 1952.

¹⁴⁶ *Aliens Control Act* 96 of 1991.

¹⁴⁷ Peberdy & Crush 1998b quoted in Maharaj 2004:3.

While the *Immigration Act*,¹⁴⁸ officially replaced the exclusionary *Aliens Control Act*, Amit's research shows that restrictive migration practices continued to prevail.¹⁴⁹ This ongoing circumstance suggests that changes in legislation have not necessarily led to significant reform. Crush and Ramachandran support this viewpoint, pointing out that although the Act introduced provisions for work permits, women migrant workers in the informal economy were predominantly left out.¹⁵⁰ Similarly, Chisale noted that South African immigration policy is gender biased and overlooked the legacies of colonialism that practically encouraged men to study science and mathematics, and channelled the girl child to focus more on art subjects.¹⁵¹ This exclusion brings to light the ongoing disparities that are ingrained in South Africa's migration policies, where the struggles women face frequently remain unacknowledged.

In the last few years, it appears that discussions around policy have increasingly leaned towards a more progressive perspective. The White Paper on International Migration 2017, the White Paper on Citizenship, Immigration, and Refugee Protection and the White Paper concerning National Labour Migration Policy all advocate for the creation of structured migration systems.¹⁵² These approaches aim to connect migration with economic priorities and the fundamental rights of individuals. Even so, despite these efforts, recent studies by Dodson and Magidimisha have found that the specific issues confronting women migrants are predominantly not covered or excluded from policy discussions.¹⁵³ The feminisation of migration, a fundamental characteristic of present-day global mobility, is regularly neglected. Thus, women migrants, particularly in high-risk sectors such as domestic employment and agriculture, remain situated in a largely unacknowledged realm within national migration dialogues.¹⁵⁴ This study seeks to cover that gap by proposing a GLI which can, in essence, address the gender specific vulnerabilities and exclusions faced by women migrant workers.

Labour legislation serves as another example of the disparity between formal protections and actual experiences. The *Labour Relations Act promotes equitable*

¹⁴⁸ *Immigration Act* commenced on 12 March 2003 by Proclamation R13 of 2003.

¹⁴⁹ Amit 2012:44-57.

¹⁵⁰ Crush & Ramachandran 2014.

¹⁵¹ Chisale 2015:1.

¹⁵² Republic of South Africa, Department of Home Affairs 2017,2024 &2025.

¹⁵³ Dodson 2018; Magidimisha 2018.

¹⁵⁴ Dodson 2018; Magidimisha 2018.

labour practices and, as the study by Twala highlights, even offers protections to undocumented migrants as outlined in sections 185 and 213.¹⁵⁵ Likewise, the *Basic Conditions of Employment Act*¹⁵⁶ (BCEA) sets minimum standards that include provisions for maternity leave.¹⁵⁷ However, these rights are often not enforced, leaving migrant women exposed to mistreatment by employers and inconsistent application of protections. The *Employment Equity Act*,¹⁵⁸ while banning workplace discrimination, does not specifically address the status of migrants, which limits its effectiveness. The *Occupational Health and Safety Act*¹⁵⁹ is also weakened by poor enforcement in sectors where migrant women are prevalent. As Skinner notes, domestic workers frequently face exploitative working conditions, underscoring how statutory protections often remain mere “paper rights” without real impact.¹⁶⁰

Collectively, this body of literature reveals a trend in which formal inclusivity coexists with substantial exclusion. Legislative and policy frameworks seem to acknowledge universal rights, yet they do not effectively dismantle systemic exclusions based on gender and migrant status. The lack of attention to the feminisation of migration in migration policies, paired with the inadequate enforcement of labour protections, solidifies a system where women migrants are particularly vulnerable. Their experiences demonstrate how overlapping inequalities, being both a migrant and a woman, intensify their marginalisation in the workforce.

Ultimately, the migration and labour frameworks in South Africa reveal the limitations of managed migration policies when they fail to address gender-specific vulnerabilities. While policy documents increasingly emphasise the importance of aligning economic goals with the human rights of women migrants in informal sectors continue to be largely ignored. If reforms do not deliberately integrate intersectional protections and bolster enforcement, the inclusivity promised by legislation will remain more aspirational than actual. In this context, the feminisation of migration should be recognised as a crucial issue. It must be central to any efforts aimed at creating a migration system that is just and equitable.

¹⁵⁵ Twala 2023:30.

¹⁵⁶ *Basic Conditions of Employment Act* 75 of 1997.

¹⁵⁷ Section 25 of the *Basic Conditions of Employment Act*, 1997 (BCEA).

¹⁵⁸ *Employment Equity Act* of 1998.

¹⁵⁹ *Occupational Health and Safety Act* of 1993.

¹⁶⁰ Skinner 2014:150-163.

The use of the GLI in reforming South African laws to make them gender-responsive is not explored in the literature. This study aims to fill the gap by proposing the use of the GLI in migration and labour laws in South Africa, ensuring they are gender-responsive. This approach will not only cater to the gender particular vulnerabilities encountered by women migrant workers in South Africa but also align with international standards.

This part of the literature review addresses the fourth research question, “What is the methodological tool that can be used to aid laws to become gender responsive?”

Inclusion criteria consisted of statutes, regulations, jurisprudence, and international agreements that specifically pertain to migration, labour, or the rights of women migrant labourers in the South African context (inclusive of comparative analyses). Criteria for exclusion included non-legal sociological research, irrelevant legislative measures, migration frameworks that are not restricted to South African borders (unless they offered a comparative perspective), and extensive gender rights frameworks that do not directly address migration issues.

Recent studies by Marsh et al. and Vijayarasa have described the GLI as a methodological tool designed to assess the extent to which laws are gender-responsive.¹⁶¹ The GLI not only evaluates but also scores legislation by grading it from gender regressive to gender responsive when set against global benchmarks from international law, such as CEDAW.¹⁶² Research studies by Vijayarasa noted that the GLI was founded on the notion that all areas of law should consider gender from the outset of the drafting process.¹⁶³ Studies by Warren adopted a similar view and added that although gender issues were mostly considered in sectors like reproductive rights or domestic violence, they were often overlooked in areas such as bankruptcy, taxation, or financial regulations.¹⁶⁴ Studies by Vijayarasa observed that the GLI provided a remedy by adopting a gender perspective across all legal areas, thereby exposing discrimination in policies that might look neutral.¹⁶⁵ Vijayarasa further states that the GLI not only assesses the intention of laws but also their likely impact, and

¹⁶¹ Mash et al. 2018:550-557.

¹⁶² Mash et al. 2018:550-557.

¹⁶³ Vijayarasa 2022:68.

¹⁶⁴ Warren 2018.

¹⁶⁵ Vijayarasa 2022:68.

this is particularly important during the drafting phase to prevent the creation of gender-blind or gender-regressive laws.¹⁶⁶

Further studies by Vijeyarasa revealed that the GLI evaluated legal frameworks across two fundamental dimensions, with the first being the spectrum from gender-regressive to gender-responsive and the second focusing on the degree of alignment of laws with international standards, ranging from “complete disregard” to “full compliance with international norms”.¹⁶⁷ Vijeyarasa, as a leading scholar, defines the terms gender-responsive, gender-neutral, gender-blind, and gender-regressive.¹⁶⁸ Vijeyarasa notes that gender-responsive legislation systematically recognises the distinct requirements of different genders, addresses systemic barriers, and aims to promote meaningful equality.¹⁶⁹ Furthermore, gender-neutral legislation does not differentiate based on sex; this inadvertently risks obscuring the realities of gender, and may easily devolve into gender-blindness, neglecting the unique vulnerabilities experienced by women.¹⁷⁰ Gender blind legislation overlooks situations where gender considerations should have been considered.¹⁷¹ Gender-regressive legislation directly opposes global women's rights standards.¹⁷² Gender-regressive legislation refers to laws and policies that roll back existing rights, protections, or advances towards gender equality. Similarly, research studies conducted by Atrey and Nussbaum found that gender-regressive laws actively subvert women's rights, this is evidenced by restrictions on abortion and legal frameworks that exclude women migrants from access to social protections.¹⁷³

Studies by Vijeyarasa demonstrate that the GLI uses seven criteria derived from CEDAW's 39 General Recommendations to determine if a law is gender-responsive.¹⁷⁴ The seven criteria for the gender responsive legislation require that laws, clearly prohibit discrimination and guarantee services that are accessible, affordable and acceptable to women, make provision for adequate education and information on the rights and entitlements, guarantee that women's decision are fully

¹⁶⁶ Vijeyarasa 2021.

¹⁶⁷ Vijeyarasa 2021.

¹⁶⁸ Vijeyarasa 2019:274-279.

¹⁶⁹ Vijeyarasa 2019:274-279.

¹⁷⁰ Vijeyarasa 2019:274-279.

¹⁷¹ Vijeyarasa 2019:274-279.

¹⁷² Vijeyarasa 2019:274-279.

¹⁷³ Atrey & Nussbaum 2019.

¹⁷⁴ Vijeyarasa 2019:2.

informed, voluntary and confidential, ensure that equality between men and women is promoted, protect women from gender specific vulnerabilities, guarantee access to remedies and justice that is effective and establish mechanisms for continuous monitoring and evaluation systems of gender disaggregated data.¹⁷⁵ These criteria, noted by Vijeyarasa, apply to civil, criminal, and public law at both domestic and international levels. A critical feature of the GLI is that it assesses whether the law adopts a woman's standpoint, challenges gender norms and addresses intersectional discrimination.¹⁷⁶

However, Vijeyarasa concedes to the fact that the GLI is limited when examining a law's actual implementation.¹⁷⁷ A similar view was adopted by Merry, who stated that while the gender legislative index provides a helpful measure of the degree of gender responsiveness incorporated in legislation, it is restricted in its ability to analyse the execution of laws and their impact on gender-equal outcomes in practice. A law can appear progressive on paper, meeting criteria for gender responsiveness, but may ultimately fail to be implemented in ways that promote genuine equality and social change.¹⁷⁸ This point is acknowledged in the study in Section 5.6; hence, a proposal is made to have the laws assessed by the GLI. These include the International Labour Organisation, the CEDAW Committee and the South African Commission for Gender Equality.

Furthermore, studies by Warren and Vijeyarasa found that a unique feature of the GLI is its ability to consider gender in areas such as bankruptcy and taxation, not traditionally considered from a gender perspective. This, they noted, allowed for proactive integration of gendered perspectives.¹⁷⁹ Moreover, the GLI can conduct a comprehensive textual analysis, clause by clause, critically assessing both the intention and likely effect of legislation.¹⁸⁰ This is crucial for identifying potentially gender-blind or regressive legislation before it is implemented.

This study favours the GLI in comparison to some of the indices that have been used in Africa. For instance, the African Gender and Development Index is only able to

¹⁷⁵ Vijeyarasa 2019:2.

¹⁷⁶ Vijeyarasa 2019:2.

¹⁷⁷ Vijeyarasa 2019:277.

¹⁷⁸ Merry 2006:38-51.

¹⁷⁹ Warren 2002:23; Vijeyarasa 2022:23.

¹⁸⁰ Vijeyarasa 2019:277.

aggregate broad legal categories and indicators; it is not able to analyse specific legal texts as the GLI does. The Social Institutions and Gender Index focuses more on customary norms and overall discrimination, and not migration-specific issues. It is not able to dissect actual legal texts. The Women, Business and Law Index is limited to economic/legal barriers, focusing more on issues that concern labour, finance, and family; it does not cover migration or asylum laws.

In contrast to other broader indices, the GLI uses methodologically sound standards grounded in the international women's rights law, mainly CEDAW. Vijayarasa noted that using CEDAW standards as the basis for the GLI had formidable advantages. Firstly, the only foundation for a human rights index with near-universal commitment is CEDAW.¹⁸¹ Furthermore, Vijayarasa notes that CEDAW is the main international human rights instrument dedicated exclusively to the rights of women. CEDAW contains universally accepted principles that go beyond legal systems and cultural differences, and which member states have voluntarily committed to abide by.¹⁸² Similarly, studies by Atrey and Nussbaum argue in favour of the GLI as they described it as an indispensable tool grounded in the infallible framework of CEDAW.¹⁸³

However, there is considerable disagreement about using CEDAW standards as the basis for the GLI. Studies by Merry, Charlesworth, and Banda have criticised CEDAW for reflecting Western biases that overlook cultural differences affecting women and for imposing a Western framework that may not resonate with local cultural norms and values in some post-colonial states.¹⁸⁴ They argued that relying heavily on CEDAW may promote a universal perspective on women's rights that ignores intersections of gender, race, culture, and religion.¹⁸⁵ Vijayarasa, in defence, argues that patriarchy and women's unequal status are universal challenges for women.¹⁸⁶ By grounding itself in CEDAW, the GLI provides an initial starting point for defining and measuring legislative progress among the 189 state parties committed to the rights outlined in CEDAW.¹⁸⁷ The inevitable outcome is a unified and comprehensive framework that integrates women's concerns and avoids fragmenting them with issues of race, class,

¹⁸¹ Vijayarasa 2019:276.

¹⁸² Vijayarasa 2021.

¹⁸³ Atrey 2017:862; Nussbaum 2016:589.

¹⁸⁴ Merry 2009:72.

¹⁸⁵ Banda 2019:268.

¹⁸⁶ Vijayarasa 2019:277.

¹⁸⁷ Vijayarasa 2019:277.

religion, ethnicity, sexuality and disabilities, among other identities.¹⁸⁸ Studies by Mullins, Alvarez and Bauder adopted a similar view to that of Vijayarasa, with Mullins highlighting the fact that CEDAW, served as a foundational tool for assessing legislative progress among the 189 state parties committed to women's rights and that by measuring the GLI with CEDAW's provisions, the GLI aimed to track advancements in gender equality and empower advocates to push for necessary reforms, ultimately fostering a more equitable legal framework for women across diverse contexts.¹⁸⁹ Alvarez and Bauder found that CEDAW served to address not only the formal dimension of equality but also the substantive and transformative dimensions, aiming to eliminate stereotypes and social structures that harm women, which include patriarchy.¹⁹⁰

This study, therefore, argues for the use of the GLI to enable laws in South Africa to be more gender-responsive and align them with the international human rights principles, particularly those outlined in CEDAW. The application of the GLI in South Africa would enable policymakers to audit migration and labour laws, ensuring that they not only provide formal equality but also achieve substantive equality.

Existing literature shows that governments lack a clear policy framework concerning women migrants. Furthermore, no effective enforcement mechanisms are in place for managing employers who violate women migrant workers rights. Current literature highlights the urgent need to prioritise rights-based, gender-sensitive migration policies and practices to reduce the vulnerability of women migrants. No research has considered the use of the GLI in South Africa to address the underlying inequalities in migration legislation and policies, which make women migrants vulnerable to exploitation and abuse.

1.7 RESEARCH METHODOLOGY

Broadly, my thesis provides a detailed analysis of primary legal sources, including international and regional instruments, case law, domestic legislation, and policies. It

¹⁸⁸ Vijayarasa 2019:277.

¹⁸⁹ Mullins 2018:257-272.

¹⁹⁰ Alvarez & Bauder 2024.

also employs a socio-legal research methodology to critically examine the legal frameworks that affect the rights of women migrant workers in South Africa. A socio-legal approach is essential and suitable because it offers an interdisciplinary perspective, enabling an integrated analysis of law and the lived experiences of women migrants. This methodology also examines how intersectional aspects, including gender, race, class, and origin, exacerbate the vulnerabilities faced by women migrant workers, as articulated by Crenshaw's intersectionality framework. The study draws on feminist and Crenshaw's theories, forming the basis of the analysis, which emphasises how overlapping identity markers, such as gender, race, class, and origin, intensify discrimination and increase vulnerabilities, leading to rights violations. This highlights the importance of gender-responsive frameworks.

Another research method used in this thesis is a comparative legal analysis. The thesis examines international and regional frameworks as they establish the normative framework for protecting the rights of women migrants against South African laws. An assessment is conducted to determine whether South African laws and policies align with international standards for protecting the rights of women migrant workers, and a proposal is developed to ensure a practical solution is gender-responsive.

In addition to the socio-legal and comparative approaches, this research also uses a doctrinal analysis of the law. This method provides a systematic presentation of the rules governing specific legal categories, analysing the relationships between these rules, identifying problematic areas, and predicting future developments. It mainly focuses on primary legal sources such as legal doctrines, case law, and legislation, emphasising the "black letter" of the law rather than its practical application. Through this analytical and doctrinal approach, the research highlights both the positive aspects of the law (what a legal situation is) and its normative aspects (what it should be), thereby setting parameters and critically interpreting facts. This involves a descriptive and detailed analysis of legal rules found in primary sources, aiming to gather, organise, and describe the law, provide commentary, and identify underlying themes and connections between legal sources. While this approach is useful for establishing a solid structure and a clear definition of legal rules, it has limitations. It can be too formalistic, potentially oversimplifying legal doctrine, and is limited to the researcher's perspective, sometimes failing to account for factors outside the legal framework or the actual functioning of the law in practice, such as court practices. To address this

limitation, the thesis/study integrates doctrinal, socio-legal, and comparative methodologies. A socio-legal perspective grounds the analysis in practical realities, recognising how women migrant workers encounter and navigate the law in practice. The comparative method enables the research to go beyond a South African perspective, drawing on international standards and best practices to evaluate the adequacy of domestic laws. In this way, the doctrinal analysis is not only enriched and contextualised but also results in a comprehensive methodology. This integrated methodological approach reveals the current state of the law while evaluating its capacity to respond to challenges and guide law reform.

1.8 CHAPTER OUTLINE

This dissertation is divided into six chapters.

1.8.1 Chapter One

Chapter One contains the introduction, outlining the background to the problem, sets out the problem statement, and outlines the overall objectives, literature review, motivation and methodology of this study.

1.8.2 Chapter Two

This chapter discusses the foundational elements of the thesis. First, the chapter explores the root causes of rights violations. Feminist legal theories, including radical, Marxist, dual systems, Africanist, and liberal feminism, are utilised to clarify the entrenched patriarchal and capitalist systems that sustain the subjugation of women. Intersectionality theory further demonstrates how overlapping identity markers such as gender, race, class, and migrant status generate compounded vulnerabilities. Complementing these frameworks, migration theories such as the push-pull model, the new economics of labour migration, and the dual labour market theory are employed to explain the motivations behind women's migration and their concentration in undervalued and insecure job sectors. Second, the chapter identifies and categorises the types of violations that women migrants are subjected to in South

Africa. Third, the chapter assesses the legal framework governing gender equality and migrant rights in South Africa. Particular emphasis is placed on the constitutional values of equality, dignity, and freedom, and how these rights are either granted or denied to women migrants. Legal precedents such as those established in *Harksen v Lane* and *Khosa v Minister of Social Development* are analysed to reveal both the protections and limitations inherent in the constitutional framework as they relate to systemic violations. The chapter also discusses the different types of equality, which include formal, substantive, and transformative, in order to ascertain which approach is most appropriate for women migrant workers.

1.8.3 Chapter Three

This chapter examines the normative framework for protecting women migrant workers under international and regional laws. The first section of this chapter will examine the International Labour Organisation and the effectiveness of two of its treaties, namely the Migration for Employment Convention¹⁹¹ and the Migrant Workers Conventions,¹⁹² in the protection of the rights of workers, particularly those of women migrants. The second section discusses the significance of the United Nations Conventions, which include ICPRMW,¹⁹³ the Convention Concerning Decent Work for Domestic Workers,¹⁹⁴ and CEDAW. I examine CEDAW and its interpretation of substantive equality against formal equality

I also examine how governments, employers and workers demonstrate their commitments to develop more effective labour migration policies for women migrants through the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.¹⁹⁵ The 2006 Multilateral Framework on Labour Migration,¹⁹⁶ The Manila Call to Action,¹⁹⁷ and the Declaration of the United Nations General Assembly High-level Dialogue on International Migration and Development,¹⁹⁸ will be discussed. Lastly, the chapter will examine applicable regional

¹⁹¹ ILO Migration for Employment No. 97 of 1949.

¹⁹² Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975.

¹⁹³ The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

¹⁹⁴ ILO Convention Concerning Decent Work for Domestic Workers.

¹⁹⁵ ILO Declaration on Fundamental Principles and Rights at Work, 1998

¹⁹⁶ ILO Multilateral Framework on Labour Migration (adopted 2 November 2005 and entered into force March 2006).

¹⁹⁷ ILO Manila Call to Action (adopted and entered into force October 2008).

¹⁹⁸ OHCHR 2013.

treaties, namely the ACHPR,¹⁹⁹ the Maputo Protocol,²⁰⁰ The SADC Protocol on Gender and Development,²⁰¹ and the SADC Protocol on Employment and Labour ²⁰² and the roles they have played in protecting the rights of women migrant workers in Africa.

1.8.4 Chapter Four

Chapter 4 examines the legal and institutional framework in South Africa that governs migration and labour, with a particular focus on its impact on women migrant workers. It begins by outlining the evolution of migration laws, tracing their origins to the colonial and apartheid eras, and demonstrating how exclusionary measures have shaped current national policies. The chapter then moves to the present legal framework, analysing constitutional protections alongside the *Immigration Act*, its amendments, the *Refugees Act*, and recent policy documents such as relevant White Papers and the National Labour Migration Policy. The goal is to assess whether these legal instruments recognise and address the particular vulnerabilities encountered by women migrant workers. The section also examines several labour regulations, including the *Labour Relations Act*, the *Basic Conditions of Employment Act*, the *Employment Equity Act*, and the *Occupational Health and Safety Act*, evaluating their effectiveness in protecting women migrant workers' rights in practice. Finally, South African legislation is compared against international and regional human rights principles, considering rights to equality, dignity, fair working conditions, and social security. The chapter concludes by noting that, although some measures are in place, South African legislation remains largely gender-neutral, poorly enforced, and not fully aligned with global standards for safeguarding women migrants.

1.8.5 Chapter Five

Chapter 5 introduces the GLI as a methodological framework for assessing the effectiveness of legislation in addressing gender issues. Based on international law, particularly CEDAW, the GLI aims to highlight systemic discrimination and examine

¹⁹⁹ African Charter on Human and Peoples' Rights.

²⁰⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

²⁰¹ SADC Protocol on Gender and Development.

²⁰² SADC Protocol on Employment and Labour.

legislation along two dimensions, from gender-regressive to gender-responsive and from neglect to meeting international standards. It considers both the objectives and the likely impact of laws, recognising that gender-neutral language can often mask gender-insensitive outcomes. This framework employs seven key criteria to evaluate responsiveness, ensuring that laws are not only well-intentioned but also properly implemented and enforced.

The chapter further assesses the implementation of the GLI across different territories, including Australia, Indonesia, the Philippines, and Sri Lanka, showcasing its adaptability and benefits in contrast to similar methodologies, while also recognising its limitations. It stresses the necessity of monitoring implementation by organisations like the ILO, the CEDAW Committee, and South Africa's Commission for Gender Equality. The role of the GLI in contributing to global and regional objectives, including SDG 5 and the AU's Agenda 2063, is also highlighted. Lastly, the chapter illustrates how the GLI can be utilised to evaluate South African migration and labour laws, measuring their gender responsiveness and tackling the challenges faced by women who migrate for work.

1.8.6 Chapter Six

Chapter Six will consist of the study's conclusion and recommendations.

CHAPTER 2: FOUNDATIONAL ELEMENTS OF THE STUDY

2.1 INTRODUCTION

This chapter lays the groundwork for the study by actively addressing the research question: What factors contribute to the violations experienced by women migrants in South Africa? It constructs the theoretical, empirical, and legal foundations necessary for exploring this inquiry. This is achieved by incorporating feminist and intersectional theories, migration studies, and constitutional law, which together provide a thorough overview of both the reasons behind and the forms of rights violations. In this manner, the chapter establishes the intellectual framework that underpins the entire study. Its primary goal is to situate the experiences of women migrants within a broader theoretical and legal landscape. Feminist legal perspectives, in their diverse manifestations, radical, marxist, dual systems, Africanism, and liberal feminism, serve to illuminate the patriarchal and capitalist systems that perpetuate the oppression of women. Intersectionality theory further enriches the discussion by demonstrating how intersecting identity factors such as gender, race, class, and migrant status create multiple layers of discrimination. Meanwhile, migration theories like the push and pull model, the new economics of labour migration, and the dual labour market theory provide insight into the economic and structural influences that drive women's migration, often leading them into precarious and undervalued employment.

Building upon these theoretical perspectives, the chapter also pinpoints and classifies the specific types of rights violations that women migrants encounter in South Africa. The analysis reveals the feminisation of migration and the contradiction of women migrants as both empowered economic participants and vulnerable victims of exploitation. Specifically, it delves into four case contexts: domestic work, characterised by exploitation, low pay, absence of contracts, and gender-based violence; farm work, which is associated with long hours, insufficient pay, sexual harassment, and poor living conditions; sex work, where criminalisation and stigma subject women to systemic violence, including mistreatment by law enforcement; and deskilling, in which migrant women with professional credentials are marginalised from skilled jobs and compelled into low-paid, unstable work. Lastly, the chapter examines the constitutional framework that oversees rights protections in South Africa. It analyses the constitutional principles of equality, dignity, and freedom in relation to

women migrants, particularly how these protections are enacted or denied in practice. Judicial rulings, such as *Harksen v Lane* and *Khosa v Minister of Social Development*, are reviewed to illustrate the strengths and weaknesses of constitutional safeguards in addressing systemic violations. To achieve these aims, the chapter is organised as follows: Section 2.2 presents the theoretical framework, with a special focus on feminist, intersectional, and migration theories. Section 2.3 investigates gendered migration, highlighting the historical male predominance in migration, the feminisation of migration, and the rise of women as both economic agents and victims of exploitation. This section also offers a comprehensive overview of the rights violations that women migrants face in South Africa across various sectors. Section 2.4 examines the constitutional foundations of gender equality, focusing on the principles of equality, dignity, and freedom, and assessing their effectiveness in protecting women migrants from discrimination and exploitation.

2.2 THEORETICAL FRAMEWORK

In this section, I explore the theoretical framework of the study. I discuss the feminist, intersectionality and migration theories.

2.2.1 Feminist Legal Theory

I focus my discussion on four theories relevant to the study. These include radicalism, Marxism, dualism, Africanism and liberal feminism. The concepts of gender inequality and discrimination are central themes across the theories. They, however, differ in their explanations of the source, structure, and remedies for gender inequality.

Radical feminist

Radical feminism is a theoretical and political perspective, and its focus is on the domination of women by men.²⁰³ Radical feminism primarily developed in Western

²⁰³ Mills et al. 2010.

countries, particularly in France, England, Canada, and the United States, during the 1960s and onwards.²⁰⁴

Radical feminism is rooted in the wider radical contemporary movement.²⁰⁵ Women who participated in the anti-war and New Left political movements of the 1960s often found themselves excluded from equal power within the movement, despite the movement's purported underlying values of empowerment.²⁰⁶ This clearly shows that gender inequality dates back to the 1960s. Many of these women formed feminist groups while retaining much of their original radical political ideals and methods. "Radical feminism" became the term used for the more radical edge of feminism.²⁰⁷ The leading figures of this second wave of feminism included Shulamith Firestone, Kathie Sarachild, Ti-Grace Atkinson, Carol Hanisch, Roxanne Dunbar, Naomi Weisstein, and Judith Brown.²⁰⁸

The concept of "patriarchy" is central to radical feminism. Radical feminists state that patriarchy refers to the historical and cultural dominance of men over women.²⁰⁹ Early radical feminists, such as Kate Millett and Shulamith Firestone, frame patriarchy as a universal structure.²¹⁰ They argue that male dominance over women is a foundational, near-constant feature across all societies. This view by Firestone and Millet is powerful as it identifies gender oppression as ingrained in the system. Radical feminists assert that there are various ways in which men oppress women. The nuclear family²¹¹ is viewed as a site where men oppress women through unpaid domestic labour in the home.²¹² A woman's duty is often seen as taking care of her household, which inevitably restricts her ability to gain positions of power in society.²¹³ Radical feminists argue that, because of patriarchy, women are subordinate to men and, as a result, are systematically oppressed and marginalised.

²⁰⁴ Wills 1984; Giardina 2010.

²⁰⁵ Gamble 2001:25.

²⁰⁶ Gamble 2001:25.

²⁰⁷ Gamble 2001:25.

²⁰⁸ Gamble 2001:25.

²⁰⁹ Hines 2015:24 ; Millet 1970:25-58; Firestone 1970:4-5; Walby 1990:20-24.

²¹⁰ Millett 1970:24-25 & 33-34; Firestone 1970:1-5 & 11-12.

²¹¹ "Nuclear family" refers to the main family consisting of the parents and the children.

²¹² Hines 2015:24

²¹³ Hines 2015:24

Women, both inside and outside the family, are primarily defined by their traditional family roles of wife, mother, and daughter.²¹⁴ This indicates that these roles are not independent but rather assume an automatic economic dependency on men.²¹⁵ Furthermore, reproduction served to reinforce gender inequality further as women became more dependent on men for financial support, further highlighting patriarchal power structures.²¹⁶

Other radical feminists highlighted sexual violence, rape, domestic violence, sexual harassment and pornography services as ways in which men oppressed women in a patriarchal system.²¹⁷ In section 2.3.4, I discuss how women migrants are exposed to gender-based violence and sexual harassment in work environments. Firestone argues that the only way women can be liberated is through the abolition of the family.²¹⁸ Radical feminists address the core of women's oppression, which is a systemic issue that necessitates a global overhaul of the system. They are more straightforward, implying that women's liberation can only happen if patriarchy is completely overthrown. As seen from the discussion above, the oppression of women by men is evident through the patriarchal system, which results in gender inequality. Hence, as a result of gender inequality, migrant workers who are women are exposed to gender-based violence and exploitation in both the domestic and the workplace. This clearly highlights why a gender responsive framework is essential, as it addresses these systemic inequalities. While radical feminism viewed patriarchy as an overall structure of women's oppression, Marxist feminists, on the other hand, maintained that the system of capitalism is the basis for gender inequality.²¹⁹ The next section discusses the Marxist feminist theory.

Marxist feminism

²¹⁴ Fineman 2005:417.

²¹⁵ Fineman 2005:417.

²¹⁶ Hines 2015:24.

²¹⁷ Grosser & Tyler 2022 5; MacKinnon 1988:237.

²¹⁸ Firestone "Why the radical feminist who wanted to abolish pregnancy remains relevant. The Conversation", <https://theconversation.com/shulamith-firestone-why-the-radical-feminist-who-wanted-to-abolish-pregnancy-remains-relevant-115730> (accessed on 4 June 2022).

²¹⁹ Hines 2015:24; Desai 2014:119.

This movement was led by left-wing men and women inspired by the ideas of Karl Marx (1818-1883) and Friedrich Engels (1820-1895).²²⁰ A few women who contributed to the development of Marxist feminism as a theory were Chizuko Ueno, Anuradha Ghandy, Claudia Jones, and Angela Davis.²²¹ Chizuko Ueno is well known for being one of the first women to introduce Marxist feminism in Japan.²²² As one of the primary developers of feminist theories in Japan, alongside other renowned Marxist feminists, their influence has impacted nations such as Ukraine, India, Russia, the United States of America, and Trinidad and Tobago.²²³

These thinkers theorised capitalism as a mode of economic production based on exploiting the working class (or proletariat) labour by the bourgeois class (owners of capitalist companies).²²⁴ Capitalism created two major social classes, namely, the bourgeoisie, who own the means of production, and the workers, who possess only their labour force, which they sell in exchange for a wage.²²⁵ Engels describes the role of the blue-collar worker as one that generates profit for the bourgeoisie.²²⁶ Capitalism is an economic system in which private actors own and control property in their own interests.²²⁷ It is essential to note that a key characteristic of capitalism is the pursuit of profit. Hines and Walby note that capitalists use patriarchy to reinforce gender inequality.²²⁸ The crucial site of women's oppression varies between Marxists.²²⁹ The site of women's oppression is at home and in the workplace. The system of patriarchy relegates women to domestic tasks. The family is considered to benefit capital by providing a cost-effective means of caring for workers, such as providing food and clean clothes, and producing the next generation of workers.²³⁰ It is affordable because women, as housewives, do this for no wage and merely receive maintenance from their husbands.²³¹ Thus, capitalists benefit from the unequal sexual division of

²²⁰ Marx 1848:9-10; Marx 1967:290-295; Marx & Engels 1998:21-25.

²²¹ Ueno 1999:45

²²² Ueno 1999:45.

²²³ Ghandy 2001:7; Davis 1981:98; Phillips 1998:64.

²²⁴ Marx 1848:9-10; Marx 1867:290-295; Marx & Engels 1998:21-25.

²²⁵ Marx 1848:9-10; Marx 1867:290-295; Marx & Engels 1998:21-25.

Engels "The origin of the family, private property and the state. French translation, 1952. Wikirouge, 'Féminisme socialiste', https://wikirouge.net/Féminisme_socialiste#Marx_et_Engels (accessed on 14 November 2024).

²²⁷ Jahan & Mahmud "What Is capitalism?", https://www.imf.org/external/pubs/ft/fandd/basics/2_capitalism.htm (accessed on 5 August 2022).

²²⁸ Hines 2015:24; Walby 1990:4.

²²⁹ Walby 1990:4

²³⁰ Walby 1990:4

²³¹ Walby 1990:4.

labour within the home.²³² It allows capitalists to justify their over-exploitation and underpayment of women on the labour market, as their work is seen as less productive than men's.²³³ Women are also exploited as a low-wage and expendable reserve army of labour. Through the exploitation of women, capitalists make profits.

Furthermore, Marxist feminists argue that economic class relations, coupled with women's unequal position in the labour market, were at the root of the subordination of women.²³⁴ Capitalists invoke weakness on the part of women, and this is shown through menstruation, absenteeism for pregnancy and maternity leave, breastfeeding, and caring for sick children and older relatives.²³⁵ According to recent data, women in South Africa earned approximately 78 cents for every rand earned by men in 2021, indicating a gender wage gap of about 22 per cent. This gap has widened from around 89 cents for every rand in 2008.²³⁶ Furthermore, the UN Women's 2023 report on gender pay disparities in East and Southern Africa states that women's earnings in the region are approximately 21 per cent lower than men's.²³⁷ This information highlights the persistent wage inequality experienced by women in South Africa and the broader region. Factors which include job types, access to leadership roles, and societal norms all contribute to this inequality.²³⁸ This fact has a double advantage for capitalists. First, they have a cheaper, more flexible labour pool from which persons can be employed or laid off according to market fluctuations. Second, this enables them to bring down rates of pay generally.²³⁹ This is especially relevant for women migrant workers who are absorbed in informal sectors where they are made to work long hours, are underpaid and used as cheap labour.

²³² Walby 1990:4.

²³³ Commane "How patriarchy and capitalism combine to aggravate the oppression of women", <https://www.cadtm.org/How-Patriarchy-and-Capitalism-Combine-to-Aggravate-the-Oppression-of-Women> (accessed on 23 July 2022).

²³⁴ Hines 2015:24.

²³⁵ Commane "How patriarchy and capitalism combine to aggravate the oppression of women", <https://www.cadtm.org/How-Patriarchy-and-Capitalism-Combine-to-Aggravate-the-Oppression-of-Women> (accessed on 23 July 2022).

²³⁶ Pleace et al. "Gender pay gaps on the rise in South Africa", <http://sati.wider.unu.edu/article/gender-pay-gaps-on-the-rise-in-south-africa> (accessed on 23 October 2024).

²³⁷ UN Women Africa "The gender pay gap report", <https://africa.unwomen.org/en/what-we-do/womens-economic-empowerment/the-gender-pay-gap-report> (accessed on 20 October 2024).

²³⁸ UN Women Africa "The gender pay gap report", <https://africa.unwomen.org/en/what-we-do/womens-economic-empowerment/the-gender-pay-gap-report> (accessed on 20 October 2024).

²³⁹ Commane "How patriarchy and capitalism combine to aggravate the oppression of women", <https://www.cadtm.org/How-Patriarchy-and-Capitalism-Combine-to-Aggravate-the-Oppression-of-Women> (accessed on 23 July 2022).

The Marxist feminist perspective argues that women's oppression can only be abolished if capitalism is overthrown.²⁴⁰ The main problem raised by critics of Marxist feminism is that it is too narrowly focused on capitalism, being unable to deal with gender inequality in pre- and post-capitalist societies, and that it incorrectly reduces gender inequality to capitalism rather than recognising the independence of gender dynamics.²⁴¹

This theory is relevant to women migrant workers who are absorbed into low-wage informal labour sectors and endure economic exploitation where they work long hours with low wages, no contracts and where there are contracts which contain unclear job descriptions. I discuss these rights violations in section 2.3.4 later in this chapter. The dual systems is another feminist theory.

Dual systems feminist

Feminists supporting the dual systems approach attribute gender inequality to both patriarchy and capitalism and further assert that women are disadvantaged because of their dual roles in the home and workplace.²⁴² Hartman sees capitalism and patriarchy as two intertwined systems that form a single entity, “patriarchal capitalism”.²⁴³ An examination of the relationship between women’s positions in the domestic division of labour (patriarchy) and paid work (capitalism) is necessary to have a complete understanding of gender inequality. The dual systems theory provides a more comprehensive explanation of gender inequality.

Walby argues that capitalism and patriarchy are interrelated.²⁴⁴ However, she raises an interesting point by alluding to the fact that the interests of the two are not always the same, as they collide over the exploitation of female labour.²⁴⁵ Capitalism demands cheap labour for its workforce, whereas patriarchy resists this, wanting to keep women subordinate to men within the private domestic sphere.²⁴⁶ Walby notes that capitalism

²⁴⁰ Hines 2015:24; Holborrow 2024; Bhattacharya 2020.

²⁴¹ Tong 2006:103-107; Walby 1990:3-8; McRobbie 2009:18-25; Fraser 2013:1-10.

²⁴² Hines 2015:24; Walby 1986.

²⁴³ Hartmann 1979:1.

²⁴⁴ Walby 1988:5.

²⁴⁵ Walby 1988:5.

²⁴⁶ Walby 1988:5.

is more powerful.²⁴⁷ So, patriarchy adopts a strategy of segregation instead; women are allowed into the capitalist sphere of paid work, but only in low-status “women’s jobs”.²⁴⁸ The dual roles women hold result in them being less productive. Women are exploited by their employers who pay them low wages, whilst at home they are exploited through unpaid labour attached to their children and household chores.²⁴⁹ The dual feminist theory is critical to women migrant workers as it explains why women migrant workers face oppression in the workplace due to their gender and the economic class structure. Walby maintains that patriarchy provides a system of control and law and order, while capitalism proffers a system of economy in pursuing profit.²⁵⁰ She maintains that changes in one part of the capitalist-patriarchal system will cause changes in another part, as when the increase in women’s paid work due to capitalist expansion sets up pressure for political change, resulting from the increasing contradictions in the position of women who are both housewives and wage labourers.²⁵¹

Whilst the Marxist theorists focus more on capitalism, the African feminist theorists focus on cultural and historical context. Dual systems feminists attribute gender inequality to both patriarchy and capitalism.

African feminism

The African feminist theory focuses on unique issues faced by women on the African continent.²⁵² This theory emerged as a result of the radicalism and Marxists theories, which neglected specific cultural, political, and economic contexts and colonialism which affect African women.²⁵³ This school of thought views men as partners rather than adversaries in the fight against patriarchy.²⁵⁴ This contrasts with Western feminist perspectives (radicalists and Marxists) that often position men as oppressors. Amah notes that African feminism is seen as a gender-neutral movement aimed at correcting environments that marginalise women and promote equality.²⁵⁵

²⁴⁷ Walby 1988:5.

²⁴⁸ Walby 1988:5.

²⁴⁹ Hines 2015:24.

²⁵⁰ Walby 1988:5.

²⁵¹ Walby 1988:5.

²⁵² Musingafi 2023:2.

²⁵³ Musingafi 2023:2.

²⁵⁴ Musingafi 2023:2.

²⁵⁵ Amah 2023:97.

Africanist feminists argue that the radicalists' concept of patriarchy neglected cultural and historical specificities.²⁵⁶ The critics further argue that positioning patriarchy as universal can erase the complex, intersecting forms of oppression that women of colour experience.²⁵⁷ Other critics like Bell Hooks and Angela Davis also adopted the same view by highlighting that a “one size fits all” approach to patriarchy fails to account for the specific cultural and historical experiences of black women and other women of colour.²⁵⁸ Feminists from non-Western contexts also highlighted how feminist frameworks were often rooted in Western perspectives that didn't translate well to other societies. Postcolonial feminist scholars, like Chandra Talpade Mohanty, critiqued Western feminism for imposing its understandings of oppression onto women in different cultural and historical contexts, often ignoring the ways colonial histories and ethnic differences shaped women's lives outside the West.²⁵⁹

Intersectional and postcolonial feminists argued that issues of space (geography) and time (historical context) significantly impact the way patriarchy and other forms of oppression operate.²⁶⁰ For instance, a woman's experience with patriarchy in a rural African community during the colonial period would differ significantly from a woman's experience in a contemporary urban setting in the United States of America.²⁶¹ This approach challenged the notion that patriarchy manifests uniformly, advocating instead for an understanding of patriarchy that accounts for cultural, historical, and spatial specificities.²⁶² The notion of patriarchy was therefore challenged for only relying on patriarchy as the cause for inequality and failing to account for how race and ethnicity impact women's experiences and how issues of space and time bring their specificities.²⁶³

The theory of Africanism is relevant to this study because it illustrates how colonial legacies, race, ethnicity, and patriarchy intersect, making women migrant workers vulnerable. The theory illustrates how these factors contribute to ongoing inequalities. In this study, women migrant workers experience multiple forms of vulnerability due to

²⁵⁶ Hines 2015:25; Wills 1984:120–122.

²⁵⁷ Crenshaw 1989:139; Hooks 1984:17–20.

²⁵⁸ Davis 1981:6–7; Hooks 1984:17–18.

²⁵⁹ Mohanty 2003:1–3; Mohanty 1988.

²⁶⁰ Mohanty 2003:1–5; Crenshaw 1991; Collins 2000:6–7; Spivak 1988:271–273.

²⁶¹ Mohanty 2003:1–5; Crenshaw 1991; Collins 2000:6–7; Spivak 1988:271–273.

²⁶² Mohanty 2003:1–5; Crenshaw 1991; Collins 2000:6–7; Spivak 1988:271–273.

²⁶³ Hines 2015:25; Rubin 1975:158–159; Hooks 1981:7–24.

their gender, race, and ethnicity, which expose them to exploitation and discrimination. Hence, there is a need to ensure that gender-responsive laws are enacted to protect women migrants.

Liberal feminism

Theoretically, liberal feminism asserts that gender differences are not based on biology. Thus, women and men are not as different as one might think.²⁶⁴ Their shared humanity supersedes their procreative differentiation. Liberal approaches assume that gender inequality is a consequence of ignorance or prejudice.²⁶⁵ Proponents of this approach maintain that rather than focusing on critical causes of women's inequality (patriarchy or capitalism), attention must instead be directed at issues such as cultural gender stereotyping and gender divisions in the home and employment.²⁶⁶ Wienclaw²⁶⁷ maintains that liberal feminists, for example, posit that gender inequality has its origins in historical traditions that have set up barriers to women's advancement. In addition, liberal feminism emphasises issues such as individual rights and equal opportunity as a basis for social justice and reform.²⁶⁸ This framework also assumes that the socialisation of women into gender roles contributes to gender inequality. From a liberal feminist's perspective, the way women are taught and brought up to accept traditional gender roles, such as caring for the home or being a caregiver, partly contributes to or influences gender inequality.

These aspects of gender inequality can be addressed through legislation that guarantees equal opportunities and other democratic measures.²⁶⁹ From this perspective, achieving equality for women involves gradual social and legal reform processes.²⁷⁰ Wienclaw concurs and maintains that to bring about social change and neutralise gender inequities, feminists advocate removing barriers to women's

²⁶⁴ Lorber 1997:9-10.

²⁶⁵ Thompson 2003:16.

²⁶⁶ Hines 2015:25.

²⁶⁷ Wienclaw 2011:97.

²⁶⁸ Wienclaw 2011:97.

²⁶⁹ Hines 2015:25.

²⁷⁰ Hines 2015:25.

advancement and developing policies to promote equal rights for women.²⁷¹ The liberal feminist framework has served as the basis for numerous legal changes that have led to greater equality for women in the United States of America.²⁷² This is specifically relevant for women migrant workers and supports this study, which calls for gender-responsive laws that address the gender-specific vulnerabilities they encounter in the labour market, thereby better protecting the rights of women migrant workers.

The different feminist theorists' views together clearly indicate the entrenched structural foundations of gender inequality. Through gender inequality, women migrant workers are made vulnerable and exposed to exploitation, discrimination and gender-based violence. Hence, this study argues in favour of a gender responsive framework.

The following section will explore the intersectionality theory.

2.2.2 Intersectionality Theory

According to the intersectionality theory, women experience discrimination not only based on gender but also on race, class, migration status, ethnicity and nationality.²⁷³ What is more profound about the intersectionality theory is that identity markers do not exist independently but are related and create a complex convergence of oppression.²⁷⁴ Smith concurs and further adds that through intersectionality, different identity categories can intersect and coexist in the same individual, creating immense hardships for that person.²⁷⁵ Critically using an intersectional approach assists in understanding the “interconnectedness, interdependencies and mutual construction of key categories of social marking and positioning.”²⁷⁶ Scholars have applauded the intersectionality theory and described it as one of “the most important theoretical contributions that women's studies has made thus far”.²⁷⁷

²⁷¹ Wienclaw 2011:97.

²⁷² Wienclaw 2011:97.

²⁷³ Crenshaw 1989:139.

²⁷⁴ YW Boston “What is intersectionality, and what does it have to do with me?”, YW Boston Blog”, <https://www.ywboston.org/2017/03/what-is-intersectionality-and-what-does-it-have-to-do-with-me/> (accessed on 18 July 2022).

²⁷⁵ Smith 2016:73.

²⁷⁶ Amelina & Lutz 2021:55-72; Anthias 2012:3-19.

²⁷⁷ McCall 2005:1771.

This theory is especially relevant for this study as women migrant workers in South Africa face multiple layers of discrimination, thus heightening their level of vulnerability. A migrant worker in South Africa who identifies as a woman, a migrant, black and of low skill is bound to suffer multiple related layers of discrimination, which heightens her level of vulnerability to exploitation in the job market. It is important to note that Intersectionality theory demonstrates that vulnerability is not experienced uniformly but is shaped by the interactions among gender, migration status, race, class, and labour market location. While women migrant workers encounter discrimination across both formal and informal sectors, informality intensifies intersecting harms by stripping away legal visibility, institutional protection, and access to enforcement mechanisms. Consequently, identical legal rights may yield different outcomes depending on whether work is performed within formal or informal labour structures.

To better protect women migrants, a gender responsive framework is essential as it addresses the multiple layers of discrimination.

First conceived by Crenshaw, intersectionality was used to demonstrate how the intersections of gender, race, and ethnicity influenced black American women's access to the labour market.²⁷⁸ This indicates that the intersecting layers of discrimination that women, especially black migrant women, face have existed for a lengthy period. In 2012, the European Court of Human Rights introduced for the first time an intersectional interpretation of discrimination in the case of *BS v Spain*.²⁷⁹ The European Court of Human Rights (ECHR) addressed issues of intersectional discrimination involving a Nigerian woman working as a prostitute in Spain. B.S., who is the applicant in the case, alleged she had been repeatedly subjected to verbal and physical abuse by police, motivated by racial and gender-based discrimination. Applicant contended that Spanish authorities failed to investigate her claims thoroughly and did not address her specific vulnerability as an African woman in a marginalised profession, thus violating her rights under Article 3 (prohibition of

²⁷⁸ Crenshaw 1989:2.

²⁷⁹ B.S. v Spain App no 47159/08 (ECtHR, 24 July 2012).

inhuman treatment) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights. The ECHR ultimately ruled in favour of the applicant, emphasising that the Spanish courts had an obligation to consider possible racial and gender bias in their investigation. The judgment highlighted the importance of intersectionality, acknowledging how multiple aspects of identity, like race, gender, and social status, combine to create unique experiences of discrimination. This case underscores the need for legal systems to consider these overlapping identities to ensure fair treatment and robust legal protection for vulnerable groups. The *B.S. v Spain* case has become a key reference in discussing how intersectional factors should be recognised in legal frameworks to address discrimination and uphold human rights protections effectively.

This point is significant for the current study, which calls for the adoption of the GLI, which will enable laws to become more gender responsive so that intersectional factors affecting women migrant workers' rights are addressed.

Theories of migration also form a critical part of the theoretical framework.

2.2.3 Migration Theories

Migration is a multifaceted phenomenon that plays a critical role in today's world.²⁸⁰ More recently, the international importance of migration has been highlighted through its incorporation into the United Nations' Sustainable Development Goals (SDGs) 2030 Agenda, which acknowledges the crucial role of migration in achieving sustainable development.²⁸¹ Migration is "the movement of people across country (and state) lines to establish a new place or seek peace and stability."²⁸² People migrate for various reasons, including escaping poverty, fleeing conflict, and adapting to economic and environmental shocks.²⁸³ United Nations Secretary-General António

²⁸⁰ UN "Secretary-General's remarks on Migration and Development", <https://www.un.org/sg/en/content/sg/statement/2023-01-01n> (accessed on 20 June 2021).

²⁸¹ UN "Transforming our world: the 2030 Agenda for Sustainable Development", <https://sdgs.un.org/2030agenda> (accessed on 20 June 2021).

²⁸² Kalitanyi & Visser 2010:377.

²⁸³ O'Neil et al. "Women on the move: Migration, gender equality and the 2030 Agenda for Sustainable Development", July 2016 ODI Briefing, www.odi.org/sites/odi.org.uk/files/resources-documents/10731.pdf (accessed on 20 May 2023).

Guterres stated that “migration is an expression of human aspiration for dignity, safety, and a better future.”²⁸⁴

The term “migrant” can refer to two different categories of people that should not be mixed. The first group is labour migrants who move for employment.²⁸⁵ The second group consists of refugees who, owing to fear of persecution, war, or natural disasters, are outside their country of origin and unable to seek protection from that country.²⁸⁶ A migrant worker is defined as someone “who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”.²⁸⁷ Migrant workers can be classified into five categories: permanent residents, refugees, asylum seekers, temporary residents, and undocumented migrants.²⁸⁸

2.2.3.1 Push and pull theory

What are the main reasons that cause people to migrate? Different scholars provide views on why people migrate. Lee states that specific factors cause people to leave their countries of origin, while certain factors draw people to their countries of destination. Lee describes the negative aspects that drive people from their countries, such as war, poverty, or natural disasters, as well as the positive factors that attract people to their destination countries, including employment opportunities, safety, and access to education.²⁸⁹ Boyd and Grieco argue that while Lee’s explanation was helpful for basic understanding, its weaknesses lie in its focus on external factors pushing people from their countries of origin and its failure to consider how other social structures, such as gender dynamics, including gender-based violence, can affect individual experiences differently. This is especially true, particularly for women migrants.²⁹⁰ Fleury concurs and further argues that this theory does not account for

²⁸⁴ O’Neil et al. “Women on the move: Migration, gender equality and the 2030 Agenda for Sustainable Development”, July 2016 ODI Briefing, www.odi.org/sites/odi.org.uk/files/resources-documents/10731.pdf (accessed on 20 May 2023).

²⁸⁵ O’Neil et al. “Women on the move: Migration, gender equality and the 2030 Agenda for Sustainable Development”, July 2016 ODI Briefing, www.odi.org/sites/odi.org.uk/files/resources-documents/10731.pdf (accessed on 20 May 2023).

²⁸⁶ Article IA (2) United Nations Convention Relating to the Status of Refugees 1951.

²⁸⁷ Article 2 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990.

²⁸⁸ Mpedi & Smit 2011:3.

²⁸⁹ Lee 1966:49-52.

²⁹⁰ Boyd & Grieco 2003:7.

how gender dynamics, such as how patriarchal systems and gender-based violence, can act as a push factor for women migrants to move to countries of destination.²⁹¹ Hann confirms and argues that, from a historical perspective, migration patterns suggest that women from lower economic classes, in particular, migrated for survival and to escape patriarchal relations.²⁹²

2.2.3.2 New economics of labour migration

Mahapatro offers a different perspective on why women, in particular, migrate. Mahapatro bases his views on the new economics of labour migration.²⁹³ Based on this model, the decision for women to migrate is made explicitly by the family.²⁹⁴ This has been described as a family strategy to meet economic needs and cope with income risks.²⁹⁵ She maintains that this has a positive effect, as it enables women to become primary economic providers, ensuring their families' survival and financial stability, thereby challenging traditional gender roles.²⁹⁶ The new economics of labour model, as described by Mahapatro, is relevant to the current study as, through the feminisation of migration, women become economic agents. I discuss in section 2.3.4 how women send more remittances to their countries of destination as compared to men.

2.2.3.3 Dual labour market

Piore's dual labour market theory highlights the demand for low-paid, insecure jobs in advanced economies.²⁹⁷ This is particularly evident in South Africa's labour market, where migrant women predominantly occupy undervalued roles in domestic work and caregiving.²⁹⁸ This segmentation perpetuates their vulnerability to discrimination and exploitation, as these sectors are often informal and lack robust labour protections.²⁹⁹ In section 2.3.4, I discuss in detail how women migrant workers encounter multiple

²⁹¹ Fleury 2016:6-8.

²⁹² De Haan 2003:189-216.

²⁹³ Mahapatro & An 2015:3.

²⁹⁴ Mahapatro & An 2015:3.

²⁹⁵ Mahapatro & An 2015:3.

²⁹⁶ Mahapatro & An 2015:3.

²⁹⁷ Piore 1979:38-40.

²⁹⁸ Dodson 2018:99-117.

²⁹⁹ Zinatsa & Saurombe 2022:2-3.

layers of discrimination on the South African labour market, thereby underscoring the need for a gender-responsive framework, such as the GLI, that can address the intersectional vulnerabilities faced by women migrants.

Migration theories provide critical insights into why women migrate and ultimately end up in undervalued and informal labour sectors. A feminist and intersectional analysis reveals gender-specific vulnerabilities that can only be addressed by a gender-responsive framework.

2.2.4 An Analytical Integration of Themes

The theoretical perspectives outlined above operate most effectively when read together. Feminist legal theories illuminate the structural foundations of women's subordination under patriarchy. As articulated in radical and African feminist thought, patriarchy normalises gendered hierarchies that confine women to undervalued and invisible labour. Marxist and dual systems feminists show how capitalist labour markets channel women into low-wage roles that prioritise profit over protection. Together, patriarchy and capitalism create the economic precarity into which many migrant women are absorbed. Intersectionality deepens this analysis by identifying which women experience the greatest vulnerability and how overlapping identities of gender, race, class, nationality, and documentation status produce multiple, mutually reinforcing forms of discrimination.

Migration theories complement these feminist lenses by explaining why women migrate and why they are consistently pushed into precarious labour markets. Push–pull dynamics highlight the economic and gendered pressures driving their movement; the new economics of labour migration frames migration as a family survival strategy; and dual labour market theory explains why migrant women are systematically absorbed into insecure, unregulated sectors such as domestic work, caregiving, and informal trade.

Taken together, these theories form a unified analytical lens. They collectively demonstrate that the rights violations experienced by women migrants in South Africa are not isolated incidents but predictable outcomes of intersecting patriarchal,

capitalist, and migratory structures. This integrated framework underlines the analysis in Section 2.3.

2.3 GENDERED MIGRATION

Drawing on the feminist, intersectional, and migration theories outlined in Section 2.2, this section demonstrates how these structural forces manifest in the lived realities of migrant women in South Africa. It shows how patriarchal norms, capitalist labour dynamics, and gendered migration processes converge to shape the opportunities, constraints, and vulnerabilities migrant women face across labour sectors.

2.3.1 Historical Male Dominance in Migration: South Africa and Global Contexts

2.3.1.1 South Africa

The migration system has historically been characterised by male dominance, with men often regarded as the principal breadwinners migrating in search of economic opportunities.³⁰⁰ In contrast, women were typically left behind to fulfil caregiving and domestic responsibilities. This gendered dynamic was shaped and sustained by socio-cultural norms and economic structures framing migration as a masculine domain.

Labour recruitment schemes and migration policies, particularly those between the Global North and South regions, have traditionally targeted male-dominated sectors, including mining, heavy industry, and construction. In South Africa, for instance, the apartheid-era migrant labour system primarily recruited men to work in the mines, while women remained in rural areas, confined to domestic roles.³⁰¹ This pattern was further entrenched by immigration policies that either excluded women or permitted their entry solely as dependents of male migrants.³⁰² In South Africa, for instance, during apartheid, the South African pass laws and the migrant labour system itself excluded women from formal migration channels.³⁰³ Women were essentially denied access to employment in urban areas, greatly restricting their mobility and participation in formal labour migration.³⁰⁴ The *Native Act* focused exclusively on controlling the

³⁰⁰ Von Fontel & Moses 2017:251-253.

³⁰¹ Dodson 2000:21 & Magidimisha 2017:7.

³⁰² Boyd & Grieco 2003:3

³⁰³ Crush & Tshitereke 2001:1-9.

³⁰⁴ Crush & Tshitereke 2001:1-9.

movement and residence of black men in urban areas, while women were deliberately left out of the *Native Act*. This entrenches the idea that a woman's place is in the home.³⁰⁵ The *Native (Urban Areas) Consolidation Act* 25 of 1945,³⁰⁶ extended the pass system to women in a discriminatory manner. Women were still denied the right to reside or work in urban areas without a male guardian or employment justification. This reinforced gender inequality.

Traditionally, migration in Southern Africa, particularly during the colonial and apartheid periods, was also male dominated. As mentioned above, men migrated for work in South Africa's mining, construction, and manufacturing sectors, driven mainly by the patriarchal expectation that they would act as breadwinners.³⁰⁷ During the late 19th and early 20th centuries, South Africa's mining industry, particularly diamond and gold mines, relied on migrant men as workers. Thus, the South African Chamber of Mines established the Rand Native Labour Association, which institutionalised labour migration from the rest of Southern Africa to South Africa.³⁰⁸ Countries such as Mozambique, Botswana, Lesotho, Malawi and Swaziland supplied most of the unskilled labour to South African mines.³⁰⁹ The model was set up to recruit male labourers from rural communities and border states, and built single-sex hostels and compounds to accommodate them. The model entrenched gendered divisions of labour and exerted socio-economic impacts in the long run. Women, in contrast, were relegated to caregiving roles within the household and often prohibited from independent migration by law and custom. Migration systems were designed around male labour needs, with the result being that women were marginalised from formal migration pathways, and this reflected and reinforced gender inequality.³¹⁰ In the 1960s and 1970s, copper-rich Zambia and diamond-rich Botswana also attracted migrants from Southern Africa.³¹¹

At this point, it is important to note that this pattern was not unique to South Africa; it also manifested globally. To show that South Africa's historically male-dominated

³⁰⁵ The *Native (Urban Areas) Act* 21/1923.

³⁰⁶ The *Natives (Urban Areas) Consolidation Act* 25/1945 & *Pass Laws Act* 67/1952.

³⁰⁷ Dodson 2000:13 & Nshimbi & Fioramonti 2014:55.

³⁰⁸ Nshimbi & Fioramonti 2014:55.

³⁰⁹ Nshimbi & Fioramonti 2014:55.

³¹⁰ Peberdy 2009:23.

³¹¹ Nshimbi & Fioramonti 2014:55.

labour migration system reflects a broader global pattern, two brief comparative examples (the United States and France) are presented to contextualise this trend.

2.3.1.2 United States of America

Countries such as the United States of America and France illustrate this trend, in which labour recruitment and migration policies target male migrants for mining, construction, and heavy industry. In the late 19th and early 20th centuries, the United States experienced a significant influx of immigrants, primarily employed in industrial sectors such as manufacturing, steel plants, and construction. Bodnar maintains that these industries were male-dominated, and immigrant males played a crucial role in the workforce throughout the American Industrial Revolution.³¹²

2.3.1.3 France

In the early 20th century, France implemented targeted labour recruitment schemes to address significant post-war workforce shortages, particularly in heavy industry sectors such as coal mining.³¹³ Polish immigrants were recruited to work in mines in regions including Ronchamp and Nord-Pas-de-Calais. Noiriel notes that the migration was gendered, as the French state and industrial employers mainly sought non-disabled male workers who could perform arduous manual labour underground.

However, a notable transformation has occurred since the late 20th century. Women have increasingly migrated independently and in large numbers, not only as dependents but also as workers, particularly in feminised sectors such as domestic work, care work, and hospitality.³¹⁴ The migration of women demonstrates that migration has become a gendered phenomenon. This change challenges the male-dominated narrative and provokes the necessity for gender-responsive migration regimes. The following section provides a detailed discussion of the feminisation of migration.

³¹² Bodnar 1985:55.

³¹³ Noiriel 1996:37-39.

³¹⁴ Oishi 2005:11.

2.3.2 Feminisation of Migration

As noted earlier in this study (see section 1.6), the feminisation of migration has already been discussed in detail. Briefly, scholars have recognised a global shift since the 1980s, where international migration patterns once dominated by men are becoming increasingly gender-balanced or even predominantly female.³¹⁵ Importantly, the shift is characterised not only by numbers but also by roles.³¹⁶ Women are no longer seen as accompanying dependents but as autonomous economic agents migrating independently in search of employment. Castles and Miller emphasise that feminisation of migration should be measured both through absolute increases in women's mobility and changes in gender ratios, while Verschuur and Oishi highlight the growing trend of women migrating as independent workers rather than as family dependents.³¹⁷

Furthermore, the focus shifted from “trailing wives” to autonomously migrating women employed in the domestic and care sectors, such as symbolic figures like nannies or nurses.³¹⁸ Satterthwaite suggests that the world today is witnessing the increasing “feminisation of migration,” emanating from a set of global forces wherein gender roles and sex discrimination are inseparable from globalisation.³¹⁹ Trends leading to these are the growing demand for labour in areas dominated mainly by women, especially the service sector, the lower manufacturing costs when labour-intensive work comes into the hands of migrant women workers,³²⁰ and the sex-stereotyping of governments and business houses that may think of women as cheap, auxiliary, or temporary workers whose “docile” nature makes them easily exploitable.³²¹ The deepening levels of poverty in Zimbabwe have resulted in high numbers of Zimbabwean women migrating to South Africa in the hopes of securing better wages and job security.³²² Most of these migrants end up working in the informal sector with limited income, high levels of insecurity, and a lack of protection against gender-based violence and

³¹⁵ Vause & Toma 2015:39 ; Castles & Miller 1998:37; Alexander & Steidl 2012:224; Boyd 2006:1-13.

³¹⁶ Vause & Toma 2015:39 ; Castles & Miller 1998:37; Alexander & Steidl 2012:224; Boyd 2006:1-13.

³¹⁷ Verschuur 2013:150 & Oishi 2002:2.

³¹⁸ King & Zontini 2000:35-52; Tacoli 1999:658-682.

³¹⁹ ILO 2003.

³²⁰ Sassen-Koob 1984:1144-67.

³²¹ ILO 2003:19.

³²² Mutambara & Naidu 2023:54.

xenophobia.³²³ The relatively stable political climate and relatively strong economy, coupled with low travel costs, make South Africa an attractive destination for many Zimbabwean migrants.³²⁴ This notion is supported by the push and pull theory discussed earlier in section 2.2.3. Historically, mostly men migrated from Zimbabwe to work in South African farms and diamond mines, while the women stayed at home, looking after families. However, a change in gender roles and deepening poverty have influenced several women to migrate to South Africa to look for work to provide for their families.³²⁵

There has been a remarkable increase in the number of women migrants globally, who now make up almost half of the migrant population.³²⁶ Today, women comprise approximately half of the world's 272 million migrants and 42 per cent of the estimated 164 million migrant workers.³²⁷ In the world of work, 63.5 per cent of all migrant women are in the labour force, compared to around 48 per cent of non-migrant women.³²⁸ While around 74 per cent of migrant women work in service-sector jobs, including domestic work and healthcare, they are also employed in various other sectors such as financial and scientific institutions, academia, and government.³²⁹

Pursuing opportunities for work and better wages is a motivating factor for many migrant women. In a survey of migrant women from Libya, East Africa, and West Africa, between 33 and 37 per cent cited insufficient earnings in their countries of origin as a motivating factor behind their migration. As stated in section 1.1, in Africa, women comprise 49 per cent of the migrant population.³³⁰

³²³ Mutambara & Naidu 2023:54.

³²⁴ Crush et al. 2017:13.

³²⁵ Hlatshwayo 2019:161.

³²⁶ Diop & Aloisio "Special report: Migration and gender in the African Context, International Committee for the Red Cross", <http://www.fasngo.org/assets/files/publicatons/Factsheets%20-%20Gender%20and%20Migration%20in%20the%20African%20Context.pdf> (accessed on 10 July 2022).

³²⁷ UN Women 2020 "How migration is a gender equality issue", <https://interactive.unwomen.org/multimedia/explainer/migration/en/index.html> (accessed on 10 March 2025).

³²⁸ UN Women 2020 "How migration is a gender equality issue", <https://interactive.unwomen.org/multimedia/explainer/migration/en/index.html> (accessed on 10 March 2025).

³²⁹ UN Women 2020 "How migration is a gender equality issue", <https://interactive.unwomen.org/multimedia/explainer/migration/en/index.html> (accessed on 10 March 2025).

³³⁰ Mbiyozo 2018:16.

The number of women migrants in South Africa has quadrupled in the last 15 years.³³¹ According to a United Nations International Children's Emergency Fund (UNICEF) report, the number of international women migrants in South Africa increased from 519,315 in 1990 to 1,007,320 in 2013.³³² In 2017, South Africa reported the highest share of mixed women migrants in Africa, with 1,8 million, followed by Uganda, with approximately 898,000 women migrants.³³³

An important question to ask is what led to the feminisation of migration? According to a United Nations report,³³⁴ the main reasons why women migrate are different, and these include escaping poverty, conflict and climate-related disasters, as well as escaping deeply entrenched gender inequalities, which include sexual and gender-based violence and lack of access to livelihoods and resources.³³⁵ Others, however, migrate in pursuit of work or educational opportunities and the possibilities of a better life.³³⁶ Various factors, including economic opportunities, gender-based violence, and oppressive conditions in home countries, influenced the feminisation of migration in South Africa. Zimbabwean women began migrating to South Africa in significant numbers during the late 1990s and early 2000s, driven by political instability and economic decline in Zimbabwe.

An increasing number of women migrants arrived in South Africa before the democratic transition in 1994.³³⁷ While early migration flows were predominantly male-dominated due to the country's migrant labour system, which was designed to supply cheap, controlled labour to the mining and industrial sectors, women's migration was often overlooked or rendered invisible in official narratives.³³⁸ Nonetheless, women migrated independently or joined their spouses, driven by poverty, conflict, and limited

³³¹ Mbiyozo 2018:16.

³³² UNICEF "South Africa: Migration Profiles", <https://esa.un.org/migmgprofiles/indicators/files/SouthAfrica.pdf> (accessed on 1 April 2021).

³³³ Migration Data Portal "Number of female international migrants at mid-year, 2017", https://migrationdataportal.org/data?i=stock_abs_female_&t=2017 (accessed on 13 April 2019).

³³⁴ UN Women 2020 "How migration is a gender equality issue", <https://interactive.unwomen.org/multimedia/explainer/migration/en/index.html> (accessed on 10 March 2025).

³³⁵ UN Women 2020 "How migration is a gender equality issue", <https://interactive.unwomen.org/multimedia/explainer/migration/en/index.html> (accessed on 10 March 2025).

³³⁶ UN Women 2020 "How migration is a gender equality issue", <https://interactive.unwomen.org/multimedia/explainer/migration/en/index.html> (accessed on 10 March 2025).

³³⁷ Dodson 1998:1.

³³⁸ Crush & Dodson 2007:3-4.

socio-economic opportunities in their countries of origin, including Lesotho, Mozambique, Zimbabwe, Malawi, and Botswana.³³⁹ Their roles in the South African economy became particularly significant in the low-wage and informal sectors excluded from formal labour protections.³⁴⁰

Taran and Geronimi note that much of the labour for migrant women falls in the unregulated sector, including domestic service, unofficial “off the books” services or industries and criminalised industries such as the sex trade.³⁴¹ Additionally, most of the labour that follows legal migration channels lies in the areas of males, like agriculture and construction work, putting women at a significant disadvantage.³⁴² The ILO found that the demand for foreign labour expresses the long-term trend of the informalisation of poorly paid and low-skilled jobs, in which irregular immigrants are preferred since they accept lower wages temporarily in times of overproduction or to perform dirty and hard jobs.³⁴³ This not only applies to irregular migrant workers but also to regular migrant workers

They worked as domestic workers in urban homes, performing cleaning, childcare, and various chores under precarious conditions.³⁴⁴ Satterthwaite maintains that this interplay of competing incentives provides a platform for abuse of those already disadvantaged through systems of discrimination and marginalisation that operate along streams of gender, race, poverty and position within the global economic order.³⁴⁵

Although globalisation has resulted in significant push-pull factors for women’s labour migration, it has also led to a decrease in labour market regulation, an increase in the informal market, and the emergence of new forms of exploitation that are predominantly gendered.³⁴⁶ Satterthwaite observed that despite these trends, most

³³⁹ Mbiyozo 2018:1-12.

³⁴⁰ Rogerson 2016: 229.

³⁴¹ Taran & Geronimi “Globalization, labor and migration: Protection is paramount, at 10, in ILO international migration programme: Perspectives on labor migration”, <http://www.ilo.org/dyn/dwresources/docs/690/F1095867070/migration%203e%20english.pdf> (accessed on 2 August 2025).

³⁴² Taran & Geronimi “Globalization, labor and migration: Protection is paramount, at 10, in ILO international migration programme: Perspectives on labor migration”, <http://www.ilo.org/dyn/dwresources/docs/690/F1095867070/migration%203e%20english.pdf> (accessed on 2 August 2025):10.

³⁴³ Satterthwaite 2005:5.

³⁴⁴ ILO 2021:6.

³⁴⁵ Satterthwaite 2005:8.

³⁴⁶ Satterthwaite 2005:8.

governments are tightening migration controls while allowing private employers and recruiting agencies to operate unchecked by regulation or inspection.³⁴⁷ This interplay of competing incentives sets the scene for abuse of those already disadvantaged through streams of discrimination and marginalisation that operate along lines of gender, race, poverty and position within the global economic order.³⁴⁸ For women in many parts of the world, these trends spell increased vulnerability to exploitation and abuse, while simultaneously presenting opportunities for empowerment.³⁴⁹

Larmbardie-Jackson states that domestic work is one of the major forces driving international female labour migration.³⁵⁰ Globally, there are 75.6 million domestic workers aged 15 years and older.³⁵¹ Seventy-six per cent of the world's domestic workers are women.³⁵² Statistics South Africa's latest Quarterly Labour Force Survey shows that the hiring of domestic workers has improved significantly over the last year.³⁵³ The latest data from South Africa's Quarterly Labour Force Survey for 2024 shows that approximately 843,000 individuals work as domestic workers in the country. This figure reflects a decline from pre-pandemic levels, where the sector employed over a million people. The report also notes that the total number of domestic workers remains about 150,000 lower than before COVID-19 due to job losses that have not been fully recovered in the years since.³⁵⁴ Domestic worker employment has been particularly affected by rising costs and economic pressures, leading many households to reduce or discontinue domestic services

Migrant domestic workers in South Africa primarily come from neighbouring countries within the SADC. Zimbabwe remains the most significant source, followed by Mozambique, Lesotho, and Malawi. This migration pattern aligns with South Africa's

³⁴⁷ Satterthwaite 2005:8.

³⁴⁸ Satterthwaite 2005:8.

³⁴⁹ Satterthwaite 2005:8

³⁵⁰ Labardie-Jackson 2008:75.

³⁵¹ WIEGO Blog "Domestic workers worldwide: 5 key facts", <https://www.wiego.org/blog/domestic-workers-worldwide-5-key-facts> (accessed on 15 August 2022).

³⁵² WIEGO Blog "Domestic workers worldwide: 5 key facts", <https://www.wiego.org/blog/domestic-workers-worldwide-5-key-facts> (accessed on 15 August 2022).

³⁵³ Staff Writer "Here's how many domestic workers there are in South Africa – and the wage changes you should know about", <https://businesstech.co.za/news/finance/515584/heres-how-many-domestic-workers-there-are-in-south-africa-and-the-wage-changes-you-should-know-about/> (accessed on 15 July 2022).

³⁵⁴ Staff Writer "Major blow to domestic workers in South Africa as households call it quits", <https://businesstech.co.za/news/trending/787468/major-blow-to-domestic-workers-in-south-africa-as-households-call-it-quits/> (accessed on 25 May 2024).

economic landscape, which attracts many from the SADC region seeking work in domestic service. Others worked in agriculture, especially on commercial farms where seasonal work offered little security.³⁵⁵

2.3.3 Women Migrants as Economic Agents

Migration can be a vital tool for empowering women economically.³⁵⁶ When migrant women are employed, they gain financial independence and can send remittances back to their families. Remittances migrants send offer developmental benefits to both the destination and the origin countries.³⁵⁷ O'Neil *et al.* noted that migration holds essential socio-economic benefits for host and home countries, including gendered remittances and labour market integration.³⁵⁸

Migrants' remittances to developing countries have increased in recent decades, partly due to reduced transaction costs and improved living conditions in host countries.³⁵⁹ Farley observed that patterns of sending and receiving remittances are highly gendered.³⁶⁰ Globally, women economic migrants tend to send a higher proportion of their income for extended periods despite typically earning less than men.³⁶¹ Despite the difficulties female migrants encounter in the labour market, their total remittances may be higher and more resilient than those of male migrants, owing to these women's stronger links to family members left behind and self-insurance motives. Moreover, women often face more pressure to send remittances to support their families, owing to traditional gender roles.³⁶² Women migrant workers also contribute to "social" remittances, meaning they play a critical role in reshaping norms, ideas and behaviours through the social and cultural capital they carry.³⁶³ Some of the workers return with "social remittances." According to a Global Migration brief, social

³⁵⁵ Landau & Freemantle 2010:386.

³⁵⁶ Farley 2019:3.

³⁵⁷ Farley 2019:8.

³⁵⁸ O'Neil et al. "Women on the move: Migration, gender equality and the 2030 Agenda for Sustainable Development", July 2016 ODI Briefing, www.odi.org/sites/odi.org.uk/files/resources-documents/10731.pdf (accessed on 20 May 2023).

³⁵⁹ Goff 2016:1.

³⁶⁰ Farley 2019:8.

³⁶¹ IOM "Gender, migration and remittances", <https://www.iom.int/sites/g/files/tmzbd1486/files/about-iom/Gender-migration-remittances-infosheet.pdf> (accessed 11 July 2024).

³⁶² Farley 2019:8.

³⁶³ UN Women "How migration is a gender equality issue", <https://interactive.unwomen.org/multimedia/explainer/migration/en/index.html> (accessed on 10 March 2025).

remittances are new skills that workers acquire when they are working in a foreign country, such as values, ideas, knowledge, and practices that are not acquired at home. Such skills help to better their lives and those of their relatives.³⁶⁴ Parrenas confirms that in addition to economics, each of them also breaks with typical gender norms to become breadwinners, community organisers, or migrant rights campaigners. In doing so, they redefine womanhood, family, and citizenship outside of borders.³⁶⁵ Migration is a strategic action adopted by women to ensure the survival of their families, achieve self-actualisation, or escape from gender violence or economic disasters. This is evidence of agency rather than passivity.³⁶⁶

2.3.4 Disempowerment through Discrimination

As seen from section 2.3.2, whilst the feminisation of the migration process enables women migrant workers to gain economic empowerment and agency, it also exposes them to multiple layers of discrimination. The violations suffered by women migrant workers in South Africa are diverse and often systemic. Women migrants, in most instances, disproportionately suffer discrimination, which leads to treatment and deskilling based on gender and race upon arrival in destination countries.³⁶⁷ I discuss deskilling in detail in section 2.3.5.4. Discrimination gives rise to rights violations. Reilly *et al* note that most of the violations suffered by women migrant workers stem from discriminatory attitudes and institutional failures to address the gendered nature of migration.³⁶⁸ As mentioned, women migrant workers are disproportionately concentrated in domestic work, caregiving, agriculture, and informal trade sectors. They are vulnerable to labour exploitation, including underpayment, non-payment of wages, excessive working hours, and a lack of social protections. Sager observes that migrant women confront sexually segregated labour markets in which most of them are only eligible for jobs with low wages and status.³⁶⁹

³⁶⁴ Global Forum on Migration and Development “Issues Brief No. 3: Migration as an enabler for inclusive social development”, https://www.gfmd.org/sites/g/files/tmzbd1801/files/documents/GMG-Issues-Brief-No-3_Migration-as-an-enabler-for-inclusive-social-development.pdf (accessed 23 July 2025).

³⁶⁵ Parreñas 2001:29.

³⁶⁶ Thebe & Maombera 2019:6-12.

³⁶⁷ Ruiz & Donato 2025:186.

³⁶⁸ Reilly *et al* 2021:1&13.

³⁶⁹ Ruiz & Donato 2025:186.

As data show, women are heavily concentrated in specific sectors, resulting in a gendered division of labour.³⁷⁰ Some sectors, such as household services or social reproductive labour (domestic work and care), are predominantly occupied by women.³⁷¹ This trend often reflects broader societal expectations and norms, where women's labour is closely linked to care roles and domestic responsibilities. This occupational gendering can perpetuate pay disparities and impact women's access to more diverse employment opportunities outside of traditionally "feminine" sectors.³⁷² As discussed by Crenshaw, these layers of discrimination overlap and intersect, and they are interdependent.³⁷³ Their migration and labour experiences thus highlight the intersection of gender, class, and legal status within South Africa's migration regime, necessitating the need for a gender-responsive approach to migration and labour policy.³⁷⁴ This point is supported by Rikjen and Lange, who emphasise that a comprehensive policy approach is essential, one that not only recognises the complexities of the informal labour market but also aims to improve labour protection.³⁷⁵

2.3.4.1 Formal and Informal Labour Contexts and Differential Vulnerability

The intersectional vulnerabilities experienced by women migrant workers are not uniform across labour market contexts. Women migrants in the formal sector, although still exposed to discrimination, generally face lower vulnerability than those in informal employment.³⁷⁶ This distinction is explained by several structural factors.

First, formal employment is characterised by legal visibility and enforceability. Written contracts, identifiable employers, payroll systems, and regulatory oversight provide access to labour inspections, dispute resolution mechanisms, and the courts. By contrast, women migrants in informal sectors lack these entry points.

Second, formal-sector employment provides greater access to institutions, including social security, maternity protection, occupational health and safety regimes, and trade union representation. These institutions serve as buffers against extreme exploitation.

³⁷⁰ Bastia & Piper 2019:4-5.

³⁷¹ Christou & Kofman 2022:34.

³⁷² Christou & Kofman 2022:34.

³⁷³ Crenshaw 1989:139.

³⁷⁴ Walker & Vearey 2022:4.

³⁷⁵ Rikjen & De Lange 2018:282.

³⁷⁶ Sedacca 2024:63.

Third, informal employment, particularly live-in domestic work, is characterised by heightened dependence on employer discretion.³⁷⁷ Employment relationships are personalised and private, granting employers disproportionate power and increasing the risk of abuse.³⁷⁸ Formal employment diffuses this power through regulation and oversight.

Finally, international labour and human rights instruments are largely centred on formal employment relationships. As a result, women migrants in the formal sectors benefit more directly from international standards, whereas informal-sector workers remain in regulatory blind spots.³⁷⁹ This helps explain why South Africa may appear compliant with international norms on paper while failing to protect women migrant workers in practice.

Importantly, the distinction does not imply that women migrants in the formal sector are free from intersectional discrimination. Rather, informality intensifies intersectionality by removing the institutional ‘shock absorbers’ that might otherwise mitigate gendered harm.

This pattern aligns closely with dual labour market theory, which holds that advanced economies maintain a secondary labour market characterised by insecurity, informality, and low wages.³⁸⁰ Migrant women are systematically channelled into this secondary sector, where the lack of regulatory oversight heightens their exposure to exploitation and discriminatory labour practices.

The following discusses the rights violations of women migrant workers working as domestic workers, farm workers and women who engage in sex work. This has already been mentioned in section 2.3.2.

³⁷⁷ Jinnah 2020:219.

³⁷⁸ Jinnah 2020:219.

³⁷⁹ Mantouvalou 2012:133-135.

³⁸⁰ Mahapatro & An 2015:3.

2.3.4.1 Domestic Workers

In modern societies, domestic workers play a pivotal role in supporting the labour market and the country's economy by relieving working families of household chores.³⁸¹ Lutz concurs and adds that domestic work is a crucial tool for the sustainability and functioning of the economy.³⁸² Three-quarters of all domestic workers are women with low levels of education (only 12 per cent have completed high school), and almost all are black. The sector is a considerable source of employment for black women.³⁸³ Access to working benefits is low among all domestic workers, except for those who receive a regular wage increase.³⁸⁴ Dinat and Peberdy note that many domestic workers are women migrant workers who endure poor working conditions and low incomes despite the Department of Labour's attempts to set minimum standards.³⁸⁵

Many live in isolation on their employers' properties and lack opportunities for collective action to improve their working conditions.³⁸⁶ Furthermore, low income and arduous working conditions may limit access to health services, as time away from work can result in lost revenue.³⁸⁷ Domestic workers are therefore at increased risk of HIV infection as a result of their gender, migration status, social isolation, poverty, low levels of education, and lack of access to healthcare services.³⁸⁸

From the above discussion, it is clear that low wages, long working hours, and limited labour protections thus characterise the domestic sector. Domestic workers frequently lack the support structures in more formal workplaces, such as human resources departments, standardised policies, or the separation of professional and personal spaces. Due to this close working relationship, domestic workers may face several types of rights violations.

In a research conducted by Jinnah on cross-border migrant domestic workers in South Africa, working conditions were cited as poor, with long working hours stretching to

³⁸¹ Thobejane & Khoza 2019:27-38.

³⁸² Lutz 2007:88-105.

³⁸³ Jinnah 2020:212.

³⁸⁴ Jinnah 2020:212.

³⁸⁵ Dinat & Peberdy 2007:188; Moeletsi 2017:63& 68.

³⁸⁶ Dinat & Peberdy 2007:188; Moeletsi 2017:63, 68.

³⁸⁷ Dinat & Peberdy 2007:188; Moeletsi 2017:63, 68.

³⁸⁸ Dinat & Peberdy 2007:188 & Mpedi & Mpedi 2020 & White & Rispele 2021.

twelve hours a day.³⁸⁹ Respondents cited not being given written contracts, no paid leave, minimal time off, unclear job descriptions, and a lack of job security as the most common complaints from domestic workers.³⁹⁰ All respondents raised concerns about low wages, as most stated that a salary of R1000 and R2000 a month was insufficient to live on.³⁹¹ As per the Marxist feminist theory described by Marx and Engels, women migrant workers are seen as cheap labour; hence, they are exploited as cheap labour for profit. This also shows that employers do not comply with the new laws of minimum wage laws announced by the government and tend to exploit women migrant workers as domestic workers. These labour conditions violated constitutional provisions, especially Section 9 of the *Constitution*, which guarantees the right to equality and prohibits unfair discrimination based on gender, sex, and social origin.³⁹²

For women migrant workers, their level of vulnerability is heightened by the intersectional discrimination where gender inequality overlaps with race, class and social origin. A theory expounded on by Crenshaw in section 2.2.2. Albertyn argues that women migrant workers become prone to exploitative labour while positioning themselves outside the complete protection of the law.³⁹³ It is important to note that the South African government has announced a minimum wage; therefore, the challenge in this case is more one of enforcement.

Another constitutional provision that was also violated was the right to dignity.³⁹⁴ The Constitutional Court emphasised that dignity is inherent to all individuals and must be respected and protected.³⁹⁵ Exploitative wages, lack of job security and dehumanising treatment degrade workers' sense of self-worth and reflect disregard for their inherent dignity. In *Khumalo v Holomisa*,³⁹⁶ the Court emphasised that dignity is not only a foundational value but a justiciable right and its violation must be remedied through appropriate legal means.

³⁸⁹ Jinnah 2020:212.

³⁹⁰ Jinnah 2020:219.

³⁹¹ Jinnah 2020:219.

³⁹² *Constitution* :sec. 9(1).

³⁹³ Albertyn 2007:259.

³⁹⁴ *Constitution*:sec .10.

³⁹⁵ *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA):par. 27.

³⁹⁶ *Khumalo v Holomisa* 2002(5) SA 401 (CC):par. 27.

The *Constitution* guarantees everyone the right to fair labour practices.³⁹⁷ Jinnah described the work conditions as long hours, no contracts, and no leave. This does not constitute fair working practices. The *Basic Conditions of Employment Act* 75 of 1997 further reinforces this requirement, stipulating that every employer must ensure that employees have written contracts that regulate hours and paid leave. Failure to comply with these standards is often due to the fact that domestic work takes place in private households, which makes enforcement of laws difficult. Bridges argues that domestic workers' isolation within private homes limits their access to support networks and makes it difficult for them to report abuses or seek assistance.³⁹⁸ The absence of effective monitoring and enforcement of labour laws results in perpetrators not being held accountable for their actions.

Recent data specifically detailing sexual violence and abuse among migrant domestic workers in South Africa remains limited, with most available studies focusing on broader categories of gender-based violence against migrant women in general. Key sources highlight that migrant women, particularly those in domestic work, face high levels of gender based violence GBV due to intersecting vulnerabilities, including limited access to legal protections, precarious working conditions, and social isolation.³⁹⁹ A recent study conducted by Tekie suggests that women migrant workers suffered physical, mental and emotional abuse and had no work contracts. This is evidenced by the following;

Our employers are abusing us physically, emotionally and mentally, but we are scared to report them because we might lose our jobs.

And;

Having a written contract may help, and if they can be organisations that will speak for us since we are voiceless..⁴⁰⁰

According to a 2021 UN Women report, migrant women face elevated risks of abuse throughout their migration journey and within South Africa, exacerbated by economic

³⁹⁷ *Constitution*:sec. 23.

³⁹⁸ Bridges 2018:17-19. & Koesrianti 2015:245-268.

³⁹⁹ UN Women "From evidence to action: Tackling gender-based violence against migrant women and girls", <https://www.unwomen.org/en/digital-library/publications/2021/10/policy-brief-from-evidence-to-action-tackling-gbv-against-migrant-women-and-girls> (accessed on 14 July 2025).& Sukesu 2018

⁴⁰⁰ Tekie 2021:9.

dependency and unsafe living conditions.⁴⁰¹ These circumstances often increase susceptibility to sexual and transactional violence as they struggle to secure safe employment and housing in the informal sector.⁴⁰² Manomano *et al* concur and add that migrant domestic workers from South Africa face a significant risk of sexual violence and abuse, fuelled by a complex web of factors that include their vulnerable legal status, isolation, and the intrinsic power dynamics of domestic workplaces.⁴⁰³

A study conducted through surveys and structured interviews by Izwi Domestic Workers Alliance from May 2018 - February 2021 supported Manomano *et al* when it found that a male employer sexually abused domestic workers who shared the same house with the employer.⁴⁰⁴ Therefore, domestic work is a sector in which enforcement is problematic, leading workers to experience vulnerable conditions, including limited labour protection, low wages, gender-based violence and little recourse to protect against exploitation.⁴⁰⁵

These patterns strongly reflect the dynamics outlined in Marxist and dual systems feminism, in which women's labour is devalued under capitalism and simultaneously subordinated within patriarchal household structures. The domestic sector exemplifies this convergence, with migrant women constituting a cheap, flexible labour force while lacking the institutional protections available in the formal economy.

2.3.4.2 Farm Workers

Commercial farming is sometimes heralded as one of the success stories of the post-apartheid economy. However, much of South Africa's economic "success" in this area continues to be built on the backs of migrants from neighbouring countries. Previous studies have highlighted the history and persistence of poor working conditions on

⁴⁰¹ UN Women "From evidence to action: Tackling gender-based violence against migrant women and girls", <https://www.unwomen.org/en/digital-library/publications/2021/10/policy-brief-from-evidence-to-action-tackling-gbv-against-migrant-women-and-girls> (accessed on 14 July 2025).

⁴⁰² UN Women "From evidence to action: Tackling gender-based violence against migrant women and girls", <https://www.unwomen.org/en/digital-library/publications/2021/10/policy-brief-from-evidence-to-action-tackling-gbv-against-migrant-women-and-girls> (accessed on 14 July 2025).

⁴⁰³ Manomano *et al*. 2015 & Kouta *et al* 2021.

⁴⁰⁴ Tekie & Nyinion 2021:15.

⁴⁰⁵ Jinnah 2020: 212.

many South African farms.⁴⁰⁶ Women on Farms Project director Colette Solomons said they received anecdotal reports and complaints from seasonal migrant farmworkers about their living and working conditions, prompting the need for more quantitative and qualitative research.⁴⁰⁷

Mort, the health and empowerment coordinator of the Stellenbosch-based Women on Farms, states that it has been common practice for males in positions of power on farms to request female employees for sexual favours in exchange for job security.⁴⁰⁸ Whilst women are the backbone of the agricultural sector in developing countries, their position in the value chain has not exonerated them from sexual and physical exploitation on farms.⁴⁰⁹ Mort argues that foreign women seeking jobs on the farms are the most vulnerable and suffer the brunt of not only abuse but also exploitation and what is referred to as deviant predatory advances in the workplace.⁴¹⁰ Women are silenced or forced to tolerate harassment out of fear of not being believed and not obtaining employment.⁴¹¹

Two women migrant farm workers between the ages of 30 and 35 reported having been physically and verbally abused on separate occasions. One of the victims stopped showing up for work and later revealed that the farm manager had been making advances, and when she turned him down, he was abusive towards her.⁴¹² The other victim is reported to have given in to the advances of the farm manager, become pregnant and been physically abused by the farm manager. Important to note,

⁴⁰⁶ Crush 2000. See also Department of Labour, 2001. See also South African Human Rights Commission (SAHRC) 2003.

⁴⁰⁷ Fortuin "Working and living conditions of migrant farm women reminiscent of apartheid", <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a> (accessed on 18 November 2022).

⁴⁰⁸ Ngcakani "Agriculture's shame: The abuse of migrant female workers is rife", <https://www.foodformzansi.co.za/agricultures-shame-the-abuse-of-migrant-female-workers-is-rife/> (accessed on 18 May 2025).

⁴⁰⁹ Ngcakani "Agriculture's shame: The abuse of migrant female workers is rife", <https://www.foodformzansi.co.za/agricultures-shame-the-abuse-of-migrant-female-workers-is-rife/> (accessed on 18 May 2025).

⁴¹⁰ Ngcakani "Agriculture's shame: The abuse of migrant female workers is rife", <https://www.foodformzansi.co.za/agricultures-shame-the-abuse-of-migrant-female-workers-is-rife/> (accessed on 18 May 2025).

⁴¹¹ Ngcakani "Agriculture's shame: The abuse of migrant female workers is rife", <https://www.foodformzansi.co.za/agricultures-shame-the-abuse-of-migrant-female-workers-is-rife/> (accessed on 18 May 2025).

⁴¹² Ngcakani "Agriculture's shame: The abuse of migrant female workers is rife", <https://www.foodformzansi.co.za/agricultures-shame-the-abuse-of-migrant-female-workers-is-rife/> (accessed on 18 May 2025).

however, is that both victims are too afraid to report the abuser, who, fortunately, has been fired.⁴¹³

The SAMP conducted a survey involving 152 Basotho farmworkers. The study focused on six farms in different districts of the Free State, including Ladybrand, Clocolan, Ficksburg, Fouriesburg, Bethlehem, and Reitz, which ranged in size from 250 to 5,000 hectares.⁴¹⁴ The labour force varied from 35 to 1300 employees, with the number of Basotho farm workers ranging from twelve to 889.⁴¹⁵ The Basotho migrant farm workers were predominantly older women and among Lesotho's poorest citizens, who generally saw farm work as the only option.⁴¹⁶

Almost without exception, the farm workers interviewed testified that they endured exploitative employment conditions, including wages below the minimum, living standards that were unhygienic and crowded, and they suffered abusive treatment from other farm workers and supervisors.⁴¹⁷ Furthermore, working conditions and remuneration on the farms could have been improved. The survey respondents worked an average of ten hours per day.⁴¹⁸ The general pattern for those harvesting was to begin at about 5:00 am, take a break for breakfast and lunch, and then work an afternoon shift until all the produce was harvested.⁴¹⁹ This pattern was extended in peak season, and work sometimes continued until midnight.⁴²⁰ It is clear from this survey that migrant women farm workers' rights were grossly violated through long working hours and low pay. Forced sex on South African farms has also become an issue for foreign women. 14,4 per cent of migrant women reported that they were forced into sexual relations in the last twelve months in a study conducted by the International Organisation for Migration.⁴²¹

According to a 2021 report released by Women on Farms based in Stellenbosch, women migrant workers from other African countries were reportedly exploited by

⁴¹³ Ngcakani "Agriculture's shame: The abuse of migrant female workers is rife", <https://www.foodformzansi.co.za/agricultures-shame-the-abuse-of-migrant-female-workers-is-rife/> (accessed on 18 May 2025).

⁴¹⁴ Ulicki & Crush 2007:155.

⁴¹⁵ Ulicki & Crush 2007:155.

⁴¹⁶ Ulicki & Crush 2007:171.

⁴¹⁷ Ulicki & Crush 2007:155.

⁴¹⁸ Ulicki & Crush 2007:161 .

⁴¹⁹ Ulicki & Crush 2007:161.

⁴²⁰ Ulicki & Crush 2007:161.

⁴²¹ International organisation for migration, 2013.

farmers in the Western Cape.⁴²² Approximately 105 migrant farmworkers from Zimbabwe, Lesotho, and Malawi working on farms around De Doorns, Wolseley, Rawsonville, and Klapmuts were interviewed.⁴²³ Results of the interview revealed that farmers exploited migrant farmworkers immensely, as they were paid less than the minimum wage and not compensated for overtime.⁴²⁴ Furthermore, when injured on duty, women migrant workers were threatened by the farmers not to reveal that at the clinic as the farmers did not want to be held accountable.⁴²⁵ According to Solomon, women migrant workers were often unaware of their rights, and even if they were aware, they were so dependent on and desperate for work that they needed to send money to their families back home, making them unlikely to report a farmer to the Department of Employment or Labour.⁴²⁶

As already discussed in section 2.3.3, women migrants send large portions of their salaries to their home countries. This high remittance percentage significantly reduces their disposable income, making it challenging to afford essentials such as nutritious food, healthcare, transportation, and safe housing. With limited funds available for their own needs, these workers often experience heightened financial insecurity, dependency on local support networks, and a lack of resources for emergencies, all of which contribute to their vulnerability and precarious living conditions.

⁴²² Fortuin “Working and living conditions of migrant farm women reminiscent of apartheid”, <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a> (accessed on 18 November 2022).

⁴²³ Fortuin “Working and living conditions of migrant farm women reminiscent of apartheid”, <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a> (accessed on 18 November 2022).

⁴²⁴ Fortuin “Working and living conditions of migrant farm women reminiscent of apartheid”, <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a> (accessed on 18 November 2022).

⁴³⁸ Fortuin “Working and living conditions of migrant farm women reminiscent of apartheid”, <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a> (accessed on 18 November 2022).

⁴²⁶ Fortuin “Working and living conditions of migrant farm women reminiscent of apartheid”, <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a> (accessed on 18 November 2022).

When inspectors visited the farm, they opted to engage with the South African farmers and not the migrant workers, which further worsened the exploitation, as they were not able to report the exploitation they were subjected to.⁴²⁷

The conditions in which migrant farm workers worked were no different from the apartheid period, which was highly characterised by no work contracts, low pay, and no compensation for overtime. Fortuin noted that the exploitation of migrant farm women within today's context of democracy is not only unconstitutional but also morally and ethically unjust.⁴²⁸

Section 9(1) of the *Constitution* ensures that all people are equal before the law and are entitled to equal protection and benefits. Section 9(3) also prevents unfair discrimination based on gender, sex, and social origin. From the above discussion, I note that the treatment of migrant women on South African farms, as documented by the SAMP and the Women on Farms Project, reflects multiple forms of discrimination, including gender, race, and social origin.

Section 10 of the *Constitution* protects the inherent dignity of all human beings. The degraded circumstances in which migrant women farmworkers live, characterised by overcrowding, unpaid overtime, and a coerced silence about their injuries at work, deprive them of their humanity. Their dignity is routinely violated when denied the basic respect afforded to other workers. The Constitutional Court has consistently maintained that dignity is foundational to the democratic order and must be protected in public and private spheres.

Section 12(1) of the *Constitution* further entitles every individual to the right to personal liberty and security, including the right to be free from all types of violence, either public or private. Reports indicating that 14,4 per cent of migrant women were forced into sexual relations on farms point to a gross violation of this right. The state is obligated

⁴²⁷ Fortuin "Working and living conditions of migrant farm women reminiscent of apartheid", <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a> (accessed on 18 November 2022)

⁴²⁸ Fortuin "Working and living conditions of migrant farm women reminiscent of apartheid", <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a> (accessed on 18 November 2022).

under constitutional and international law to provide effective remedies and to prevent such abuses, especially against vulnerable populations.

Section 23(1) ensures everyone has the right to fair labour practices. Migrant women farmworkers often lack formal contracts, are underpaid, denied overtime pay, and forced to work under inhumane conditions. These labour law breaches reflect a failure to implement constitutional protections and the rights in the BCEA, the state's failure to enforce these standards, particularly when labour inspectors ignore migrant workers, compounds the injustice.

Section 27(1) entitles everyone to the right to health care services. However, women migrant workers who are told not to report work injuries at clinics are denied this right. Moreover, their exclusion from the Unemployment Insurance Fund and workers' compensation schemes denies them access to valuable social support designed to protect all workers in South Africa.

Constitutional section 24(a) entitles everyone to a right to an environment that will not harm their health or well-being. Poor sanitary and overcrowded living conditions endured by migrant farmworkers violate this right. This is confirmed in section 27, which entitles everyone to an adequate standard of living. Therefore, poor sanitation, inadequate shelter, and insufficient access to safe drinking water compromise their health and exacerbate their vulnerability.

The prevalence of gender-based violence in farm labour settings echoes the concerns of radical feminist theory, which identifies sexual violence and male domination as central mechanisms of patriarchal control. Intersectionality further shows that migrant women experience these abuses in more acute forms because gender intersects with race, nationality, and socioeconomic marginalisation.

2.3.4.3 Sex Workers

Women migrants in South Africa also engage in sex work to supplement their low salaries. Despite the risks that women migrants in this industry are exposed to, sex work is seen as a quick way to make money. Walker and Galvin suggest that women migrants sell sex as a temporary measure to supplement other livelihood strategies

that include vending and domestic work.⁴²⁹ Despite these vulnerabilities, selling sex remains a viable livelihood strategy for migrant women for several reasons that include flexible hours, better rates of pay than other informal work, and the lack of any requirement for documentation or formal qualifications.⁴³⁰

Sex work or selling sex refers to the “exchange of sexual services, performances, or products for material compensation”.⁴³¹ In most countries, sex work is criminalised and frowned upon. Although sex work is a vital livelihood strategy, in South Africa, it is criminalised.⁴³² As a result, sex workers, their clients, and anyone living off the earnings of a sex worker are liable to prosecution.⁴³³ The criminalisation of their livelihood activity exposes sex workers to layers of vulnerabilities, including gender-based, interpersonal, and behavioural violence (attacks from clients, abuse by the police, or members of the public).⁴³⁴ They are also exposed to structural violence (police and client harassment and brutality) and barriers to healthcare, specifically HIV and AIDS testing and treatment programmes.⁴³⁵ These experiences are not only common among women who engage in sex work in South Africa. Busza, note that such experiences are reflective of the larger global picture of vulnerabilities and risks faced by women who sell sex.⁴³⁶

Due to their marginalised position in society, sex workers are often the target of police violence and human rights violations, which include verbal and physical attacks, sexual assault and rape committed by both the police and their clients. The stated violations have far-reaching implications for public health. Existing complaint mechanisms and police oversight structures rarely ensure accountability for sex worker human rights violations.⁴³⁷

For migrant women in South Africa, the risks are intensified by the xenophobic sentiments found in state institutions and the wider society, which shape everyday life

⁴²⁹ Walker & Galvin 2018:277-292.

⁴³⁰ Oliveira 2017:43-57.

⁴³¹ Weitzer 2011:1.

⁴³² Section 20(1) (a) of the *Sexual Offences Act 23/1957* and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32/2007*.

⁴³³ Note 2009.

⁴³⁴ Walker & Oliveira 2015:129-153.

⁴³⁵ Walker & Oliveira 2015:129-153.

⁴³⁶ Busza 2004:231-249.

⁴³⁷ Evans et al 2019:80.

and give rise to periods of extreme violence.⁴³⁸ Mutola *et al.* concur and add that the burden is heavier on migrant female sex workers whose gender and foreign citizenship intersect to produce a plethora of adverse health, social, and legal outcomes.⁴³⁹ A 2010 survey of female sex workers in Johannesburg, Rustenburg and Cape Town found that 46 per cent were migrants and that this exposed them to additional violence and health risks.⁴⁴⁰

A study by the African Centre for Migration examined the impact of immigration and sex on the lived experiences of women migrants in Johannesburg, South Africa.⁴⁴¹ In-depth, semi-structured interviews were conducted with ten cross-border migrant women who regularly sold sex. Seven women were from the DRC, two were from Zimbabwe, and one was from Mozambique. The participants were undocumented migrants over the age of 18 years who had arrived in South Africa between 2000 and 2013. All had chosen (albeit often against a minimal range of options) to sell sex to support their children financially. The majority (eight) had used the services of human smugglers to enter South Africa. The participants in this study were recruited through a snowball sampling process.⁴⁴² This process involves one participant in the study recruiting others who share similar circumstances or meet the study criteria. The other participants will, in turn, recruit others. The initial interviews were conducted over a 24-month period, from 2014 to 2016. Follow-up interviews were conducted in 2017 as part of the Migration and Health Project Southern Africa and the “Life in the City” Project at the African Centre for Migration and Society.

The interviews took place in neutral spaces away from where the women lived and worked, and focused on a range of issues such as the experience of travelling to South Africa, negotiating life in Johannesburg and their trajectories into selling sex. Neutral

⁴³⁸ Landau 2011 in Walker & Gavin 2018:7.

⁴³⁹ Mutola et al 2022:430-436.

⁴⁴⁰ Crush et al. “Harnessing migration for inclusive growth and development in Southern Africa. SAMP (Southern African Migration Project) Special Report”, <http://samponline.org/wp-content/uploads/2018/06/SAMPSpecialReport.pdf> (accessed on 18 October 2020).

⁴⁴¹ Walker & Gavin 2018:277-292.

⁴⁴² “Snowballing” refers to a process where something gradually accumulates and grows larger or more intense, often at an accelerating pace. This term comes from the idea of a snowball rolling down a hill, gathering more snow and increasing in size and speed. It’s commonly used to describe situations where small issues or effects build on each other, leading to a much larger impact, such as in finance, emotions, or social dynamics.

spaces safeguard participant anonymity, which is essential in research involving sensitive and often stigmatised activities.

Findings from the study revealed that women migrants who sell sex face multiple vulnerabilities, including discrimination, criminalisation, and many levels of violence directed mainly at non-nationals.⁴⁴³ One interviewee stated:

“When we go to the clinic, they shout at us because we are foreigners ... when the police come, they shout at us for being sex workers ... when we go to Home Affairs, we stand there all day, and then they don’t help us ... they treat us like dogs”(Thoko, Zimbabwe 20-07-2015)

The extent of abuse and violence by the police toward sex workers in South Africa is well documented. A 2018 report by Sonke Gender Justice outlined experiences of torture and physical violence, which sometimes led to long-term and permanent injuries, humiliation, and police harassment.⁴⁴⁴ Findings from the study also showed that women migrants who sold sex were often raped by the police and, in some cases, could only receive “protection” in exchange for sexual services. Some examples include:

“They wait and ask you for your papers sometimes you have to sleep with them” (Shalati, DRC, 20-07-2015).⁴⁴⁵

“The police came and made us get in the van. After that, they kept us long and said bad things about us, telling us we must pay them R300 each to get out” (Ana-Marie, DRC, 11-6-2015).⁴⁴⁶

In 2016, various sex work sector stakeholders and allied civil society members partnered in a collaborative project to document the operational policing challenges and recorded a contemporary evidence base of sex worker rights violations by law enforcement.⁴⁴⁷ The findings demonstrated that the violation of sex workers' human rights is systemic, pervasive, and entrenched.⁴⁴⁸

Human rights violations against sex workers by law enforcement agencies are often broad and severe, impacting numerous fundamental rights, according to reports by

⁴⁴³ Walker & Galvin 2018:7.

⁴⁴⁴ Evans & Walker 2018.

⁴⁴⁵ Walker & Galvin 2018:7.

⁴⁴⁶ Walker & Gavin 2018:7.

⁴⁴⁷ Evans et al 2019:80.

⁴⁴⁸ Evans et al 2019:80.

organisations like Amnesty International⁴⁴⁹ and Human Rights Watch.⁴⁵⁰ The following key human rights are commonly violated: The right to personal security and freedom from violence contained in Section 12 of the *Constitution*. Sex workers face physical abuse, sexual violence, and harassment from police, which often goes unpunished due to the stigma surrounding their work. Moreover, violations of the right to health occur when police confiscate or destroy condoms, use condoms as evidence of sex work, or intimidate sex workers accessing health services. This creates barriers to maintaining sexual health and accessing preventative care.

Regarding the right to privacy, law enforcement actions, including arbitrary arrests, searches without cause, and exposure of personal information, infringe upon sex workers' privacy rights as contained in Section 14 of the *Constitution*. Right to fair treatment and due process. Sex workers are frequently detained without cause, denied access to legal representation, and face discrimination in the legal system. This violates their right to a fair trial and due process, as well as their rights to dignity and freedom from discrimination. Stigmatisation and criminalisation of sex work lead to police practices that disregard the dignity of sex workers, subjecting them to public humiliation and verbal abuse, which violates principles of equality and non-discrimination and the right to have one's dignity respected. These violations indicate a systemic issue where law enforcement practices undermine the safety, health, and autonomy of sex workers, often leaving them with limited access to justice and protection from harm.

2.3.4.4 Deskilling

Most migrant women work in domestic, farm, and sex work in South Africa. Migrant women who are skilled end up deskilled due to high unemployment rates and the fact that their foreign qualifications are not recognised in South Africa. The following section discusses deskilling and its risks to women migrants in South Africa.

⁴⁴⁹ Amnesty International Sex Workers at Risk: A Research Summary on Human Rights Abuses Against Sex Workers (2016) available at <https://www.amnesty.org/en/documents/pol40/4061/2016/en/> (accessed on 11 September 2025).

⁴⁵⁰ Human Rights Watch, "South Africa: Decriminalise Sex Work: Criminalisation Harms Women, Fuels HIV Epidemic" (7 August 2019) Human Rights Watch available at <https://www.hrw.org/news/2019/08/07/south-africa-decriminalise-sex-work> (accessed 11 September 2025).

Among the more subtle but essentially harmful forms of discrimination that confront migrant women workers in South Africa is the practice of deskilling. In this instance, women who arrive with formal training and experience from their countries of origin are subjected to unregulated, low-status employment as domestic workers, caregivers, or street vendors. Far from always being a direct outcome of discrimination, deskilling is most often born of a failure to recognise foreign-gained qualifications, amplified by strict immigration policy and entrenched assumptions about the role of women migrants within society.

Deskilling is broadly defined as a situation where migrant workers occupy jobs that are not commensurate with their qualifications and experience.⁴⁵¹ Nonnenmacher explains that this usually occurs (although it is not the only factor) due to the nonrecognition of professional qualifications of migrant workers, such as their diplomas, which “determines whether the knowledge and professional skills of the applicant are appropriate to undertake a particular profession in the receiving country.”⁴⁵² Scholars have different perspectives on deskilling. Jong and Madamba note that deskilling is a form of underemployment.⁴⁵³ Pecararo points out that deskilling is a form of job mismatch.⁴⁵⁴ “Mismatched underemployment” occurs when a worker’s skills, knowledge, and capacities could be better utilised in an occupation other than the one in which they are employed, and hence falls within the framework of “invisible underemployment.”⁴⁵⁵ Bauer and Zimmerman described it as a form of downward occupational mobility.⁴⁵⁶ When Bauer and Zimmerman describe “deskilling” as a form of downward occupational mobility, they refer to the process in which workers move from roles that require specific skills or higher levels of education to jobs that demand less skill or expertise. Grande views deskilling as a form of degrading skills.⁴⁵⁷ Galgóczi et al. highlighted that deskilling resulted in skill erosion.⁴⁵⁸ Balakrishnan concurred that skill erosion occurs when a migrant fails to use skills over time.⁴⁵⁹

⁴⁵¹ Mollard & Umar 2013:12.

⁴⁵² Nonnenmacher 2007:91-112.

⁴⁵³ Jong & Madamba 2001:117-130.

⁴⁵⁴ Pecoraro 2011:1.

⁴⁵⁵ Mollard & Umar 2013:15.

⁴⁵⁶ Bauer & Zimmermann 1999:58.

⁴⁵⁷ Grande 2008.

⁴⁵⁸ Galgóczi et al 2009:1-28.

⁴⁵⁹ Balakrishnan 1997.

These numerous definitions and ideas demonstrate that the concepts of skills and deskilling are discussed from various perspectives. Gubba and Chisale attribute the deskilling of highly skilled professional women to migration and immigration policies.⁴⁶⁰ They further argue that migration and immigration policies do not integrate them into the knowledge market or jobs that align with their careers; hence, they are forced into the second category of jobs, which are characterised by low wages and unfavourable working conditions.⁴⁶¹ The immigration policies in South Africa prohibit employers from employing foreign nationals without a valid visa.⁴⁶² They suggest that deskilling is a gendered and feminine phenomenon.⁴⁶³ This is evidenced by how the South African policy on “scarce skills” in the employment of teachers in public schools, particularly highlights how the policy divides the labour market by prioritising employment opportunities for mathematics and science teachers. Historically, these subjects were mainly offered as areas of specialisation for boys, whilst girls focused on non-science subjects⁴⁶⁴ rather than girls. Men thus consequently specialised in teaching mathematics and science subjects.

This shift can lead to the loss of professional skills over time, further cementing their position in lower-status jobs and reducing their chances of advancing back into skilled occupations. Deskilling as a form of downward occupational mobility is particularly problematic because it can lead to a cycle of underemployment, economic insecurity, and limited upward mobility. This concept highlights the structural barriers that prevent workers from achieving employment that aligns with their skills and qualifications, often forcing them into roles that don't fully utilise their capabilities and leaving them economically and professionally disadvantaged.

High rates of unemployment, coupled with harsh labour policies, have forced many migrant women to take any available job by deskilling instead of using their qualifications.⁴⁶⁵ Most qualified women migrants end up deskilling as a coping mechanism.⁴⁶⁶ In South Africa, Zimbabwean migrant women are most likely to work in low-skilled and low-paying jobs, although the majority have completed secondary and

⁴⁶⁰ Gubba & Chisale 2022:217-218.

⁴⁶¹ Gubba & Chisale 2022:220.

⁴⁶² *Immigration Act 13 of 2002* section 38(1) & 49(3).

⁴⁶³ Gubba & Chisale 2022:218.

⁴⁶⁴ Gubba & Chisale 2022:223.

⁴⁶⁵ Ncube et al. 2020:1165-85.

⁴⁶⁶ Ncube 2017.

tertiary education.⁴⁶⁷ This is primarily due to the high unemployment rates, the lack of recognition for their foreign qualifications, and the prejudices against foreign education in the host country.⁴⁶⁸

Deskilling results in highly skilled women migrants engaging in work not aligned with their skills and qualifications. This work often falls into the category of high-demand work that is valued poorly and poorly regulated, regardless of its abilities.⁴⁶⁹ Failure to use their skills over time will result in skills wastage. Furthermore, since they have been deskilled, migrant women expose themselves to poorly regulated job markets where they can be easily exploited. Underemployment is a significant obstacle to the personal development and contribution of skilled women to their families, host communities, and home communities. Deskilling is a way for the host country to fill labour shortages by capitalising on migrants' cheap labour and is also seen as a deliberate discriminatory act.⁴⁷⁰

Deskilling exemplifies the structural discrimination highlighted by intersectional theory: migrant women's qualifications are devalued not only because they are foreign, but also because gendered, racialised, and class-based assumptions shape perceptions of their competence. Their downward occupational mobility, therefore, reflects and reinforces multiple intersecting inequalities.

Taken together, the empirical patterns outlined above demonstrate that women migrants' vulnerabilities are structurally produced rather than incidental. These realities underscore the urgent need for a gender-responsive legal framework capable of addressing the intersectional harms documented in this section.

⁴⁶⁷ Tayah "Decent work for migrant domestic workers: Moving the agenda forward. International Labour Office, Conditions of Work and Equality Department" Geneva: ILO", http://www.oit.org/wcmstp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_535596.pdf (accessed on 22 August 2023).

⁴⁶⁸ Ncube 2017.

⁴⁶⁹ Mbiyozo 2019:3.

⁴⁷⁰ Siar 2013.

2.4 CONSTITUTIONAL FOUNDATIONS OF GENDER EQUALITY IN SOUTH AFRICA

The South African *Constitution* is considered a progressive document which has the aim of redressing deep inequalities produced by apartheid, colonialism and patriarchy.⁴⁷¹ Albertyn notes that among its constitutional values and rights are equality, human dignity and freedom, which form the constitutional foundations of gender equality.⁴⁷² Gender equality is therefore a value and an enforceable right. I will now discuss the constitutional foundations of equality, human dignity and freedom, showing how it is practically impossible to obtain gender equality in the absence of these three foundations.

The *Constitution* states that “everyone has inherent dignity and the right to have their dignity respected and protected”.⁴⁷³ Different scholars and judges have different views on human dignity. Ackermann defines human dignity as the intrinsic value of all persons, which grants them the right to be respected simply because they are human beings.⁴⁷⁴ Justice O'Regan views human dignity as the ethical basis for the rights to equality and freedom.⁴⁷⁵ The Constitutional Court in *S v Jordan* emphasised that gender equality can't be achieved in the absence of human dignity; in fact, laws that treat women as lesser or subordinate reinforce unequal power relations and inadvertently undermine their dignity.⁴⁷⁶ When women migrant workers are treated as lesser beings than men due to their gender, race, ethnicity and social origin, their right to human dignity is affected, and the achievement of gender equality becomes impossible.

Closely linked to human dignity is the right to freedom and security of the person.⁴⁷⁷ It also includes “the right to be free from all forms of violence” and the “right to bodily and psychological integrity”.⁴⁷⁸ Justice Cameron notes that these freedoms are fundamental in the context of gender-based violence, where the law is required to protect women not only from private harm but also from differences between

⁴⁷¹ Albertyn 2019:751-766.

⁴⁷² *Constitution*: section 1(a) ;Albertyn 2007:260 & Matthews 2024:15.

⁴⁷³ *Constitution*: sec. 10.

⁴⁷⁴ Ackermann 2011.

⁴⁷⁵ *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936; 2000 (8) BCLR 837 (CC) par. 35.

⁴⁷⁶ *S v Jordan* 2002 (6) SA 642 (CC).

⁴⁷⁷ *Constitution*: sec 12.

⁴⁷⁸ *Constitution of South Africa*:sec. 12(1)(c)-(e).

institutions.⁴⁷⁹ In *Carmichele v Minister of Safety and Security*,⁴⁸⁰ the Constitutional Court established that the state has a positive duty to protect women from known threats, even in the absence of direct legislation.⁴⁸¹ Dodson makes a significant point that women's freedom must also be understood within the broader socio-economic contexts. Migrant women, for instance, are often not able to exercise freedom of choice because of restrictive immigration policies and informal and precarious employment. These constraints on freedom necessitate a call for gender-responsive legal frameworks that can protect them. Women migrants, as seen from section 2.3.4.1 are subjected to emotional, physical and sexual violence. This reduces their self-worth, not only affecting their right to human dignity but also their right to freedom and security.

As stated earlier in this section 2.4, equality is a value that informs the interpretation of all rights and is a right in its own right. The equality clause states that everyone is equal before the law.⁴⁸² The *Constitution* further provides that,

[t]he state may not unfairly discriminate, either directly or indirectly, against anyone on many grounds, including, but not limited to, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.⁴⁸³

This provision extends to “everyone,” including women migrant workers. It explicitly prohibits state discrimination and, through Section 9(4), applies the same obligation to private persons and institutions, including employers and service providers.⁴⁸⁴

Discrimination involves differentiation on illegitimate grounds as outlined in Section 9(3) of the Constitution. Currie and De Waal noted that unfair discrimination happens when there is differential treatment that is both “hurtful and demeaning,” and when law or conduct, for no reason, treats some individuals as inferior or less deserving of respect than others. Although the equality clause in South Africa provides for the right to equal treatment and protects against unfair discrimination as stipulated in section

⁴⁷⁹ *AK v Minister of Police* (CCT 94/20) [2022] (14) ZACC:par 3.

⁴⁸⁰ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

⁴⁸¹ *Carmichele v Minister of Safety and Security*:par. 62.

⁴⁸² *Constitution* : sec 9(1).

⁴⁸³ *Constitution*:sec. 9(3)-(5).

⁴⁸⁴ *Constitution*:sec. 9(4).

9(3), women migrant workers continue to experience unfair discrimination on the grounds of gender, race, ethnicity, and social origin.

The multiple layers of discrimination based on gender, race, ethnicity, or social origin are hurtful and demeaning, rendering women migrants vulnerable and contravening their right to equality, human dignity, and freedom. There are also other ways in which unfair discrimination can occur. Currie and De Waal state that unfair discrimination can also happen when the law fails to address a situation of prevailing disadvantage or marginalisation. Unfair discrimination negatively impacts the vulnerable in society as it damages their dignity. It also indicates that unfair discrimination has breached a person's right to equality. The main question is how a violation of the right to equality can be established. The Constitutional Court in *Harksen v Lane* established an inquiry to determine whether the equality clause has been infringed, and this framework is discussed in more detail below.

2.4.1 The Harksen test

The *Harksen* case examined the constitutionality of certain provisions of the Insolvency Act 24 of 1936. In discussing the case, reference is made to the equality clause in Section 8 of the Interim Constitution (hereinafter referred to as the Interim Constitution), which later became Section 9 of the Constitution. Mr Harksen's estate was sequestrated in 1995, and he was married to Jeanette Harksen at the time, out of the community of property. Mrs Harksen, the applicant in the case, challenged Sections 21, 64, and 65 of the Insolvency Act because they conflicted with the Bill of Rights. It was argued that her property and affairs as a solvent spouse were affected by her spouse's sequestration. Section 20 of the Insolvency Act permitted the vesting of the estate of a solvent spouse living with an insolvent spouse in the Master of the High Court. Mrs Harksen argued that this provision of the Act violated her right to equality, as it amounted to unequal treatment and discrimination against the solvent spouse.

She also argued that it placed unfair burdens on the solvent spouse compared to other individuals close to the insolvent, either through dealings or possession of property owned by the insolvent. The Court outlined the stages of an inquiry for violations of

the right to equality. Firstly, one must determine whether the law or conduct in question distinguishes between different people or groups. If it does, then it must be assessed whether a rational connection exists between the differentiation and the legitimate governmental purpose it aims to serve. If such a connection exists, the measure does not breach Section 8(1) of the Interim Constitution. If there is no rational link, then it violates Section 8(1) of the Interim Constitution (now Section 9(1) of the Constitution). If a rational connection can be established, it is then necessary to determine whether the differentiation amounts to discrimination or unfair discrimination despite the rationality.⁴⁸⁵ In defining unfair discrimination, Justice Goldstone ⁴⁸⁶ drew on *Prinsloo v Van der Linde & Another*, where unfair discrimination was described as ‘treating persons differently in a way which impairs their fundamental dignity as human beings’.⁴⁸⁷

Discrimination can also occur on a ground not specified as listed if it is based on characteristics impairing a person's dignity or exposing them to adverse treatment.⁴⁸⁸ If it can be established that there was discrimination, it is then necessary to determine whether the discrimination is “unfair.”

The following factors were suggested for consideration concerning whether the discrimination was unfair:

- a) The position that the complainant held in society, whether they have suffered from patterns of disadvantage in the past and whether the discrimination is based on a listed ground or not.⁴⁸⁹
- b) The nature of the provision and the purpose or power that is aimed to be achieved by it.⁴⁹⁰
- c) Any other relevant factors, including the extent to which the discrimination has impacted the rights of the complainants, and whether it has impaired their dignity.⁴⁹¹

⁴⁸⁵ *Harksen v Lane NO*:par. 44.

⁴⁸⁶ *Harksen v Lane NO*:par. 46.

⁴⁸⁷ *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 CC.

⁴⁸⁸ *Ngcukaitobi et al* 2012:197.

⁴⁸⁹ *Harksen v Lane NO*:par. 51(a).

⁴⁹⁰ *Harksen v Lane NO*:par. 51(b).

⁴⁹¹ *Harksen v Lane NO*:par. 51(c).

Furthermore, when determining whether discrimination is unfair, it is necessary to question whether the dignity of a human being has been impacted.⁴⁹² If discrimination has occurred on one of the listed grounds, then the court will assume that such discrimination is unfair. The lawmaker or the party relying on the classification is responsible for rebutting this assumption.⁴⁹³ If, for instance, discrimination occurs on an analogous rather than a listed ground or where it impairs an individual's sense of dignity, unfairness is not presumed, and the complainant bears the burden of proof to show that such discrimination is unfair.⁴⁹⁴ If the discrimination is found to be unfair, then it will amount to a breach of Section 8(2) of the *Interim Constitution* (now Section 9(3) of the *Constitution*). The case of *Khosa v Minister of Social Development and Others* provides further illustration in this regard.

2.4.2 Khosa v Minister of Social Development

In *Khosa v Minister of Social Development and Others*,⁴⁹⁵ the applicants in this case were Mozambican citizens residing in South Africa as permanent residents, along with minor children. They challenged the validity of the *Social Assistance Act*,⁴⁹⁶ which excluded non-citizens from receiving social grants (child support, care dependency, and old age grants). They argued that this violated their right to equality,⁴⁹⁷ social security,⁴⁹⁸ and the best interests of the child.⁴⁹⁹ The issue before the Court was whether excluding permanent residents from accessing social assistance amounted to unfair discrimination, therefore violating the equality clause.

The state argued that people without citizenship do not have a claim to social security benefits.⁵⁰⁰ The Constitutional Court disagreed and affirmed that “everyone” applies not only to citizens but also to permanent residents.⁵⁰¹ The Constitutional Court ruled in favour of the applicants, holding that the South African *Constitution* confers the right to social security on “everyone” and that permanent residents are part of “everyone”

⁴⁹² Motala & Ramaphosa 2002:269.

⁴⁹³ Motala & Ramaphosa 2002:269.

⁴⁹⁴ Motala & Ramaphosa 2002:269.

⁴⁹⁵ *Khosa v Minister of Social Development and Others* 2004 6 SA 505 (CC).

⁴⁹⁶ *Social Assistance Act* 13/2004.

⁴⁹⁷ Section 9 of the *Constitution*.

⁴⁹⁸ Section 27 of the *Constitution*.

⁴⁹⁹ Section 28 of the *Constitution*.

⁵⁰⁰ *Khosa v Minister of Social Development*:par. 50.

⁵⁰¹ *Khosa v Minister of Social Development*:par. 47.

and thus bearers of this right. Thus, the exclusion of permanent residents from the social protection scheme was discriminatory and unfair, infringing on the right to equality.⁵⁰² The exclusion amounted to discrimination on the grounds of citizenship, which is analogous to the grounds listed in Section 9(3). Secondly, the Court also noted that leaving out permanent residents amounts to unfair discrimination in light of the vulnerability of the affected group, which included children, the elderly and disabled persons, thus impacting their dignity and equality; the fundamental values of the *Constitution*.⁵⁰³ In addition, the exclusion of non-nationals would only reinforce the surrounding stigma that they do not have the same rights as South Africans.⁵⁰⁴ The Court struck down the challenged provisions relating to child support grants, care dependency grants, and old-age grants. In addition, the Director-General of Social Development and the Member of the Executive Council MEC for Health and Welfare in the Northern Province were ordered to pay the applicants the relevant grants, including certain arrears and to receive and process applications for grants from the named persons on whose behalf the applicants had acted.⁵⁰⁵

Having discussed the constitutional foundations of gender equality, anchored in equality, human dignity, and freedom, I now focus my discussion on the different types of equality, which include formal, substantive, and transformative equality, and which best apply to women migrant workers in achieving gender equality.

2.5 Formal equality

Currie and De Waal describe formal equality as “sameness of treatment, meaning the law must treat individuals in similar circumstances”.⁵⁰⁶ Fraser shares the same view with De Waal and Currie and emphasises that a formal approach to equality aims for sameness with similar beings, who are treated equally.⁵⁰⁷ Smith also concurs and adds that through the formal approach to equality, social identity markers such as gender,

⁵⁰² *Khosa v Minister of Social Development*:par. 71-72.

⁵⁰³ *Khosa v Minister of Social Development*:par 80-82.

⁵⁰⁴ *Khosa v Minister of Social Development*:par. 80.

⁵⁰⁵ *Khosa v Minister of Social Development*:par. 104-106.

⁵⁰⁶ Currie & De Waal 2013:232.

⁵⁰⁷ Fraser 2014.

sex, race, and religion cannot cause people to be treated differently.⁵⁰⁸ Smith likens formal equality to the Aristotelian conception of equality, which holds that cases that are alike should be treated the same.⁵⁰⁹ Under this formal notion, as long as there is consistency in treatment, there is no discrimination.

However, the formal equality approach has not been without criticism. Fraser contends that a formal equality analysis overlooks the social and cultural context, making it incorrect to compare, for instance, males, the dominant norm, directly with women.⁵¹⁰ For example, by setting men as the norm of comparison, formal equality ignores the systemic disadvantages and structural barriers faced by women, especially those who are marginalised.⁵¹¹ Fraser maintains that applying the same work policies to both men and women without considering gendered caregiving needs or pay gaps, for instance, workplace discrimination may appear fair at first glance, but it reinforces existing inequalities.⁵¹² Smith agrees with Fraser, noting that a key feature of formal equality is treating individuals similarly, regardless of their circumstances or the context in which they exist, or the context of individuals or groups.⁵¹³

Bonthuys and Albertyn argue that formal equality assumes everyone is equal and that treating people differently based on grounds listed in the *Constitution* is irrational.⁵¹⁴ The formal equality approach does not acknowledge differences as a means to promote equality; instead, it views them as a form of discrimination, as seen in issues surrounding affirmative action and maternity benefits.⁵¹⁵ Bonthuys and Albertyn thus conclude that formal equality is “the abstract prescription of equal treatment for all persons regardless of their circumstances.”⁵¹⁶ Devenish argues that this view is too simplistic and worsens the prevailing inequalities in South African society.⁵¹⁷ Currie and De Waal concur and maintain that formal equality is blind to historical context and thus not able to cater for entrenched disadvantages.⁵¹⁸ The views of Devenish, Currie and De Waal show that the equality jurisprudence has evolved from formal equality to

⁵⁰⁸ Smith 2014:611.

⁵⁰⁹ Smith 2014:611.

⁵¹⁰ Fraser 1997:17.

⁵¹¹ Fraser 1997:17.

⁵¹² Fraser 1997:17.

⁵¹³ Smith 2014:611.

⁵¹⁴ Bonthuys & Albertyn 2007:88.

⁵¹⁵ Bonthuys & Albertyn 2007:88.

⁵¹⁶ Bonthuys & Albertyn 2007:88.

⁵¹⁷ Devenish 1999:39.

⁵¹⁸ Currie & De Waal 2013:232.

the adoption of substantive equality, which emphasises considering circumstances. For women migrant workers, the formal equality approach does not lead to the achievement of gender equality, as sameness of treatment for persons who have previously been disadvantaged with those who have not, ultimately leads to gender inequality. I discuss substantive equality in more detail below.

2.6 Substantive Equality

Whilst a key characteristic of the formal equality approach is “sameness of treatment” regardless of circumstances. Substantive equality considers circumstances and aims for equal outcomes.⁵¹⁹ Durojaye⁵²⁰ concurs, arguing that substantive equality is founded on the core value of accommodating people’s differences to achieve equality of outcome. Substantive equality extends beyond treating people equally and focuses on addressing not only structural but also systemic barriers that perpetuate gender inequality. Fredman and Goldblatt observe that, due to this, substantive equality is closely aligned with and able to address gender equality⁵²¹. Albertyn notes that to overcome the legacy of discrimination and disadvantage, substantive equality requires both the relevant social and economic context to be taken into account. Smith maintains that substantive equality aims to prevent the reinforcement of social, political, or economic disadvantage among groups and emphasises assessing and addressing these disparities to uphold the Constitution's commitment to equality.⁵²²

In looking to capture the principle that equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded or ignored,⁵²³ Fredman has proposed a frame of analysis for substantive equality, which was as follows:

- a) redress social and economic disadvantage;

⁵¹⁹ Albertyn 2019:751-766.

⁵²⁰ Durojaye 2017:31-52.

⁵²¹ Fredman &Goldblatt 2015:8.

⁵²² Smith 2014:613.

⁵²³ Fredman 2016:713.

- b) counter stereotyping, stigma, prejudice, humiliation and violence based on protected characteristics;
- c) enhance voice and participation, countering political and social exclusion and accommodating and affirming differences, diversity and identity;
- d) and achieving structural changes.⁵²⁴

Fredman presents these components as a four-dimensional framework of aims and objectives that can be used to assess and assist in modifying policies and initiatives to attain substantive equality.⁵²⁵ This framework addresses stigma, prejudice, stereotyping, and violence facilitates participation, valuing, and accommodates difference through structural change, and redresses socio-economic disadvantages.⁵²⁶ The Fredman framework provides a comprehensive lens through which the experiences of violations faced by women migrant workers in South Africa can be fully understood. In terms of the already mentioned first aim, which seeks to redress social and economic disadvantage, this is relevant for women migrant workers in South Africa, who are, as discussed in section 2.3.4, concentrated in insecure, low-paid sectors and exploitative industries that lack adequate legal or social protections. Furthermore, the discussion in the section also reveals that they lack access to protections such as social security and collective bargaining, and have limited or no access to healthcare. This contributes to deepening systemic economic marginalisation. This issue is particularly significant for the study, which advocates for a gender-responsive framework in both migration and labour laws to address the material disadvantages faced by women migrants.

Fredman, in the second aim mentioned in this section, is relevant because women migrants in South Africa face discrimination based on sex, race, and social origin, as well as gender-based violence (GBV) in both the workplace and community. This aim directly connects with the intersectionality theory discussed in section... This study expands on Fredman's framework and advocates for a GLI to develop a gender-responsive framework that can address the gender-specific vulnerabilities faced by women migrant workers in South Africa. Fredman's third aim is relevant to this study

⁵²⁴ Albertyn & Fredman 2015:439.

⁵²⁵ Fredman 2016:728.

⁵²⁶ Albertyn & Fredman 2015:432

because women migrant workers in South Africa are excluded from unions and policymaking. Domestic workers, for example, are confined to their employers' homes, and women migrant workers employed as farm workers cannot join trade unions due to fear of losing their jobs and their migrant status.

Fredman's third aim is relevant to this study because women migrant workers in South Africa are excluded from unions and policymaking. Domestic workers, for example, are confined to their employers' homes, and women migrant workers employed as farm workers cannot join trade unions due to fear of losing their jobs and their migrant status. As discussed in section 2.3.4.2, when women migrant workers are structurally silenced, as seen in the case of women migrant farm workers, this further places them in a vulnerable position, making them more prone to rights violations. The fourth aim is also relevant to the study. As discussed in section 2.3.4, violations suffered by women migrant workers in South Africa are rooted in systemic inequalities, which include gendered divisions of labour (domestic work, sex work, care work), restrictive migration policies, and labour laws that do not specifically include women migrant workers, as discussed in more detail in section 4.2-4.4. As Fredman mentioned earlier in this section, achieving structural change involves transforming these structures. Fredman's framework supports this study, which advocates for substantive equality—requiring the transformation of these structures and ensuring laws are gender-responsive and address the gender-specific vulnerabilities faced by women migrant workers.

Fredman maintains that all these dimensions must be dealt with interactively to achieve substantive equality.⁵²⁷ Policies and measures can only be successfully addressed through an interactive process. However, MacKinnon has criticised this suggested model, arguing that the four facets fail to account for the significant role of power relations between social hierarchies, making inequality far more complicated.⁵²⁸ She criticises this model by pointing out its failure to acknowledge the inherent power relations underlying unequal treatment.

⁵²⁷ Fredman 2016:749.

⁵²⁸ MacKinnon 2017:1176.

Mackinnon's critique of Fredman's four-dimensional framework is significant for this study, as it demonstrates that understanding inequality requires looking beyond disadvantage, stereotypes, exclusion, or structural barriers alone. MacKinnon argues that it is crucial to examine the deeper relations that create and uphold these inequalities. A closer look at the violations faced by women migrant workers in South Africa shows that these violations largely do not stem from economic vulnerability or social exclusion but from their position at the intersection of multiple hierarchies, including women confronting patriarchy, capitalism, and xenophobia as migrants.

MacKinnon therefore advocates for a framework focused on transforming the structural power imbalances that normalise exploitation and silence women migrants, which can only be achieved through the enforcement of strong labour protections in sectors where women migrants are typically employed and by protecting them from retaliation when reporting abuse, see discussion in section 2.3.4.2. This study supports MacKinnon's recommendations by emphasising the importance of addressing the power relations underlying the vulnerability of women migrant workers. It particularly advocates for the use of a GLI, which can help laws become gender responsive, thereby actively dismantling the structural and power-based barriers that sustain the vulnerability of women migrant workers.

Substantive equality is thus the appropriate approach for women migrant workers in South Africa as it tackles not just formal equality but also disadvantages and power imbalances that shape their experiences. This study argues in favour of substantive equality, which ensures that labour and migration laws actively transform the structures that deepen the vulnerability of women migrants. The following case law, which I discuss below, acknowledges substantive equality. As the preferred approach over formal equality, it is also the best approach for women migrant workers.

2.6.1 Bhe and Others v Khayelitsha Magistrate and Others

The South African Constitution recognises substantive equality. This was demonstrated in the case of *Bhe and Others v Khayelitsha Magistrate and Others*, where the Court invalidated the customary rule of male primogeniture, which excluded women and girls from inheritance. The Court argued that applying the rule, which

justified excluding women on the grounds of gender, was a clear violation of the Constitution. The study in section 2.4, which discusses the constitutional right to equality, states that no one may be unfairly discriminated against based on factors such as gender, as this constitutes unfair discrimination. The Court reasoned that this form of discrimination entrenched historical patterns of disadvantage among a vulnerable group, worsened by outdated notions of patriarchy that conflicted with the guarantee of equality under the constitutional order. Furthermore, the Court also held that the rule of primogeniture violated women's right to human dignity as guaranteed in Section 10 of the Constitution (human dignity is discussed in more detail in section 2.4), since it implied that women were unfit or incapable of owning or managing property, thus placing them under the control of male heirs. The Court in Bhe operationalised substantive equality by recognising that treating heirs equally in a formal sense would perpetuate disadvantages faced by women and children.

The judgement marked a shift beyond formal equality, as applying male primogeniture equally to all would have reinforced the exclusion of women who were already disadvantaged in the past. Instead, the Court promoted substantive equality by acknowledging how the rule affected vulnerable groups such as women and children and by addressing the social and economic disadvantages it caused. As already discussed in section 2.6, substantive equality extended beyond treating people equally and focused on addressing not only structural but also systemic barriers that perpetuated gender inequality. The case aligns with Fredman's first dimension of substantive equality, which advocates for redress of entrenched disadvantages, demonstrating how substantive equality ensures laws are responsive to the real-life situations of marginalised groups.

The case of *Mahlangu and Another v Minister of Labour and Others* shows how the court considered circumstances to achieve substantive equality.

2.6.2 *Mahlangu and Another v Minister of Labour and Others*

In the case of *Mahlangu and Another v Minister of Labour and Others*, Ms Mahlangu was employed as a domestic worker in a private home at the time of her death. She had worked for the same family for 22 years in Faerie Glen, Pretoria. On the morning of 31 March 2012, Ms Mahlangu drowned in her employer's pool while carrying out

her duties. Her body was discovered floating in the swimming pool by her employer, who had been present in the home at the time of the incident but claimed he heard no sounds of a struggle. It is alleged that Ms Mahlangu was partially blind and unable to swim, which led to her drowning. After her death, her daughter, the first applicant, who was financially dependent on her mother, approached the Department of Labour to inquire about compensation for her mother's death. She was informed that she could not receive compensation under the Compensation for Occupational Injuries and Diseases Act (COIDA) nor unemployment insurance benefits for her loss, which COIDA would typically provide. COIDA is a law that governs compensation for employees who are injured or who contract diseases during their employment. The applicants argued that exempting domestic workers from the scope of COIDA infringes their right not to be unfairly discriminated against under Section 9(3) of the Constitution on the grounds of race, sex, gender, and social origin, as this exclusion differentiates between domestic workers employed in private households and other employees covered by COIDA, without any rational connection to a legitimate government objective.

They further argued that excluding domestic workers from COIDA deprives them of social insurance benefits, thereby breaching their right to social security under Section 27(1)(c) of the Constitution. Lastly, the applicants asserted that excluding domestic workers from COIDA infringes upon their right to dignity under section 10 of the Constitution.

The High Court declared the exclusion of domestic workers from *COIDA* unconstitutional and invalid.⁵²⁹ The leading judgment in the Constitutional Court, penned by Victor AJ, confirmed the order of constitutional invalidity made by the High Court.⁵³⁰ The Court further ordered that section 1(xix)(v) be severed from *COIDA*.⁵³¹ The Court held that the exclusion of domestic workers from the definition of "employee" constitutes an infringement of the rights to access to social security in terms of Section 27(1)(c) read with section 27(2) of the *Constitution*; equal protection and benefit of the

⁵²⁹ *Mahlangu and Another v Minister of Labour and Others*; par.120.

⁵³⁰ *Mahlangu and Another v Minister of Labour and Others*; par.120.

⁵³¹ Provides the definition of "employee" but a domestic employee employed in a private household is excluded from the definition.

law under section 9(1) of the *Constitution*; human dignity in section 10 of the *Constitution*; and constitutes indirect discrimination on the bases of race, sex and gender, in terms of section 9(3) of the *Constitution* which proscribes unfair discrimination by the state on specific grounds. The Court observed that domestic workers, predominantly black women, suffered compounded vulnerability and exclusion from social protection.⁵³²

This case is important because it shows substantive equality in practice. The Court observed that treating domestic workers and other workers equally on paper masked systemic exclusion in real life.⁵³³ By declaring the exclusion of domestic workers unconstitutional, the Court called for legislative reform to protect a historically marginalised group.⁵³⁴ As seen in the Court's judgement, it went beyond identifying discrimination and linked the exclusion to the denial of dignity and the undervaluation of domestic work.⁵³⁵ In doing so, it illustrates how substantive equality seeks to achieve structural change and social recognition. For women migrant workers in domestic work, this case sets an important precedent for challenging discriminatory exclusions from legal protections.

While the *Mahlangu*,⁵³⁶ case marks a significant judicial advance in extending social protection to domestic workers, a sector overwhelmingly feminised and disproportionately occupied by migrant women, its long-term post-judgment impact reveals serious implementation shortcomings. Despite the Constitutional Court's recognition that excluding domestic workers from compensation for occupational injuries violated substantive equality,⁵³⁷ James, Mullagee & Osiki noted that enforcement has been uneven, slow, and largely inaccessible to undocumented and informally employed migrant workers.⁵³⁸ In fact, as observed by Alfery & Moussié, in practice, access to compensation remains mediated through administrative systems that privilege formal employment status and valid documentation, thereby reproducing exclusion under the guise of neutral regulation.⁵³⁹ When read alongside earlier equality

⁵³² *Mahlangu and Another v Minister of Labour and Others*:par.114 &120.

⁵³³ *Mahlangu and Another v Minister of Labour and Others*:par.73.

⁵³⁴ *Mahlangu and Another v Minister of Labour and Others*:par.114.

⁵³⁵ *Mahlangu and Another v Minister of Labour and Others*:par.108 &109.

⁵³⁶ *Mahlangu and Another v Minister of Labour and Others* para 50.

⁵³⁷ *Mahlangu and Another v Minister of Labour and Others* para 71–72.

⁵³⁸ James, Mullagee & Osiki 2023:20-23.

⁵³⁹ Alfery & Moussié 2019:11.

jurisprudence, such as the Khosa case,⁵⁴⁰ which rejected citizenship-based exclusion from social assistance, a pattern emerges in which transformative judgments articulate inclusive constitutional principles but fail to dismantle the structural and bureaucratic barriers that marginalised groups face in practice. Crush argues that this persistent implementation failure is particularly acute for undocumented migrant women, whose intersecting vulnerabilities of gender, migration status, and informality place them beyond the effective reach of post-judgment policy reform.⁵⁴¹ The Gender Legislative Index (GLI) directly addresses this gap through its implementation-monitoring function, which requires scrutiny not only of legislative intent and judicial pronouncements but also of whether administrative practices, enforcement mechanisms, and access pathways translate substantive equality into lived protection.

By mandating gender-disaggregated data, assessing accessibility for precarious groups, and evaluating enforcement in informal sectors, the GLI exposes how judicial victories such as *Mahlangu* and *Khosa* risk remaining symbolic unless accompanied by sustained, gender-responsive monitoring and accountability. These post-judgment implementation failures reinforce the need for the monitoring and accountability measures proposed in Chapter 6, where the GLI is advanced as a practical tool for tracking enforcement, administrative accessibility, and gender-responsive outcomes in migration and labour governance.

2.6.3 *Union of Refugee Women v Director, Private Security Industry Regulatory Authority*

In the case of *the Union of Refugee Women, the Private Security Industry Regulatory Authority* highlights the tension between formal and substantive equality. The Private Security Industry Regulatory Authority withdrew the registration of several refugees within the private security industry.⁵⁴² Furthermore, the applications of those who applied for registration were rejected. The basis for the withdrawal and rejection was that they were not South African citizens or permanent residents, which was a requirement for registration.⁵⁴³ The applicants contended that section 23(1)(a) of the

⁵⁴⁰ *Khosa v Minister of Social Development and Others*:para 74–76.

⁵⁴¹ Crush & Tawodzera 2017:12

⁵⁴² *Union of Refugee Women*:par. 8.

⁵⁴³ *Union of Refugee Women*:par. 14.

Private Security Industry Regulation Act,⁵⁴⁴ which provided for this discriminatory requirement, was unconstitutional as it violated their right to equality.⁵⁴⁵ Using the *Harksen v Lane* test, the majority found that the differentiation had a rational connection to a legitimate government purpose and did not constitute unfair discrimination.⁵⁴⁶ The purpose sought to be achieved by Section 23(1)(a) was to protect the safety and security of the public. While the Constitutional Court found that foreign nationals, including refugees, could not be said to be inherently less trustworthy, the reality was that citizens and permanent residents would more easily be able to prove their trustworthiness.⁵⁴⁷ The primary reason is that, as a citizen or permanent resident, a person's criminal record can likely be accessed. Therefore, differentiating between citizens and permanent residents, on the one hand, and all other foreigners, on the other, had a rational foundation and served a legitimate governmental purpose.⁵⁴⁸ The Constitutional Court ruled that the differentiation constituted discrimination.⁵⁴⁹ In respect of unfairness, the Court's point of departure was that while refugees had the right to seek employment in terms of the *Refugees Act*, they did not have a constitutional right to freedom of trade, occupation and profession,⁵⁵⁰ which was the right limited by section 23(1)(a) of the *Security Act*. It emphasised that this limitation did not restrict their right to seek employment and to work, as they were not precluded from working in industries other than the private security industry.⁵⁵¹

The Court considered the argument that section 17(1) of the United Nations Convention Relating to the Status of Refugees entitles them to be treated the same as permanent residents.⁵⁵² The Constitutional Court rejected this argument.

⁵⁴⁴ Section 23(1) of the *Private Security Industry Regulation Act* 56/2001 provides as follows: "Any natural person applying for registration in terms of section 21(1), may be registered as a security service provider if the applicant is a fit and proper person to render a security service, and- (a) is a citizen of or has permanent resident status in South Africa."

⁵⁴⁵ *Union of Refugee Women*:par. 20 & 26.

⁵⁴⁶ *Union of Refugee Women*:par. 42 & 54.

⁵⁴⁷ *Union of Refugee Women*:par. 42.

⁵⁴⁸ *Union of Refugee Women*:par. 37-42.

⁵⁴⁹ *Union of Refugee Women*:par. 45.

⁵⁵⁰ *Union of Refugee Women*:par. 46 & 51-54 & *Refugees Act* 130 of 1998, s 27(f).

⁵⁵¹ *Union of Refugee Women*:par. 47.

⁵⁵² *Union of Refugee Women*:par. 62 & 64.; United Nations Convention Relating to the Status of Refugees, 1951, art 17(1).

Accordingly, the discrimination was found to have minimal potential to substantially impair their human dignity, and it was considered fair.⁵⁵³

The dissenting judgment, written by Mokgoro J and O'Regan J, found that the applicants were unfairly discriminated against, as the impact of the discrimination was significantly damaging. Although refugees were permitted to work in other industries, evidence suggested that the relatively low-skilled work available in the private security industry was a significant source of employment for many refugees. Therefore, their exclusion from working in the industry was not inconsequential but rather one that could severely impact their ability to earn a livelihood in South Africa.⁵⁵⁴ A noteworthy point was that refugees were more akin to permanent residents than temporary residents, as they had the right to remain in South Africa indefinitely, as per the *Refugees Act*.⁵⁵⁵ Therefore, Section 17(1) of the UN Convention was interpreted to mean that refugees should be afforded the same work opportunities as permanent residents.⁵⁵⁶

The ruling highlights the employment barriers that migrant women, especially refugees, face due to restrictive licensing and regulatory requirements. For women migrants, who may already face discrimination and limited job opportunities, this decision underscores the difficulty of accessing certain types of employment. The case of the *Union of Refugee Women* provides an opportunity to examine the intersection of migration status and substantive equality in South Africa. This exclusion reinforces social and economic marginalisation in a country where employment is a key mechanism for dignity and inclusion. The applicants argued that the law constituted unfair discrimination based on social origin and nationality, which are protected grounds under the *Constitution*.⁵⁵⁷ Although the Constitutional Court upheld the provision, the dissenting judgment resonates with South Africa's evolving jurisprudence on substantive rights. The concept of substantive equality, as developed in South African constitutional law, demands more than identical treatment.⁵⁵⁸ It requires attention to the context of laws and policies, their impact, and their outcomes,

⁵⁵³ *Union of Refugee Women*:par. 65 & 66.

⁵⁵⁴ *Union of Refugee Women*:par. 122.

⁵⁵⁵ *Union of Refugee Women*:par. 99.

⁵⁵⁶ *Union of Refugee Women*:par. 109.

⁵⁵⁷ *Constitution*:sec. 9(3). *Union of Refugee Women*:par.42-45.

⁵⁵⁸ *Union of Refugee Women*:par. 43.

especially for historically disadvantaged or vulnerable groups.⁵⁵⁹ In this case, the policy's uniform application failed to account for the structural disadvantages faced by refugee women, many of whom already endure economic hardship, xenophobia, gender-based violence, and limited access to public services.⁵⁶⁰ By excluding them from lawful employment in the security industry, the law deepened their social and economic vulnerability, reinforcing gendered and xenophobic barriers to self-sufficiency.⁵⁶¹ A formal equality approach treating all non-citizens the same obscured the real effects of the law, which disproportionately harmed refugee women who may rely on employment in informal or semi-formal sectors due to their legal and socio-economic status.⁵⁶² In this sense, the case illustrates the limitations of formal equality and underscores the need for a substantive, contextualised approach to equality.⁵⁶³

This means interpreting equality rights in a manner that recognises and redresses historical disadvantage, rather than applying rigid, one-size-fits-all rules.⁵⁶⁴ While the *Union of Refugee Women* case failed on constitutional grounds, it exposed the precarity faced by migrant and refugee women workers in South Africa.⁵⁶⁵ Many of these women are excluded from legal protections, denied work opportunities, and rendered vulnerable to exploitation.⁵⁶⁶ Their experiences demonstrate how discrimination based on migration status often intersects with gender, creating a compounded disadvantage. This aligns with the principle of intersectionality, which recognises that multiple axes of identity, such as race, gender, and legal status, combine to produce unique experiences of discrimination. For women migrant workers, especially in sectors like domestic work, caregiving, and informal trade, the consequences of such exclusionary policies are profound. Without legal avenues to formal employment, they are pushed into unregulated, low-wage jobs, where they are exposed to abuse, underpayment, and a lack of social protections.

The case of *Bhe, Mahlangu, and the Union of Refugee Women* illustrates South Africa's evolving commitment to the constitutionally recognised right to equality.

⁵⁵⁹ *Union of Refugee Women*:par. 43.

⁵⁶⁰ *Union of Refugee Women*:par. 43.

⁵⁶¹ *Union of Refugee Women*:par. 43.

⁵⁶² *Union of Refugee Women*:par. 43.-44.

⁵⁶³ *Union of Refugee Women*:par. 43.-44.

⁵⁶⁴ *Union of Refugee Women*:par. 43.-44.

⁵⁶⁵ *Union of Refugee Women*:par. 43.-44.

⁵⁶⁶ *Union of Refugee Women*:par. 43.-44.

Notably, when the Court in the cases of *Bhe and Mahlangu* applied the principle of substantive equality, it not only recognised the disadvantages faced by women but also dismantled the structural and systemic barriers that upheld inequality. Conversely, in the case of the *Union of Refugees Women*, where the majority judgment embraced formal equality, the outcome was insufficient protection for vulnerable groups. For women migrants, therefore, substantive equality remains a crucial and vital constitutional approach. As Fredman argues in Section 2.6, substantive equality necessitates laws and policies that are specific to the context, aim to redress disadvantages, challenge stereotypes and violence, promote participation, and transform the structures that sustain vulnerability. Having addressed substantive equality, I now turn to discuss transformative substantive gender equality.

2.7 Transformative substantive gender equality

As discussed above, substantive equality goes beyond treating people equally; it seeks equitable outcomes by recognising and addressing historical and structural disadvantages. It requires contextual fairness, redress, and the removal of barriers to full participation in society.⁵⁶⁷ Substantive equality is therefore a vital element and the basis of transformative gender equality, aiming to end patriarchal power, reform social and economic institutions, and empower citizens through legal and policy changes, as well as social practices.⁵⁶⁸ It is redistributive and reconstructive, seeking to change the norms and institutions perpetuating gender inequality.⁵⁶⁹ Substantive equality enables a transformative agenda by moving beyond identical treatment to address the different lived realities of individuals and groups. It recognises that granting equal rights is insufficient in contexts marked by deep-rooted social, economic, and cultural disparities. Instead, it requires the law to be responsive to the historical and systemic inequalities that continue to disadvantage marginalised groups, particularly women. Fredman suggests this would mean placing positive obligations on the state to take proactive measures to redress disadvantages and promote genuine equality.⁵⁷⁰ Albertyn concurs and adds that substantive equality requires the legal system to

⁵⁶⁷ Albertyn 2007:261.

⁵⁶⁸ Albertyn 2007:253.

⁵⁶⁹ Albertyn 2007:253

⁵⁷⁰ Fredman 2005:171; Albertyn 2007:254.

actively work against patriarchal norms and systems that support gender-based oppression, helping to change society.⁵⁷¹

In the case of *Bhe v Magistrate, Khayelitsha*,⁵⁷² a case already discussed in section 2.4.2.1, Langa DCJ stated that substantive equality demands transformation of legal systems to ensure consistency with constitutional values.⁵⁷³

Attaining transformative substantive gender equality means more than reversing discriminatory laws. It entails a profound transformation of institutions, a shift in values, and an inclusive policy process that counters ingrained disparities of power.⁵⁷⁴ From this perspective, South African courts have increasingly adopted this transformation, holding that pursuing substantive and transformative equality imposes positive obligations upon the state and a commitment to changing material conditions for disadvantaged individuals.⁵⁷⁵

In *the Union of Refugee Women*, although the Court upheld a regulation requiring permanent residence for security work, the minority judgment by Mokgoro J and O'Regan, as stated above in section 2.4.2.3, stressed that intersectional discrimination based on gender, migrant status, and socioeconomic vulnerability must be assessed holistically. This dissenting view aligns with transformative substantive equality by demanding a more inclusive and empathetic legal reasoning.⁵⁷⁶

Substantive equality, as it is understood in South African jurisprudence, forms the basis for transformative gender equality. Whereas substantive equality ensures equality of outcome as opposed to equality of treatment, transformative equality operates with a view to undoing entrenched disparities and undermining social assumptions that perpetuate gender subordination. Through progressive interpretations of law, in landmark judgments such as *Bhe*, *Mahlangu*, and *Union of Refugee Women*, South African Courts have departed from formal understandings of equality to adopt an approach that restructures society, specifically for vulnerable women, including migrant workers.

⁵⁷¹ Albertyn & Goldblatt 1998:249.

⁵⁷² *Bhe v Magistrate, Khayelitsha*.

⁵⁷³ *Bhe v Magistrate, Khayelitsha*:par. 94.

⁵⁷⁴ Albertyn 2007:254.

⁵⁷⁵ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC):par. 27.

⁵⁷⁶ *Union of Refugee Women v Director, Private Security Industry Regulatory Authority*:par. 111–114.

2.8 CONCLUSION

This chapter establishes the conceptual and legal foundation necessary to understand the violations experienced by women migrants in South Africa. The analysis highlighted that the roots of these violations lie within interconnected systems of power, including patriarchy, capitalism, racism, and restrictive migration policies that together influence the labour markets in which migrant women exist and work. With the use of feminist legal theory, the study illustrated how women's subordination continues in both public and private realms, while the concept of intersectionality revealed how factors like gender, race, class, and migrant status compound vulnerabilities. Migration theories further clarified how structural economic conditions, such as the need for inexpensive labour and the feminisation of unstable jobs, foster environments conducive to exploitation.

The findings in this chapter further indicate that women migrants in South Africa encounter various overlapping forms of violations. These violations include labour exploitation in domestic and agricultural work, marked by inadequate pay, absence of contracts, extended hours, and poor conditions, sexual and gender-based violence, particularly in settings like domestic service, agricultural work, and among women who engage in sex work.

While South Africa's Constitution guarantees equality, dignity, and freedom, the findings of this chapter reveal a significant gap between theoretical rights and real rights. Judicial interpretations, such as those in *Harksen v Lane* and *Khosa v Minister of Social Development*, uphold the principle of non-discrimination but do not adequately address the structural and intersectional factors contributing to migrant women's vulnerabilities. Consequently, formal equality has failed to provide meaningful protection. The chapter also demonstrates that substantive equality necessitates law and policy to engage with context, address socio-economic disadvantages, dismantle stereotypes and violence, enhance participation, and facilitate structural change. Substantive equality is the most appropriate constitutional approach for women migrant workers because it not only addresses discrimination

through law but also confronts the systemic and intersectional barriers they face. Using Fredman's multidimensional framework and MacKinnon's critique of power relations, substantive equality tackles both the material and structural realities of women migrant workers. The cases of Bhe and Mahlangu illustrate how substantive equality operates in practice, while the minority judgment in *Union of Refugee Women* emphasises that women migrants remain inadequately protected. Transformative equality builds upon substantive equality, calling for a radical overhaul of socio-economic systems that sustain subordination. For women migrant workers, this involves transforming migration systems, labour markets, and gendered divisions of work.

In conclusion, the chapter reveals that the causes and types of violations experienced by women migrants in South Africa arise from deeply rooted structural inequalities that the current legislative framework inadequately addresses. To achieve adequate protection and empowerment, it is essential to adopt transformative strategies that extend beyond mere formal rights recognition and aim to dismantle systemic obstacles, thereby securing migrant women's access to justice and equality. These findings pave the way for the upcoming chapter, which will examine international and regional legal frameworks as measures for assessing and enhancing South Africa's protection of the rights of women migrant workers.

CHAPTER 3: INTERNATIONAL AND REGIONAL FRAMEWORK FOR PROTECTING WOMEN MIGRANT WORKERS' RIGHTS

3.1 INTRODUCTION

Having laid the conceptual, legal, and theoretical foundations underpinning the research, it also demonstrates that women migrant workers in South Africa face multiple rights violations, ranging from workplace exploitation and abuse to social and legal discrimination, mainly influenced by gendered vulnerabilities and gaps in protection. The discussion then proceeds to examine the normative standards that safeguard the rights of women migrant workers at global and regional levels.

This chapter examines the normative framework for protecting the rights of women migrant workers under international and regional laws. It critiques these instruments in terms of their gender sensitivity, challenging their ability to address the specific vulnerabilities encountered by women migrant workers. The chapter then explores the deficits and weaknesses in the available frameworks, such as shortcomings in enforcement mechanisms and the widespread gender blindness that characterises migration governance instruments. The analysis emphasises the need for a gender responsive approach to interpreting and implementing these frameworks to guarantee the protection and fulfilment of women migrant workers' rights. The first section of this chapter will examine the International Labour Organisation and the effectiveness of two of its treaties, namely the Migration for Employment Convention and the Migrant Workers Convention, in protecting workers' rights, particularly those of women migrants. The second section discusses the significance of the United Nations conventions, which include ICPRMW, the Convention Concerning Decent Work for Domestic Workers, and CEDAW.

I also explore declaration of commitment by governments, employers and workers organisations to develop more effective labour migration policies for women migrants through the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the 2006 Multilateral Framework on Labour Migration, the Manila Call to Action, and the Declaration of the United Nations General Assembly

High-level Dialogue on International Migration and Development,⁵⁷⁷ will be discussed. Lastly, the chapter will examine applicable regional treaties, namely the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Southern African Development Community Protocol on Gender and Development, and the SADC Protocol on Employment and Labour and their contributions to safeguarding the rights of women migrant workers' rights in Africa.

Understanding what constitutes a normative framework is crucial for evaluating the effectiveness of current protections for women migrant workers. I provide an overview of the normative framework, highlighting its importance from a human rights perspective, particularly as it relates to vulnerable populations, such as migrant women workers.

3.2 INTERNATIONAL NORMATIVE STANDARDS

A normative framework is a set of norms, rules, and principles that guide the operations and mandates of institutions and states concerning human rights. In international law, states have a tripartite duty to respect, protect and fulfil human rights. The obligation to respect requires states to refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to prevent third parties, including private actors and employers, from violating human rights. The obligation to fulfil requires states to take positive measures to facilitate, provide, and promote the realisation of rights. This framework is particularly important for women migrant workers who may encounter systemic discrimination, exploitation, and be excluded from both formal and informal labour markets. These obligations inform how normative frameworks must be interpreted and applied in practice, requiring passive endorsement and active state measures to uphold women's rights in migration contexts.⁵⁷⁸

⁵⁷⁷ United Nations "Resolution adopted by the General Assembly on 21 December 2016 [on the report of the Second Committee (A/71/465/Add.2)] 71/237. International migration and development", https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_237.pdf (accessed on 4 November 2023).

⁵⁷⁸ United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1 of the Covenant), UN Doc. E/1991/23:par. 1.

Taekema,⁵⁷⁹ explains that normative frameworks play critical roles in the supply of evaluative standards by which legal systems and practices can be judged. In international human rights law, normative frameworks encompass treaties and conventions, declarations, and authoritative interpretations, such as General Comments and concluding observations of treaty-monitoring bodies. These texts outline entitlements to rights and freedoms for all individuals, irrespective of nationality, gender, and socio-economic circumstances, and serve as aspirational and legally binding instruments of reform and accountability.

One of the most widely accepted and commonly used normative tools is the Universal Declaration of Human Rights (UDHR), which enshrines the core principles of human rights and serves as the international benchmark for promoting dignity, equality, and freedom. On the regional front, the African Charter on Human and Peoples' Rights (ACHPR) is also a normative document that protects rights in the African region. Adopted in 1981 and ratified by the government of South Africa in 1996, the Charter ensures various rights, including those of equality, dignity, and protection against discrimination. Such rights are particularly important for migrant labourers, whose life experiences are often characterised by institutionalised inequality and marginalisation.

In South Africa, the Constitution establishes a robust domestic normative framework. The *Constitution*, and in particular the Bill of Rights, enshrines a wide range of socio-economic and civil-political entitlements, including equality (Section 9), dignity (Section 10), fair labour standards (Section 23), and access to health and Education (Sections 27 and 29). In addition, Section 7(2) imposed an obligation on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights,” thereby requiring state agents to fulfil both domestic and international human rights obligations. In the opinion of Tladi, the South African *Constitution* is recognised as one of the most open constitutions to international law in the world, with express mandates for the courts to interpret international law when deciding constitutional issues.⁵⁸⁰

This interpretive commitment was affirmed in *Glenister v President of the Republic of South Africa*,⁵⁸¹ in which it was held that international law has an influence on South African jurisprudence. The Constitutional Court has established that international law,

⁵⁷⁹ Vijayarasa 2019:3-4 & Taekema 2018:7.

⁵⁸⁰ Tladi 2016:311.

⁵⁸¹ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC):note 37:par. 91.

particularly international human rights norms, carries significant weight in interpreting South African law. However, it does not automatically become enforceable as domestic law.⁵⁸² International law does not automatically become binding in South Africa. According to the Constitution, international agreements are negotiated and signed by the executive but still require approval by Parliament and must be enacted into legislation before they can be enforced domestically. In contrast, customary international law is recognised as law in South Africa unless it is inconsistent with the constitution or an Act of Parliament.⁵⁸³

The *Glenister* case provides a clear example of the enforceability of the United Nations Convention against Corruption (UNCAC) under domestic law and its obligations to the South African government.⁵⁸⁴ In this case, Hugh Glenister challenged the South African government's decision to disband the Directorate of Special Operations (DSO), the "Scorpions", an independent anti-corruption unit, and replace it with a less autonomous unit.⁵⁸⁵ Glenister argued that disbanding the Scorpions undermined the country's obligations under international law to combat corruption.⁵⁸⁶ The Constitutional Court held that South Africa's Constitution requires consideration of international law during the interpretation of the Bill of Rights. The country must comply with international agreements, such as the UNCAC.⁵⁸⁷ In the case of *S v Makwanyane*,⁵⁸⁸ the Constitutional Court emphasised the Court's openness to international law, whether binding or non-binding. Tladi,⁵⁸⁹ also reiterated the same point.

The Court argued that these obligations imply a responsibility to establish and maintain independent anti-corruption bodies.⁵⁹⁰

⁵⁸² *Glenister v President of the Republic of South Africa and others* par 88 & 92 & Adegalu F & Mitchell 2019:1082-1083.

⁵⁸³ *Constitution* section 232.

⁵⁸⁴ *Glenister v President of the Republic of South Africa and others* par 80 & 87.

⁵⁸⁵ *Glenister v President of the Republic of South Africa and others* par 1.

⁵⁸⁶ *Glenister v President of the Republic of South Africa and others* par 2 & 3.

⁵⁸⁷ *Glenister v President of the Republic of South Africa and others* par 182.
S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 par 39.

⁵⁸⁹ Tladi 2018:708-709.

⁵⁹⁰ *Glenister v President of the Republic of South Africa and others* par 183.

The main points from the *Glenister* case include that international law serves as an interpretive guide. Courts should consider international obligations when interpreting rights and duties in domestic law. Although ratified international treaties do not automatically become part of South African law, the state is still expected to act in accordance with these commitments, which in turn influences the development of constitutional and statutory interpretation. The Court emphasised that South Africa has international obligations to combat corruption, which cannot be ignored or undermined by domestic decisions, such as dissolving an independent anti-corruption body. *Glenister* reinforced the notion that international law, although not automatically part of domestic law, nonetheless informs South Africa's constitutional obligations, particularly in areas such as human rights and anti-corruption efforts.⁵⁹¹ This case has since been a reference point for arguments on integrating international standards into South African jurisprudence.

International human rights law enforcement can occur at the national, regional, or international level. States that ratify and sign human rights treaties pledge to uphold those rights and ensure that their local laws align with international agreements. South Africa has ratified numerous international human rights treaties, such as the Universal Declaration of Human Rights (hereafter the UDHR),⁵⁹² the International Covenant on Civil and Political Rights (ICCPR),⁵⁹³ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵⁹⁴ and the Convention on the Elimination of All Forms of Discrimination against Women. Through ratification, South Africa has committed to upholding the rights enshrined within these treaties and to ensuring that its domestic legislation aligns with the provisions outlined in these international laws.

The same logic extends to the protection of migrant workers. Instruments such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the ILO Convention No. 189 on Decent Work for Domestic Workers serve as normative standards that South Africa is

⁵⁹¹ *Glenister v President of the Republic of South Africa and others*.

⁵⁹² Universal Declaration of Human Rights (adopted and came into force on 10 December 1948).

⁵⁹³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force on 23 March 1976).

⁵⁹⁴ International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966 and came into force on 3 January 1976).

expected to adhere to, even when not formally incorporated into domestic law. These instruments enumerate specific rights, which include the right to equal pay, non-discrimination, safe working conditions, and access to social protection, all of which are particularly salient in contexts of gendered migration.

Moreover, South Africa's ratification of regional legal instruments, which include the ACHPR and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), further evidences its normative commitments. These frameworks obligate member states to eradicate all forms of discrimination against women and to protect marginalised groups, including migrant workers, from exploitation and abuse.

Normative frameworks perform a dual role. First, they set standards for assessing compliance with human rights commitments. Second, they provide a basis for holding governments accountable when rights are violated. In the case of migrant women workers, these frameworks serve as both protective and transformative instruments. They aim to prevent exploitation and advance gender justice by calling for structural reforms in labour, immigration, and social policy.

The normative framework for protecting women migrant workers is multi-layered and evolving. It comprises universal declarations, binding treaties, regional protocols, and domestic constitutional norms. While the presence of these instruments reflects progress in establishing formal protections, their implementation remains uneven and frequently undermined by gender blind migration policies and inadequate enforcement. Therefore, a gender responsive interpretation and application of normative standards is critical to realising the rights and dignity of women migrant workers in South Africa and beyond. Having explained the meaning of a normative framework, I delve into a discussion of the international legal instruments. I will start with the ILO.

3.3 INTERNATIONAL LABOUR ORGANISATION 1919

The ILO was created as part of the Treaty of Versailles, which ended World War I. Later, it became a specialised agency of the United Nations.⁵⁹⁵ In section 1.6, it was discussed that the ILO established the most extensive labour standards applicable to migrant workers. The ILO's primary objectives are to advance workers' rights, stimulate opportunities for decent employment, enhance social protection, and foster dialogue among governments, employers, and employees on labour migration laws and policies.⁵⁹⁶ Since its founding, the ILO has prioritised the safety of migrant workers. The ILO Constitution demonstrates this in its preamble.⁵⁹⁷ This shows unequivocally that the authors of the ILO Constitution recognised the vulnerability of migrant workers very early on and desired to protect their interests. This is especially so for women migrant workers.

South Africa is amongst the 187 countries that comprise the ILO's membership.⁵⁹⁸ As already mentioned in section 1.6, two ILO treaties, namely the Migration for Employment Convention and the Migrant Workers Convention,⁵⁹⁹ were formulated to demonstrate the organisation's commitment to protecting the rights of migrant workers. Although these Conventions were established when women primarily migrated for family reunions, they apply equally to men and women who work as migrant labourers. The ILO also adopted other instruments related to the rights of women migrant workers, which will be analysed below.

3.3.1 Migration for Employment Convention, 1949

The Migration for Employment Convention, briefly mentioned in section 1.6, is an ILO convention for migrant workers.⁶⁰⁰ It outlines several steps that signatory nations should take to protect the rights belonging to migrant workers. It also stipulates that migrant workers should be treated equally to citizens in terms of pay.⁶⁰¹ collective

⁵⁹⁵ The International Labour Organisation formed on 11 April 1919 and became the first specialised agency of the United Nations on 14 December 1946.

⁵⁹⁶ ILO "About the ILO", <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (accessed on 20 April 2023).

⁵⁹⁷ Preamble of the ILO 1946.

⁵⁹⁸ ILO "Member States. ILO", <https://www.ilo.org/global/about-the-ilo/members-and-observers/lang--en/index.htm> (accessed on 20 April 2023).

⁵⁹⁹ Migration for Employment Convention and the Migrant Workers Convention.

⁶⁰⁰ Migration for Employment Convention No.97 of 1949 (ILO).

⁶⁰¹ Art. 6 of the Migration for Employment Convention No.97 of 1949.

bargaining rights,⁶⁰² housing,⁶⁰³ and access to social security⁶⁰⁴ and medical services.⁶⁰⁵ Article 1 states that each member of the ILO for which this Convention is in force undertakes to make available on request to the International Labour Office and to each Member,

- (a) information on national policies, laws and regulations relating to emigration and immigration.
- (b) Information on special provisions concerning migration for employment and the conditions of work and livelihood of migrants for employment.
- (c) Information concerning general agreements and special arrangements on these questions concluded by the Member.

The ILO Migration for Employment Convention, while offering significant safeguards for migrant workers in general, exhibits a deficiency in terms of providing explicit provisions for women migrants. The Convention's use of gender-neutral terminology fails to sufficiently address the distinct vulnerabilities experienced by migrating women, including instances of workplace sexual abuse, labour exploitation, discrimination, and obstacles in obtaining social assistance.⁶⁰⁶ The Convention was formulated when women predominantly engaged in migration for family reunion rather than as labourers. Therefore, it is imperative to adopt a gender-responsive approach to enhance safeguards and effectively address the interplay between gender and other identity variables that affect migrating women. To improve the protection of rights for female migrants, it is advisable to amend the Convention by including clauses that promote substantive equality and explicitly acknowledge the discrimination experienced by this group.

3.3.2 Migrant Workers Convention, 1975 ⁶⁰⁷

Article 12 of the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Migrant Workers Convention) states that:

Each Member for which this Convention is in force shall, by methods appropriate to national conditions and practice—

⁶⁰² Art. 6 of the Migration for Employment Convention No.97 of 1949.

⁶⁰³ Art. 8 of the Migration for Employment Convention No.97 of 1949.

⁶⁰⁴ Art. 9 of the Migration for Employment Convention No.97 of 1949.

⁶⁰⁵ Art. 9 of the Migration for Employment Convention No.97 of 1949.

⁶⁰⁶ Chinkin 2019:270.

⁶⁰⁷ Migrant Workers Convention (Supplementary Provisions) Convention No.143 of 1975.

(a) seek the cooperation of employers' and workers' organisations and other appropriate bodies in promoting the integration of migrant workers and their families in the community.

(b) enact such legislation and promote educational programmes to secure acceptance of the integration policy.

(c) Take all steps to assist and encourage migrant workers and their families to preserve their national and ethnic identity and cultural ties with their country of origin, including allowing children to learn some of their mother tongue.

(d) Guarantee equality of treatment concerning working conditions for migrant workers who perform the same activity, whatever the particular conditions of their employment.

The Migrant Workers Convention, 1975, is an ILO convention for protecting the rights of migrant workers.⁶⁰⁸ It aims to protect their rights and sets out standards for their treatment, including recruitment practices, wages, working conditions, social security, and access to health care.⁶⁰⁹ The Migrant Workers Convention also includes provisions for protecting migrant workers' families and children.⁶¹⁰

The Migrant Workers Convention is essential because it recognises the vulnerability of migrant workers, who often encounter exploitation, discrimination, and abuse. The Migrant Workers Convention aims to safeguard the rights of migrant workers and enhance their welfare, despite their legal status or the reason for their migration. By establishing international standards for the treatment of migrant workers, the Migrant Workers Convention provides a framework for countries to develop policies and laws that protect the rights of migrant workers. It also promotes cooperation between countries in addressing the challenges associated with the migration of workers. Overall, the Migrant Workers Convention is an important international agreement that provides additional protections for migrant workers, including female migrants. Its implementation can help to reduce discrimination, exploitation, and violence against female migrants and advance gender equality and social justice in the migration process.

⁶⁰⁸ Migrant Workers (Supplementary Provisions) Convention No.143 of 1975.

⁶⁰⁹ Art 1,9-12 of the Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975.

⁶¹⁰ Art 9 of the Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975.

3.3.3 Convention Concerning Decent Work for Domestic Workers, 2011

The Domestic Workers Convention,⁶¹¹ is discussed in detail in Section 1.8 of this thesis, and is a groundbreaking treaty that establishes the first global standards for domestic workers. The standards oblige governments that ratify the Convention to protect domestic workers from violence and abuse and regulate private employment agencies that recruit and employ domestic workers.⁶¹² Many countries are reforming policies and legislation to align with the Domestic Workers Convention.⁶¹³ While such reforms significantly reduce inequalities and discrimination, more than policy and legislative reforms are required.⁶¹⁴ A profound change in the way domestic workers are treated is urgently needed.

As discussed in Chapter 2, the Domestic Workers Convention is particularly significant for women migrant workers, who usually take up domestic work and constitute a substantial portion of the domestic worker demographic.⁶¹⁵ The global population of domestic workers aged 15 years and above is 75,6 million, with women accounting for 76 per cent.⁶¹⁶ Migrant women domestic workers often face multiple forms of discrimination and marginalisation, a lack of legal status, and limited access to health and social protections. For women migrant domestic workers, the Convention is essential as it provides them with legal protections and recognition as workers with rights. This can help to reduce their vulnerability to exploitation and abuse and promote their access to social protection and other benefits. Overall, the Domestic Workers Convention is a crucial international agreement that promotes not only the rights but also the protections of domestic workers, including migrant women. Its implementation can help improve the working conditions and quality of life of domestic workers, promoting greater gender equality and social justice.

The ILO has several critical advantages that greatly enhance its ability to influence global labour standards.⁶¹⁷ One of its most vital aspects is the tripartite architecture, which enables representation from government, business, and the workforce. This framework's emphasis on ownership and agreement raises the possibility that member

⁶¹¹ ILO Convention Concerning Decent Work for Domestic Workers 2011.

⁶¹² Blackett 2014:257-279; Blackett & Trebilcock 2018:141.

⁶¹³ Marcadent n.d.; Oliveira do Prado, n.d.

⁶¹⁴ Marcadent n.d.; Rosewarne, 2013.

⁶¹⁵ ILO 2021a.

⁶¹⁶ ILO 2021a.

⁶¹⁷ Kolben 2011:403-437.

states will adopt and implement the ILO's conventions and recommendations. The ILO has been in existence for almost a century and has a stellar reputation, providing its member countries and international labour rights stakeholders with confidence and stability. Its 187 members are geographically and politically diverse, allowing it to carry out its worldwide mandate effectively.⁶¹⁸

Despite these benefits, the ILO could be better. The absence of enforcement mechanisms for its conventions and recommendations is a significant concern. ILO conventions are not legally required to be ratified or implemented by member nations, which might cause a discrepancy between standards and actual implementation. The tripartite structure of the ILO is another area of vulnerability. While it permits diversified representation, it also implies that the power dynamic is frequently tilted in favour of governments and companies, underrepresenting workers.⁶¹⁹ The United Nations Conventions also offer protection to women migrant workers.

3.3.4.1 Committee on the Elimination of All Forms of Discrimination Against Women

CEDAW established a treaty-monitoring body comprising 23 experts chosen by state parties in accordance with specific guidelines.⁶²⁰ The Committee is authorised to establish its own rules of procedure and review reports submitted by state parties on the legislative, judicial, administrative, or other steps they have taken to implement the provisions of the existing Convention, as well as the progress made.⁶²¹ After reviewing the state party reports, the Committee can offer general recommendations and proposals.⁶²² The Committee provides concluding remarks to reporting state parties, outlining specific actions each state party should implement or initiate before the following report.⁶²³ The Committee's general recommendations are not legally binding,

⁶¹⁸ UNODC 2020.

⁶¹⁹ Blackett 2012:778-794.

⁶²⁰ Art. 17 of CEDAW 1979.

⁶²¹ Art. 18,19 of CEDAW 1979.

⁶²² Art. 21 of CEDAW 1979.

⁶²³ UN OHCHR "CEDAW/C/CPV/CO/9: Committee on the Elimination of Discrimination against Women: Concluding observations on the ninth periodic report of Cabo Verde", par 27, <https://www.ohchr.org/en/documents/concluding-observations/cedawccpvco9-committee-elimination-discrimination-against-women> (accessed on 3 October 2023).

but state parties are expected to follow them in order to uphold their commitments under the Convention.⁶²⁴

The Committee has regularly voiced concern for the rights of women migrants in its concluding remarks and recommendations to state parties that have filed reports. For example, in its 2008 concluding observations on Spain, the Committee recommended that the government eliminate discrimination against migrant women in terms of wages and working conditions.⁶²⁵ In 2014, the Committee urged Italy to take measures to eliminate discrimination and violence against migrant women by providing access to justice, health care, education, and employment.⁶²⁶

The Committee urged Cyprus, in one of its recommendation reports, to closely monitor the contract terms, working conditions, and wages of women migrants, and to develop strategies and policies for their complete integration into the workforce and the abolition of both direct and indirect discrimination.⁶²⁷ In its report to Cambodia, the Committee advised the state party to concentrate on development policies and measures to protect migrant women against exploitation and abuse.⁶²⁸ The CEDAW Committee recommended that numerous state parties pursue substantive equality and that Algeria accelerate the realisation of rural women's substantive equality by adopting temporary special measures. Similarly, the Committee urged Bhutan to implement policies and programmes specifically addressed to women and girls to accelerate the achievement of substantive equality.⁶²⁹

⁶²⁴ Hainsfurther 2009:856.

⁶²⁵ Committee on the Elimination of Discrimination against Women, Concluding Observations: Spain, CEDAW/C/ESP/CO/6 (2009).

⁶²⁶ UN OHCHR “CEDAW/C/ITA/CO/7: Concluding observations on the seventh periodic report of Italy”, <https://www.ohchr.org/en/documents/concluding-observations/cedawcitaco7-concluding-observations-seventh-periodic-report> (accessed on 3 October 2023):par. 46-47.

⁶²⁷ UN OHCHR “CEDAW/C/CYP/CO/5: Concluding observations on the eighth periodic report of Cyprus”, par 14, <https://www.ohchr.org/en/documents/concluding-observations/ccprccypco5-concluding-observations-fifth-periodic-report-cyprus> (accessed 14 November 2024).

⁶²⁸ UN OHCHR “Committee on the Elimination of Discrimination against Women: Concluding observations on the sixth periodic report of Cambodia. CEDAW/C/KHM/CO/6”, par 28 <https://www.ohchr.org/en/documents/concluding-observations/committee-elimination-discrimination-against-women-concluding> (accessed on 14 November 2024).

⁶²⁹ UN OHCHR “Report of the Committee on the Elimination of Discrimination against Women. Concluding Comments of the Committee on the Elimination of Discrimination Against Women 106 UN Doc A/59/38 2004 Bhutan”, par 115. [https://documents.un.org/access.nsf/get?OpenAgent&DS=A/59/38\(SUPP\)&Lang=E](https://documents.un.org/access.nsf/get?OpenAgent&DS=A/59/38(SUPP)&Lang=E) (accessed on 3 October 2024).

In the existing literature, the substantive equality guarantees of CEDAW, combined with the state's obligation to take all appropriate measures to eliminate discrimination by any person, organisation, or enterprise, render CEDAW a powerful tool for holding states accountable for violations of the human rights of women migrant workers.⁶³⁰ In 2011, South Africa delivered their report to the CEDAW Committee.⁶³¹ The report aimed to gather data to paint a complete picture of women's status and the state's compliance with its duties under the Convention.⁶³² Migrant women were not mentioned in the study, nor were their situations or difficulties highlighted. Following the submission of their state reports to CEDAW, Cyprus and Cambodia received helpful recommendations that they could implement to improve the status of women migrant workers in their respective countries. It is clearly evident that the 2011 South Africa report to CEDAW did not include the experiences of migrant women, which unfortunately left their violations unaddressed. In contrast, Cyprus and Cambodia received specific recommendations from the CEDAW Committee, highlighting the gap in South Africa's reporting and response.

In 2019, South Africa submitted its fifth periodic report under Article 18, yet again, migrant women were not mentioned. South Africa has never submitted a government report that focuses exclusively on women migrants.

For women migrant workers, CEDAW can provide a powerful tool to challenge discriminatory practices and demand more equitable treatment. By ensuring that their rights are protected under the law, CEDAW can help improve the working conditions, living conditions, and overall well-being of women migrant workers around the world. CEDAW is considered a fundamental instrument for the formal recognition of gender equality in international law. However, scholars argue that there is room for improvement in enhancing its efficacy in safeguarding the rights of female migrant workers. CEDAW promotes the substantive equality model and embodies two central

⁶³⁰ Hains further 2009:847.

⁶³¹ Sisonke "CEDAW shadow report. Submitted by: Sisonke South Africa", https://www.nswp.org/sites/default/files/sisonke_sa_cedaw_shadow_report_final_20sep2021.pdf (accessed on 14 November 2024).

⁶³² Sisonke "CEDAW shadow report. Submitted by: Sisonke South Africa", https://www.nswp.org/sites/default/files/sisonke_sa_cedaw_shadow_report_final_20sep2021.pdf (accessed on 14 November 2024):6.

approaches to equality: equality of opportunity and equality of results.⁶³³ This means equal access to a country's resources, and state parties to CEDAW must ensure the practical realisation of these rights. This highlights the need to provide a complete framework to ensure substantive equality for migrant women, who face several levels of disadvantage.⁶³⁴

Enhancing the protection that CEDAW provides to women and migrant workers might be achieved by amending the Convention to explicitly acknowledge the unique forms of discrimination and abuse experienced by women migrant workers. This amendment would also require state parties to implement targeted measures to address these challenges and promote fair outcomes. Nevertheless, it is essential to acknowledge discrepancies between the rights outlined in the CEDAW and their actual application in real-world scenarios. This necessitates a firm commitment from political actors to enforce these protections effectively.⁶³⁵

Despite its progressive framework, CEDAW's enforcement mechanism remains relatively weak, relying on periodic reporting and individual complaint procedures.

3.4 UNITED NATIONS CONVENTIONS

The United Nations (UN) has played a pivotal role in advocating for the rights of migrant women globally. These conventions show both general and specific guarantees relating to equality, dignity, labour rights and protection from violence and discrimination. I discuss the United Nations Conventions not chronologically but in order of strength and relevance in addressing the specific violations faced by women migrant workers in South Africa. These violations include underpayment, excessive working hours, lack of social protection and contracts and exposure to sexual violence and exploitation, especially within the domestic, agricultural and sex work sectors.

⁶³³ IWRAP Asia Pacific “Substantive equality”, <https://cedaw.iwraw-ap.org/cedaw/cedaw-principles/cedaw-principles-overview/substantive-equality/#:~:text=The%20CEDAW%20Convention%20promotes%20the%20substantive%20equality%20model,supported%20by%20institutions%20and%20mechanisms%20for%20their%20operation> (accessed on 11 October 2023).

⁶³⁴ Chinkin 2019:257-279.

⁶³⁵ UN Women 2019.

3.4.1 International Convention on the Protection of the Rights of All Migrant Workers and their Families 1990

The ICPRMW,⁶³⁶ As mentioned in Section 1.1, it acts as a global charter for the rights and protection of migrant workers and their families. South Africa still needs to ratify the ICPRMW, which was adopted by the UN General Assembly in 1990. It is the first comprehensive codification of the rights of migrant workers and their family members in a single instrument.

The ICPRMW recognises that migrant workers and their families face various challenges, including discrimination, exploitation, and social exclusion. Therefore, the Convention aims to protect the human rights of all migrant workers and their families, regardless of their migration status, by establishing a comprehensive framework of rights and protections.

Migrant women are protected from discrimination when applying for the ICPRMW, which uses inclusive language. The ICPRMW states that “the present Convention is applicable, except otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex...”⁶³⁷ The ICPRMW defines a “migrant worker” as “a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a state of which he or she is not a national.”⁶³⁸

Article 11 stipulates that migrant workers should not be required to work excessive hours. This clause is particularly significant for migrant women workers in the domestic and agricultural sectors, who are often expected to work for extended periods. The article prohibiting low pay below the minimum wage is linked to this point. Article 28 extends equal protection in health and safety, particularly relevant for women who engage in sex work and farm workers exposed to exploitative conditions.

It affirms the rights of migrant workers to fair working conditions, social security, health care, education, and freedom of association. The Convention further sets out a broad array of substantive rights, such as the right to life and freedom from torture, that must

⁶³⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereafter ICPRMW) adopted on 18 December 1990 and entered into force 2003.

⁶³⁷ ICPRMW:art. 2(1).

⁶³⁸ ICPRMW:art. 2(1).

be extended to all migrant workers, irrespective of their employment or migration status. The ICPRMW also recognises the rights of migrant workers' families, including the right to family unity and protection against separation. In fact, it is a crucial international instrument for safeguarding the rights of migrant workers and their families. It calls on states to collaborate in ensuring that the human rights of all migrants are respected and protected. Furthermore, this international instrument requires states to adopt measures to respect, protect, and promote the rights of migrant workers and their families, including measures to prevent exploitation and discrimination, facilitate their integration into society, and provide access to justice and effective remedies.⁶³⁹

Article 1, provides that no migrant worker or family member shall be required to perform forced or compulsory labour.

Article 25 extends the same health and safety standards to migrant workers as they apply to nationals. Furthermore, protection concerning work conditions may not be denied based on an irregular status.

Article 26 amplifies the guarantee of equality in the ICPRMW by clearly requiring states to ensure that migrant workers benefit from the same terms as nationals, including remuneration, working hours, and overtime pay.

Satterthwaite notes that the ICPRMW was celebrated as a massive milestone in providing human rights protections to migrant workers globally, including many women migrants.⁶⁴⁰ The major challenge of the ICPRMW is the lack of provisions addressing the specific problems faced by migrant women.⁶⁴¹ The ICPRMW, therefore, lacks a gender-responsive element as it does not address the unique needs and vulnerabilities faced by women migrants.

Hainsfurther notes that, whilst the ICPRMW offers broad protections to migrants in general, in practice, it is not only a weak but an ineffective system for claiming rights, as it has only been ratified by 58 countries to date.⁶⁴² Piper and Iredale argue that

⁶³⁹ ICPRMW:art. 83.

⁶⁴⁰ Satterthwaite 2005:2.

⁶⁴¹ Hune 1991:800-817.

⁶⁴² Hainsfurther 2020:87.

countries that receive many migrants have not ratified the ICPRMW, and few are likely to do so soon, hence the achievement.⁶⁴³ An important point to mention at this stage is that in the case of *S v Makwanyane*,⁶⁴⁴ the Constitutional Court made it clear that non-ratified instruments still have interpretive weight in constitutional and policy analysis. Fifty-three countries have ratified the Migration for Employment Convention, while 29 have ratified the Migrant Workers (Supplementary Provisions) Convention. As of 28 April 2023, 100 countries had ratified, acceded to, or signed at least one of the three international conventions on migrant workers.⁶⁴⁵ The ICPRMW, the Migration for Employment Convention, and the Migrant Workers (Supplementary Provisions) have primarily failed or, at the very least, had minimal success in protecting migrants in practice. This is because most high-income countries refused to ratify and implement these Conventions.⁶⁴⁶

Another contributing factor is the lack of political will among high-income countries to safeguard the rights of migrant workers. According to the 2020 World Migration Report, only 58 nations have ratified the ICPRMW, and none are significant migrant-receiving countries.⁶⁴⁷ One reason ratification has been low is that the ICPRMW ratification necessitates that a state modify its existing policies to align with the treaty's requirements, which usually involves financial and political costs.⁶⁴⁸ States are thus less inclined to commit when they must bear high costs.⁶⁴⁹

Although the ICPRMW offers extensive safeguards for migrants, Chinkin argues that it has significant shortcomings in adequately addressing the gender specific vulnerabilities encountered by women migrants.⁶⁵⁰ Scholars agree with Chinkin, arguing that failing to use an intersectional approach leads to misapprehensions about individuals' varied experiences of discrimination and subordination.⁶⁵¹ The ICPRMW fails to use an intersectional approach and fails to adequately integrate a gendered

⁶⁴³ Piper & Iredale 2004:53; Taran & Geronimi 2002.

⁶⁴⁴ *S v Makwanyane* 1995 (3) SA 391 (CC):par. 35.

⁶⁴⁵ International Steering Committee for The Campaign for Ratification of The Migrants Convention "Guide on ratification. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. UN Office of the High Commissioner for Human Rights (OHCHR), April 2009", <https://www.refworld.org/reference/manuals/ohchr/2009/en/67108> (accessed 20 November 2024).

⁶⁴⁶ Ruhs 2017:172.

⁶⁴⁷ ILO 2020:292.

⁶⁴⁸ Western et al. 2019.

⁶⁴⁹ Western et al 2019.

⁶⁵⁰ Chinkin 2019:257-279.

⁶⁵¹ Crenshaw 1989;Caldwell 1991;139; Harris 1990.

lens, as evidenced by its failure to specifically mention the vulnerabilities faced by women that are linked to their gender. This approach fails to fully recognise the distinct challenges experienced by women, including but not limited to sexual violence, discrimination, and exploitation within the informal labour industry. The ICPRMW has been criticised as it does not include provisions that expressly aim to advance substantive equality results for migrant women.⁶⁵² A treaty that adopts a more gender-responsive approach would involve tackling the underlying factors that contribute to the unequal treatment experienced by female migrants, as well as incorporating specific measures aimed at promoting their socio-economic rights and improving their social standing.

3.4.2 The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

CERD, which entered into force in 1969, obligates state parties to eliminate all forms of racial discrimination and promote understanding among all races.⁶⁵³ The Convention includes strong language requiring state parties to prohibit and eliminate racial discrimination in all its forms and to guarantee equality before the law to all without distinction based on race, colour, national or ethnic origin.⁶⁵⁴

Article 5, therefore, is of particular relevance, as it prohibits discrimination based on race, colour, descent, or national or ethnic origin in the enjoyment of civil, political, economic, social and cultural rights. Women migrant workers often experience intersectional discrimination based on both gender and nationality. As such, CERD can be used with CEDAW (discussed in section 3.4.3 in more detail) to highlight these compounded vulnerabilities and ensure more tailored, responsive protections.

3.4.3 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

The ICESCR enshrines socio-economic rights, which are especially pertinent to women migrant workers.⁶⁵⁵ The ICESCR explicitly mandates that these rights must be

⁶⁵² Vijayarasa 2019:277.

⁶⁵³ United Nations International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, entered into force 4 January 1969.

⁶⁵⁴ Art 5 of the CERD 1965.

⁶⁵⁵ Art. 2(2) of ICESCR 1966.

exercised without discrimination based on sex or migration status.⁶⁵⁶ The same point is supported in General Comment No. 20 of the UN Committee on Economic, Social and Cultural Rights, which further elaborates that state parties must take concrete steps to ensure substantive equality for vulnerable groups, such as migrant women.⁶⁵⁷

These include the right to just and favourable work conditions.⁶⁵⁸ The ICESCR recognises the right to fair wages, defined in the Covenant as wages that, at a minimum, provide a decent living for the worker and their family, and includes the specific right to equal pay for work.⁶⁵⁹ The ICESCR guarantees workers rest, leisure, reasonable limitations on working hours, periodic holidays with pay, and remuneration for public holidays.⁶⁶⁰ These rights must be extended to women and men without discrimination.

Carney notes that the ICESCR endorses social and economic rights for all, including women migrant workers, emphasising their right to welfare.⁶⁶¹ This is evident, as the ICESCR recognises the right to social security and the right to the highest attainable standard of health.⁶⁶² Women migrant workers in the domestic and farm sectors who lack contracts or formal status are usually excluded from such protections.

General Comment No. 20 clarifies that discrimination on the grounds of nationality and also gender is prohibited and obliges states to adopt affirmative action measures for disadvantaged groups, such as migrant women.⁶⁶³

3.4.4 International Covenant on Civil and Political Rights (ICCPR) 1966

The ICCPR affirms that fundamental civil and political rights apply to all individuals, and this includes women migrant workers.⁶⁶⁴ Importantly, the ICCPR obligates state parties to respect and ensure rights without distinction, including sex and national

⁶⁵⁶ Art 7 of ICESCR 1966.

⁶⁵⁷ UN OHCHR General Comment No. 20: Non-discrimination in economic, social and cultural rights:art. 2, par. 2.; Álvarez & Bauder, 2024.

⁶⁵⁸ Art. 7(a) of ICESCR 1966.

⁶⁵⁹ Loedolf 2024:2-3.

⁶⁶⁰ Art.7(d) of ICESCR 1966.

⁶⁶¹ Carney, 2010:1-2.

⁶⁶² Art 9 &12 of ICESCR 1966.

⁶⁶³ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/GC/20 (2009) paras 2, 30, 38.

⁶⁶⁴ ICCPR 1966.

origin, thus reinforcing the universality of these protections for migrant women.⁶⁶⁵ Satterthwaite,⁶⁶⁶ notes that the right to equal protection standard in Article 2 does not draw a distinction between the rights of citizens and non-citizens and therefore expects state parties to extend the rights within the Convention to all individuals equally. Hence, Article 2 emphasises that rights must be extended to all individuals without distinction based on national origin.

Key rights under the ICCPR relevant to women migrant workers include the right to life, freedom from torture and cruel, inhuman or degrading treatment, liberty and security of the person and equality before the law.⁶⁶⁷ These protections are exceptionally vital for migrant women vulnerable to exploitation, arbitrary detention, or gender-based violence.⁶⁶⁸

Satterthwaite,⁶⁶⁹ argues that one of the most important ways to enforce non-discrimination standards is to ensure that all individuals, including women migrant workers, can vindicate their rights equally under the law. Satterthwaite further argues that violations of the right to equal protection are among the most essential violations that women migrant workers encounter since such infringements compound the underlying breach for which the remedy is sought. For instance, everyone has the right to be free of servitude. Still, when non-nationals or women are denied even the ability to challenge their servitude in a court in the country where they work, they are most certainly also facing a denial of the equal protection of the law. This means that if states have enacted legislation on wages or working conditions, such protections must be applied equally to migrants, unless the state can demonstrate that exempting migrants serves a legitimate purpose under the Covenant. Governments have entered into agreements on the standards that are appropriate to protect the rights of women migrants. Although these agreements are non-binding, they act as guidelines and inform the formulation of laws and policies.⁶⁷⁰

⁶⁶⁵ Art. 2 of ICCPR 1966.

⁶⁶⁶ Satterthwaite 2005:15.

⁶⁶⁷ Art.6,7,9 & 26 of ICCPR 1966.

⁶⁶⁸ Satterthwaite 2005:15.

⁶⁶⁹ Satterthwaite 2005:16.

⁶⁷⁰ See discussion in section 3.4.2.

3.4.5 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted in 1979 and entered into force in 1981.⁶⁷¹ CEDAW is not only a powerful tool that empowers female migrant workers but also a landmark treaty that outlines the fundamental human rights of women and aims to eliminate all forms of discrimination against them.⁶⁷² Satterthwaite⁶⁷³ notes that CEDAW was drafted with the intention of eliminating discrimination against women, so its guarantees are robust. CEDAW begins by establishing a general right to equality and non-discrimination, and then proceeds to include specific provisions.

Discrimination against women is broadly defined under CEDAW as

any distinction, exclusion or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, based on equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁶⁷⁴

It forbids discrimination against women in all its forms and requires state parties to take adequate action “in all fields” to ensure that women have access to their human rights.⁶⁷⁵ Article 2 further emphasises that state parties must ensure that women have “effective protection” against discrimination and can access courts. According to the language of the law, “all women”, including migrant women without legal status, are included in the term “women” when referring to the population of a state party.⁶⁷⁶ CEDAW can therefore be termed as an inclusive treaty. Satterthwaite notes that the definition of discrimination, when paired with the guarantee of equality, fits the

⁶⁷¹ The Convention on the Elimination of All Forms of Discrimination Against Women was adopted in 1979 and entered into force in 1981.

⁶⁷² Hainsfurther 2009:856.

⁶⁷³ Satterthwaite 2005:21.

⁶⁷⁴ Art. 1 of CEDAW 1979.

⁶⁷⁵ Art. 2 & 3 of CEDAW 1979.

⁶⁷⁶ UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 15: Avoidance of Discrimination Against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS), 1990 para 16.

substantive model.⁶⁷⁷ The substantive model is discussed in more detail in section 2.4.2.

Satterthwaite affirms that women's rights are violated not only when laws treat them differently from men but also when any law, policy or action has the practical effect of disadvantaging them.⁶⁷⁸ This, Satterthwaite notes, has important protection implications for women. Whenever a pattern is detected where a certain law or policy has a disproportionate negative impact on migrant women, discrimination is present, and the state must take active steps to ensure that women have their equal rights.⁶⁷⁹

CEDAW Article 11(1)(b) guarantees women the right to equal remuneration and favourable working conditions. This directly relates to women migrant domestic and farm workers. As evidenced in Chapter 2, many women migrants working as domestic workers and farm workers reported being required to work long hours and being paid below minimum wage.

CEDAW Article 11 (1)(e) provides for the right to job contracts, social security, and maternity benefits for women, including migrant workers. Women migrant workers often lack job contracts, making it difficult for them to claim these entitlements. The case of *Mahlangu case* is also a clear example of how a female migrant domestic worker was denied her social security.

General Recommendation No.19 interprets gender based violence to include sexual harassment, coercion and physical abuse as forms of discrimination.⁶⁸⁰ This is particularly crucial for women migrant workers in the domestic and farm sectors, and also Harassment, coercion, and physical abuse as forms of discrimination. those who engage in sex work.

Interestingly, General Recommendation 19 finds that sexual harassment amounts to discrimination when the woman has reasonable grounds to believe that her objection to the harassment would disadvantage her in connection with her employment, including recruitment or promotion, when it creates a hostile working environment.

⁶⁷⁷ Satterthwaite 2005:21.

⁶⁷⁸ Satterthwaite 2005:21.

⁶⁷⁹ Satterthwaite 2005:21.

⁶⁸⁰ Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 19: Violence against women, UN Doc. A/47/38 (1992), par 7.

Article 12 of CEDAW obliges states to ensure access to health services without discrimination.⁶⁸¹ In its General Recommendation, the CEDAW Committee called on States to give particular attention to the specific needs of migrant women who may suffer ill effects on their health status due to multiple layers of discrimination, which render them vulnerable.

General Recommendation No. 26 explicitly addresses the situation of women migrant workers and urges States to recognise the heightened vulnerabilities they encounter. It calls for the implementation,⁶⁸² of gender-sensitive migration policies.

CEDAW establishes a comprehensive international framework for promoting gender equality. It is important to note that its effectiveness relies on its implementation and oversight mechanisms. Central to this is the Committee on the Elimination of Discrimination Against Women, the treaty body responsible for monitoring state parties' compliance with their obligations under the Convention, it is discussed in more detail below.

3.5 NON-BINDING GLOBAL STANDARDS PROTECTING WOMEN MIGRANT WORKERS' RIGHTS

Beyond binding international treaties, several non-binding yet influential international instruments reflect global consensus and political commitment to protecting women migrant workers.

3.5.1 ILO Declaration on Fundamental Principles and Rights at Work, 1998

The ILO Declaration on Fundamental Principles and Rights at Work expresses commitment by governments, employers, and workers' organisations to uphold fundamental human values vital to our social and economic lives.⁶⁸³ First, regardless

⁶⁸¹ CEDAW Committee, General Recommendation No. 24: Women and Health (Article 12), UN Doc. A/54/38/Rev.1 (1999), par 6.

⁶⁸² CEDAW Committee, General Recommendation No. 26: Women Migrant Workers, CEDAW/C/2009/WP.1/R (5 December 2008) par 5.

⁶⁸³ ILO Declaration on Fundamental Principles and Rights at Work was adopted in 1998 and amended in 2022.

of whether they have ratified the pertinent conventions, all ILO member states are required by the ILO Declaration on Fundamental Principles and Rights at Work to uphold, advance, and realise the fundamental labour rights principles in the ILO Constitution. In other words, it acts as a guideline. These rights include the freedom of association and the right to collective bargaining, eradicating all forms of forced or compulsory labour, prohibiting discrimination in employment and occupation, and effectively abolishing child labour.⁶⁸⁴ Regardless of their legal status, this Declaration applies to all men and women who work as migrant labourers. However, a gendered lens demonstrates how these rights can significantly help female migrants, a group that is frequently subjected to discriminatory practices and poor working conditions.

The right to freedom of organisation and collective bargaining can be critical for female migrants, providing a platform for women to achieve better salaries, safer working conditions, and fair treatment.⁶⁸⁵ Collective bargaining has been praised for reducing income disparities and increasing work quality, especially for women.⁶⁸⁶ As a result, the Declaration can be interpreted as implicitly gender-responsive. However, its gender-neutral language may limit the Declaration's ability to safeguard female migrant workers. While this allows the provisions to be applied universally, it may overlook the unique obstacles that female migrants face due to their intersecting identities. For example, it does not explicitly address gender-based violence or gender wage disparities, both of which are prevalent in the female migrant labour force.⁶⁸⁷ Furthermore, the lack of specific provisions for migrant workers, such as the recognition of qualifications and skills or the regulation of recruitment agencies, leaves significant gaps in their protection.⁶⁸⁸ As a result, while the Declaration provides a solid basis for fundamental labour rights, it may fall short of addressing the gender-specific difficulties confronting migrant workers.

⁶⁸⁴ ILO Declaration on Fundamental Principles and Rights at Work:art. 1(d).

⁶⁸⁵ Holgate 2015:431-54

⁶⁸⁶ Burchielli et al. 2009:575-588.

⁶⁸⁷ UNODC "Data for Africa", <https://www.unodc.org/unodc/en/data-and-analysis/Data-for-Africa.html> (accessed on 1 May 2020).

⁶⁸⁸ Basok et al. 2014:1394-1413.

3.5.2 Multilateral Framework on Labour Migration, 2006

The centrepiece of the ILO's Plan of Action on Labour Migration,⁶⁸⁹ the 2006 Multilateral Framework on Labour Migration is a non-binding legal instrument that contains several principles and guidelines to help member states in developing more responsive labour migration policies. The Framework acknowledges that migrant workers, both men and women, contribute to the economic development of their countries of origin and host countries; therefore, their rights must be protected.⁶⁹⁰ For female migrants, the Framework is essential as it recognises the vulnerabilities that women face in the migration process, such as discrimination, exploitation, and violence.

This Framework promotes the protection of women migrant workers by calling for gender-sensitive policies, sex-disaggregated data, guaranteeing decent employment opportunities for all women of working age, bilateral and multilateral agreements addressing gender-specific trends and measures to address trafficking and protect victims.⁶⁹¹ It also acknowledges the particular circumstances of women and children affected by trafficking and other abusive migration conditions.⁶⁹²

3.5.3 United Nations High-level Dialogue on International Migration and Development 2006

The United Nations High-level Dialogue on International Migration and Development took place in 2006. This dialogue was significant in that it highlighted the growing global concern about migration, particularly its impact on development.⁶⁹³ In October 2013, the UN General Assembly convened the second High-level Dialogue on International Migration and Development, culminating in a declaration that underscored the critical role of migration in achieving sustainable development.⁶⁹⁴ The

⁶⁸⁹ ILO 2004. In 2004, the 92nd Session of the International Labour Conference undertook a General Discussion on migrant workers and adopted, by consensus, a Resolution on a fair deal for migrant workers in the global economy, which called for an ILO Plan of Action on Labour Migration.

⁶⁹⁰ ILO Multilateral Framework on Labour Migration: par. 4.4.

⁶⁹¹ ILO Multilateral Framework on Labour Migration: par. 4.4 & 4.5.

⁶⁹² ILO Multilateral Framework on Labour Migration: par. 4.5.

⁶⁹³ IOM "United Nations high-level dialogue on international migration and development (HLD)", <https://www.iom.int/united-nations-high-level-dialogue-international-migration-and-development-hld> (accessed on 4 November 2023).

⁶⁹⁴ United Nations "High-level dialogue on international migration and development. New York: United Nations", <https://www.un.org/en/ga/68/meetings/migration/> (accessed on 12 July 2025).

Declaration emphasised the need to protect the human rights of all migrants, regardless of their status, with specific attention to both women and children. It called for the incorporation of a gender perspective into migration policies and the strengthening of national laws and programs to combat gender-based violence and discrimination against women migrants. The Declaration also emphasised the importance of ensuring that migrant women and children have access to essential services, including healthcare and education. This political commitment reinforces the principles enshrined in binding treaties, such as CEDAW and the ICPRMW, providing a comprehensive framework for protecting women migrant workers.

It is important to note that labour migration received renewed impetus through the UN General Assembly's Declaration of the High-level Dialogue on International Migration and Development.⁶⁹⁵ The Declaration acknowledged the role of migration in realising the Millennium Development Goals and that human mobility is a critical factor for sustainable development.⁶⁹⁶ The Declaration reaffirms the need to effectively advance and protect the human rights and fundamental freedoms of all migrants, regardless of their migration status, especially those of women and children.⁶⁹⁷

Women and girls account for almost half of all international migrants globally. As a result, there is a need to address the situation and vulnerability of migrant women by incorporating a gender perspective into policies and strengthening national laws, institutions, and programmes to combat gender-based violence and discrimination against them.⁶⁹⁸ Appropriate measures must be established to protect women migrant workers in all sectors, including those involved in domestic work.⁶⁹⁹

⁶⁹⁵ IOM "United Nations high-level dialogue on international migration and development (HLD)", <https://www.iom.int/united-nations-high-level-dialogue-international-migration-and-development-hld> (accessed on 4 November 2023).

⁶⁹⁶ IOM "United Nations high-level dialogue on international migration and development (HLD)", <https://www.iom.int/united-nations-high-level-dialogue-international-migration-and-development-hld> (accessed on 4 November 2023). It acknowledges the vital contribution of migration in realising the Millennium Development Goals. It recognises that human mobility is a key factor for sustainable development and should be adequately considered in elaborating on the post-2015 development agenda.

⁶⁹⁷ IOM "United Nations high-level dialogue on international migration and development (HLD)", <https://www.iom.int/united-nations-high-level-dialogue-international-migration-and-development-hld> (accessed on 4 November 2023):art. 10.

⁶⁹⁸ IOM "United Nations high-level dialogue on international migration and development (HLD)", <https://www.iom.int/united-nations-high-level-dialogue-international-migration-and-development-hld> (accessed on 4 November 2023).

⁶⁹⁹ IOM "United Nations high-level dialogue on international migration and development (HLD)", <https://www.iom.int/united-nations-high-level-dialogue-international-migration-and-development-hld> (accessed on 4 November 2023):art. 12.

The Declaration is significant for women migrants as it recognises their unique challenges and vulnerabilities in the migration process. These challenges can include gender-based violence, discrimination, exploitation, and lack of access to essential services. Several key commitments and principles that are crucial to the rights of women migrants, including the promotion of gender equality, are outlined in the Declaration.⁷⁰⁰ The importance of promoting gender equality in all aspects of migration is recognised in the Declaration, including developing policies and programs that affect migrants.

Declaration outlines Measures to combat violence against women migrants are illustrated in the Declaration. It calls for the prevention and elimination of all forms of violence against women migrants, including sexual exploitation and trafficking.⁷⁰¹ It ensures access to essential services. The Declaration calls for crucial services to all migrants, including women migrants, such as health care, education, and social services.⁷⁰² It strengthens international cooperation. The Declaration recognises the importance of global collaboration in addressing the challenges and opportunities of migration and development, including the protection of the rights of women migrants.⁷⁰³

Overall, the Declaration of the UN General Assembly High-level Dialogue on International Migration and Development is an important international agreement that promotes the rights and protections of all migrants, including women migrants. Its implementation can help to address the unique challenges and vulnerabilities faced by women migrants and encourage greater gender equality and social justice in the migration process.

The following section focuses on the Manila Call to Action, another non-binding global commitment by governments.

⁷⁰⁰ IOM “United Nations high-level dialogue on international migration and development (HLD)”, <https://www.iom.int/united-nations-high-level-dialogue-international-migration-and-development-hld> (accessed on 4 November 2023): art. 11.

⁷⁰¹ IOM “United Nations high-level dialogue on international migration and development (HLD)”, <https://www.iom.int/united-nations-high-level-dialogue-international-migration-and-development-hld> (accessed on 4 November 2023): art. 11.

⁷⁰² IOM “United Nations high-level dialogue on international migration and development (HLD)”, <https://www.iom.int/united-nations-high-level-dialogue-international-migration-and-development-hld> (accessed on 4 November 2023): art. 13.

⁷⁰³ IOM “United Nations high-level dialogue on international migration and development (HLD)”, <https://www.iom.int/united-nations-high-level-dialogue-international-migration-and-development-hld> (accessed on 4 November 2023): art. 13.

3.5.4 Manila Call to Action, 2008

The Manila Call to Action emerged from the International Conference on Gender, Migration and Development held in September 2008. Endorsed by representatives from 36 countries, including governments, trade unions, employers' organisations, civil society, and international organisations, the document emphasised the need to protect the rights of women migrant workers and their families. It recognised the unique challenges faced by women migrants, such as discrimination, exploitation, and abuse, and called for comprehensive measures to address these issues. Key recommendations included the development of gender-sensitive migration policies, access to justice, social protections, and health services for women migrants. While not legally binding, the Manila Call to Action serves as a significant policy guideline, complementing existing international legal frameworks and identifying areas for national policy development.

More than 430 representatives at the International Conference on Gender, Migration and Development, held in Manila from 25-26 September 2008, officially endorsed protecting the rights of migrant women. The Manila Call to Action was adopted by governments from 36 countries, trade unions, employers' organisations, the private sector, civil society organisations, women's and religious associations, academia, and international organisations.⁷⁰⁴ The Call emphasises the significance of seizing opportunities and safeguarding the rights of women migrant workers and their families.⁷⁰⁵

The Manila Call to Action is a landmark document that outlines recommendations to promote and protect the rights of women migrant workers. It recognises the vital role that female migrants play in the global economy and highlights the challenges they face in terms of discrimination, exploitation, and abuse. The document addresses various issues, including labour rights, access to justice, social protections, and access to health services.⁷⁰⁶ It calls for greater cooperation between governments, civil society, and international organisations to address these issues effectively.⁷⁰⁷ Although South Africa was not a signatory, as stated above, it can still play a guiding

⁷⁰⁴ Rimando 2008.

⁷⁰⁵ Rimando 2008.

⁷⁰⁶ Rimando 2008:par. 21.

⁷⁰⁷ Rimando 2008:par. 21.

role in interpreting rights and duties, even though it is not legally bound to fulfil its obligations.

For female migrants, the Manila Call to Action is particularly significant because it acknowledges their gender-specific challenges. Women are often subject to more extreme forms of exploitation and abuse than male migrants, and they may also face additional barriers when it comes to accessing legal and social protections (as outlined in Chapter 2). By promoting the principles laid out in the Manila Call to Action, governments can work to ensure that female migrants are treated fairly and with dignity. This means empowering them with the knowledge and resources they need to assert their rights and working to eliminate the structural inequalities that make them vulnerable to exploitation and abuse.

3.5.5 Global Compact for Safe, Orderly and Regular Migration

The Global Compact for Migration GCM is a non-legally binding international instrument grounded in international human rights law. Intergovernmental consultations and negotiations by member states of the United Nations led to the adoption of the GCM (drafted on the 13th of July 2018 and signed on the 19th of December 2018)

It reaffirms states' sovereign right to determine their national migration policies while promoting international cooperation and shared responsibility. The Compact is organised around 23 objectives that provide a comprehensive framework for managing migration in a human rights-based, gender-responsive, and sustainable manner.⁷⁰⁸ The GCM is particularly important for women migrant workers, as it adopts a gender-responsive and child-sensitive approach throughout its framework. Key elements include the Compact's commitment to eliminating discrimination, promoting gender equality, and advancing the empowerment of women and girls through migration (Target 7). It recognises that women face specific forms of vulnerability, including gender-based violence, trafficking, and exploitation, often particularly in informal and domestic work environments. It calls upon states to adopt legal and

⁷⁰⁸ UN "Global Compact for Safe, Orderly and Regular Migration. A/RES/73/195. New York: United Nations General Assembly", https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195 (accessed on 11 May 2025).

operational measures for preventing and responding to abuse, exploitation, and gender-based violence, including recruitment practices (Objective 6). The GCM calls for fair access for all migrants, regardless of migration status, to education, health, justice, and social protection (Objective 15). This is particularly relevant for women, who are often excluded due to irregular migration status or employment in informal economies. The Compact promotes fair and ethical recruitment, ensuring acceptable working conditions and social protection (Objectives 5 and 6), following International Labour Organisation standards, to increase benefits for women migrant workers who work primarily in vulnerable sectors.

Countries are encouraged to disaggregate statistics by sex, age, and migration status to inform policy actions (Objective 1), which is essential to responding to the gender-specific dimensions of migration. At a regional level, the AU and SADC have established legal instruments to protect the rights of women migrant workers.

3.6 AFRICAN UNION

3.6.1 African Charter on Human and Peoples' Rights, 1981

The eighteenth assembly of the Heads of State made a historic step towards protecting human rights in Africa by adopting the African Charter on Human and Peoples' Rights (ACHPR).⁷⁰⁹ The ACHPR recognised that discrimination against women in all its forms should be eliminated and the rights of women protected.⁷¹⁰ As a regional instrument for safeguarding human rights, the African Charter encompasses significant provisions on the preservation and advancement of human rights, specifically the rights of female migrant labourers. The African Charter contains principles on non-discrimination (Article 2), equality (Article 3), and protection against violence (Article 4), which hold particular significance in the context of female migrant labourers.

Sigworth and Kumalo argue that despite containing provisions related to non-discrimination and women's rights, the African Charter was largely ineffective in

⁷⁰⁹ The African Charter on Human and People's Rights was adopted in 1981 in Nairobi Kenya and came into effect in October 1986 and was ratified by South Africa on 9 July 1996.

⁷¹⁰ African Charter on Human and Peoples' Rights, 1986:art. 18(c).

addressing violations of women's rights on the continent.⁷¹¹ After ratification, the next step for countries was to fully integrate the Charter's provisions into national laws and policies.⁷¹² However, more effective monitoring and reporting mechanisms are necessary to ensure that African states comply with the standards outlined in the Charter.⁷¹³ Furthermore, the Charter did not recognise the unique forms of discrimination and rights violations experienced by African women, including practices like female genital mutilation, inequality in marriage and divorce and lack of reproductive rights.⁷¹⁴

Its language around women's rights was viewed as too general without addressing the lived realities of African women.⁷¹⁵ In addition, determining state responsibility for addressing rights violations against women was another challenge of the Charter.⁷¹⁶ In summary, while containing critical foundational principles, the African Charter needed to improve protections, accountability, and outcomes for African women more tangibly. Its provisions were not adequately translated into domestic laws and policies, enforcement needed to be stronger, and it required more specificity regarding the intersectional oppression of African women. This rendered it ineffective in practice at addressing women's rights violations in the region.

While the African Charter contains essential provisions related to the rights of women migrant workers, there have been significant challenges in effectively implementing and enforcing these provisions. Additional efforts are needed to address the unique and intersecting forms of discrimination and exploitation faced by women migrant workers in Africa, including through the development of targeted policies and programs and the strengthening of monitoring and reporting mechanisms.

3.6.2 Maputo Protocol to the African Charter on Human and Peoples' Rights 2003

In the late 1990s, women's organisations from across Africa realised that gender inequality and discriminatory practices against women were still entrenched in Africa,

⁷¹¹ Sigsworth & Kumalo 2016:3.

⁷¹² Banda 2005:72-84.

⁷¹³ Viljoen 2007:313.

⁷¹⁴ Banda 2005:72-84.

⁷¹⁵ Chirwa 2004:63-93.

⁷¹⁶ Viljoen 2007:313.

giving rise to the need for a better framework for redress.⁷¹⁷ This gave birth to the Protocol to the African Charter on Human and Peoples' Rights on Women's Rights in Africa, also known as the Maputo Protocol.⁷¹⁸ The Maputo Protocol represents a significant milestone for women's empowerment and gender equality in Africa.⁷¹⁹ The Maputo Protocol commits all African states to combat all forms of discrimination against women through the drafting and implementation of appropriate legislative, institutional and policy measures in a determined effort to ensure the rights of women are promoted, realised, respected and protected.⁷²⁰

African states are urged to integrate a gender perspective into their policy decisions, legislation, development plans, programmes, activities, and all other spheres of life.⁷²¹ The Maputo Protocol also urges African states to take corrective positive action in those areas where discrimination against women continues to exist within the law itself.⁷²² The Protocol provides for access to justice and judicial and legal services.⁷²³ The Maputo Protocol is important because it recognises that gender inequality undermines social, economic, and political empowerment and impacts human security.⁷²⁴

The ratification of the Protocol means that accountability, protection against abuses, and equality for women are at the highest level on the continent.⁷²⁵

The Maputo Protocol needs to be incorporated into domestic law to be implemented at a national level. Not all African countries have domesticated all aspects of the Maputo Protocol, meaning that this continental instrument, which meets international standards of locating women's rights, is in danger of becoming a paper tiger and irrelevant to women's lived reality.⁷²⁶ While the expected and recommended outcome is for protocols to be incorporated into national legislation, this is not often the case.

The Maputo Protocol⁷²⁷ contains several particularly relevant provisions for women migrant workers. It prohibits discrimination against women based on their migrant

⁷¹⁷ Sigsworth & Kumalo 2016:3.

⁷¹⁸ The Protocol to the African Charter on Human and Peoples' Rights on Women's Rights was adopted in 2003 and entered into force in 2005.

⁷¹⁹ Kombo et al. 2013.

⁷²⁰ Maputo Protocol:art. 2(1).

⁷²¹ Maputo Protocol:art. 2(1)(c).

⁷²² Maputo Protocol:art. 2 (1) (d).

⁷²³ Maputo Protocol:art. 8, (a).

⁷²⁴ Maputo Protocol:art. 24, (a).

⁷²⁵ Sigsworth & Kumalo 2016:3.

⁷²⁶ Mohammed 2014:72-83.

⁷²⁷ Maputo Protocol.

status and mandates that states ensure women migrants enjoy the same rights and freedoms as nationals.⁷²⁸ It recognises women's right to decent work, requiring measures to eliminate workplace discrimination.⁷²⁹ The Protocol also addresses the specific forms of violence faced by women migrants, such as sexual violence, trafficking, and exploitation, demanding preventive and punitive actions by states.⁷³⁰ Furthermore, it acknowledges the right of women migrants to access health care services, including reproductive health care.⁷³¹ It emphasises the right to education, urging states to remove barriers to education for women migrants.⁷³²

Overall, the Maputo Protocol is an essential regional instrument for promoting and protecting the rights of women migrant workers in Africa. Its provisions provide important protections against discrimination and violence and require states to take proactive measures to ensure that women migrants have access to essential services and opportunities. However, as with any international instrument, the effectiveness of the Maputo Protocol will depend on its implementation and enforcement by African states, as well as the active engagement and advocacy of civil society organisations and other stakeholders. As South Africa falls under the SADC region, the regional level legal instruments are significant for this study.

3.7 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

3.7.1 SADC Protocol on Gender and Development 2008

The SADC Protocol on Gender and Development was adopted by SADC Heads of State in 2008 in South Africa.⁷³³ This Protocol benefits women migrants by emphasising adequate remuneration and protection of agricultural and domestic workers.⁷³⁴ It also states that women's contributions in the informal sector must be valued and recognised.⁷³⁵

⁷²⁸ Article I.

⁷²⁹ Article XIII.

⁷³⁰ Article IV.

⁷³¹ Article XIV.

⁷³² Article XI.

⁷³³ SADC Protocol on Gender and Development 2008.

⁷³⁴ SADC Protocol on Gender and Development:art. 19(2)(a)-(c).

⁷³⁵ SADC Protocol on Gender and Development:art. 19 (2) d).

Women migrant workers experience prejudice, exploitation, and a lack of social protection, all of which are acknowledged and addressed in the Protocol on Gender and Development. Some of the key provisions include;

The Protocol on Gender and Development relevant to women migrant workers includes:

- a) Non-discrimination: Migrant women are protected against discrimination under the Protocol on Gender and Development, which also mandates that nations work to abolish discrimination against women in all spheres of society, including the workplace.⁷³⁶
- b) Social protection: The Protocol on Gender and Development recognises the importance of social security for women, including women migrant workers, and requires states to take measures to provide it for all women.⁷³⁷
- c) Right to health: As established by the Protocol on Gender and Development, women migrant workers have the right to access health care services, including reproductive health care. States are obligated to take measures to ensure this right is upheld.⁷³⁸
- d) Prevention of gender-based violence: This highlights the significance of the Protocol on Gender and Development in acknowledging the distinct manifestations of gender-based violence encountered by women migrant workers.⁷³⁹ These include instances of sexual violence, trafficking, and exploitation. The Protocol mandates that states must adopt measures aimed at both preventing and addressing gender-based violence targeting women, and this also affects women migrant workers.

Overall, the Protocol on Gender and Development is an essential regional instrument for promoting and protecting the rights of women migrant workers in the SADC region. Its provisions provide important protections against discrimination, exploitation, and violence and require states to take proactive measures to ensure that women migrant workers have access to essential services and opportunities. However, as with any international instrument, the effectiveness of the Protocol on Gender and Development

⁷³⁶ SADC Protocol on Gender and Development:Preamble.

⁷³⁷ SADC Protocol on Gender and Development:art. 23 (2) , Vanyoro 2019; Khumalo 2022.

⁷³⁸ SADC Protocol on Gender and Development:art. 23 (2).

⁷³⁹ SADC Protocol on Gender and Development:art.6(2)(d).

will depend on its implementation and enforcement by SADC member states and the active engagement and advocacy of civil society organisations and other stakeholders.

3.7.2 SADC Protocol on Employment and Labour, 2014

The SADC Protocol on Employment and Labour was signed by labour ministers from all member states in 2014.⁷⁴⁰ It deals with fundamental labour rights that must be accorded to non-citizens, particularly labour/employment and social protection rights.⁷⁴¹ The Protocol on Employment and Labour measures must be adopted to provide for the unique needs of migrant women, children, and youth.⁷⁴² The challenge with the Protocol is that no SADC member state has ratified it to date. The Protocol on Employment and Labour also calls for promoting productivity, decent work, and rights protection in the informal sector, which is particularly significant for migrant women.⁷⁴³ It aims to promote decent work and social protection for all workers in the SADC region, including women migrant workers.

The Protocol acknowledges the unique difficulties encountered by female migrant workers, encompassing discriminatory practices, exploitative conditions, and limited availability of social safeguards. It encompasses provisions specifically designed to tackle these challenges, focusing on women migrant workers. The Protocol on Employment and Labour, per its non-discrimination provisions, unequivocally proscribes any form of discriminatory treatment towards workers based on their migrant status. Furthermore, it imposes an obligation upon states to adopt appropriate measures to eradicate all manifestations of discrimination against workers, encompassing the entirety of their existence, with a particular emphasis on the realm of employment.⁷⁴⁴

The Protocol on Employment and Labour recognises the fundamental right of all workers to engage in gainful employment within a safe and conducive environment that promotes their overall well-being. Furthermore, states must ensure fair employment opportunities, thus including women migrant workers in this framework.⁷⁴⁵ The Protocol on Employment and Labour acknowledges the paramount

⁷⁴⁰ SADC Protocol on Employment and Labour signed on 18 August 2014.

⁷⁴¹ SADC Protocol on Employment and Labour:art. 19 (c).

⁷⁴² SADC Protocol on Employment and Labour:art. 19(d).

⁷⁴³ SADC Protocol on Employment and Labour:art. 20.

⁷⁴⁴ SADC Protocol on Employment and Labour:art. 7; Selebogo & Ojakorotu 2013.

⁷⁴⁵ SADC Protocol on Employment and Labour:art. 7

significance of social protection for labourers, encompassing women migrant labourers. It mandates states to undertake appropriate actions to ensure comprehensive social security for all labourers.⁷⁴⁶

Ensuring occupational safety and health, as stipulated by the Protocol on Employment and Labour, necessitates that states undertake appropriate actions to safeguard the well-being of all workers, thus incorporating women migrant workers. These measures shield them from potential occupational hazards and facilitate access to comprehensive occupational safety and health services.⁷⁴⁷ The Protocol on Employment and Labour acknowledges and affirms the fundamental right to freedom of association and collective bargaining for all workers, including women migrant workers.⁷⁴⁸ This crucial provision underscores workers' need to exercise their agency in forming and affiliating with trade unions, fostering a conducive collective bargaining environment.

In the broader context of the SADC region, it is imperative to acknowledge the significance of the Protocol on Employment and Labour as a pivotal regional instrument. This Protocol assumes a paramount role in the advancement and safeguarding of the rights of women migrant workers. The provisions outlined in this document play a pivotal role in safeguarding individuals against discriminatory practices, exploitative circumstances, and limited opportunities for social welfare. Furthermore, it mandates that states adopt a proactive approach to guaranteeing that all labourers, including women migrant workers, can engage in dignified employment and receive adequate social protection. Nevertheless, it is imperative to acknowledge that, akin to any global instrument, the efficacy of the Protocol shall be contingent upon the meticulous execution and rigorous enforcement by the member states of SADC. Furthermore, the active involvement and zealous advocacy of civil society organisations and other pertinent stakeholders shall play a pivotal role in ensuring its successful implementation.

⁷⁴⁶ SADC Protocol on Employment and Labour:art. 10.

⁷⁴⁷ SADC Protocol on Employment and Labour:art. 12.

⁷⁴⁸ SADC Protocol on Employment and Labour:art. 6.

3.8 NON-BINDING REGIONAL STANDARDS PROTECTING WOMEN MIGRANT WORKERS' RIGHTS

3.8.1 SADC Labour Migration Action Plan, 2021 - (2020-2025)

The Action Plan was adopted through the Employment and Labour Sector in the Region in line with Article 19 of the SADC Protocol on Employment and Labour, which seeks to protect and safeguard the rights and welfare of migrant workers and provide them with better opportunities to contribute to their countries of origin and destination.⁷⁴⁹ In its first strategic objective, the SADC (LMAP) emphasises strengthening labour migration policy and regulatory systems for better labour migration governance.⁷⁵⁰ This includes ratifying and implementing international and regional instruments and bilateral cooperation on labour migration.⁷⁵¹ The SADC (LMAP) further emphasises the creation of rights-based, gender-sensitive national labour migration policies. These policies aim to address the specific challenges faced by women migrant workers, such as discrimination and exploitation. To date, four member states (Lesotho, Namibia, Seychelles and Zimbabwe) have comprehensive national labour migration policies, whilst Botswana, Swaziland, Malawi, and South Africa are at various stages of development.

3.8.2 SADC Employment and Labour Policy Framework, 2021 (2020–2030)

The SADC Employment and Labour Policy Framework (2020–2030) is a strategic policy effort to promote decent work, enhance inclusive labour markets, and support economic integration within Southern Africa. It was adopted in April 2021. Although non-obligatory, the Framework outlines specific policy priorities designed to improve labour market conditions and protect the rights of all workers, including migrant workers.⁷⁵² A crucial innovation brought forth by the Framework is a gender-responsive migration strategy, which calls for member states to develop national labour migration

⁷⁴⁹ SADC “SADC’s Labour Migration Action Plan (2020-2025)”, https://www.sammproject.org/wp-content/uploads/download-manager-files/ILO-Fact-Sheets-x-6_1611-1.pdf (accessed on 6 July 2025).

⁷⁵⁰ SADC “SADC’s Labour Migration Action Plan (2020-2025)”, https://www.sammproject.org/wp-content/uploads/download-manager-files/ILO-Fact-Sheets-x-6_1611-1.pdf (accessed on 6 July 2025).

⁷⁵¹ SADC “SADC’s Labour Migration Action Plan (2020-2025)”, https://www.sammproject.org/wp-content/uploads/download-manager-files/ILO-Fact-Sheets-x-6_1611-1.pdf (accessed on 6 July 2025).

⁷⁵² ILO 2022.

policies based on protection for vulnerable groups, including women, youth, and informal workers.⁷⁵³ The Framework specifically tackles the feminisation of labour migration, which is reflected by women's disproportionate participation in precarious, informal, and low-return sectors, including domestic and agricultural labour, wherein they often do not enjoy legal entitlements. Furthermore, the Framework calls for greater policymaker coherence, fair recruitment practices, mutual recognition of qualifications, and transferable social protection benefits, factors considered pivotal for improving women migrant workers' mobility and economic protection.⁷⁵⁴ Most importantly, it aligns with commonly accepted best practices, including the ILO Multilateral Framework on Labour Migration and CEDAW General Recommendation No. 26, further substantiating the case for migration frameworks that embrace a gender-focused approach.

Despite this, the Framework mainly plays an aspirational function in terms of its impact because, as soft law, it inherently does not have enforcement mechanisms and obligatory restrictions. Its reliance on voluntary compliance by member states significantly limits its ability to catalyse structural changes or uproot deep-seated forms of labour exploitation based on gender. Even though the Framework promotes substantive equality, it does not set up measurable goals, timetables, or monitoring frameworks to facilitate effective enforcement or accountability processes. For instance, whereas it recognises that women migrant labour is a priority sector for informal employment, the Framework does not make any tangible suggestions geared towards the regularisation of this labour or the inclusion of domestic workers under national labour law. Moreover, since the Framework is not ratified or incorporated into domestic law, it cannot undo regressive immigration policy and discriminatory labour law that consolidate the exclusion of women migrants in host states like South Africa.

⁷⁵³ SADC “SADC’s Labour Migration Action Plan (2020-2025)”, https://www.sammproject.org/wp-content/uploads/download-manager-files/ILO-Fact-Sheets-x-6_1611-1.pdf (accessed on 6 July 2025): 14.

⁷⁵⁴ SADC “SADC’s Labour Migration Action Plan (2020-2025)”, https://www.sammproject.org/wp-content/uploads/download-manager-files/ILO-Fact-Sheets-x-6_1611-1.pdf (accessed on 6 July 2025): 22–24.

3.9 CONCLUSION

In this chapter, I discussed the international and regional agreements, conventions, protocols, and declarations that indirectly affect the rights and issues faced by women migrant workers. Even though these international agreements, conventions, protocols, and statements may not explicitly address the problems faced by female migrants, they represent the global acknowledgement of the need to defend the rights and well-being of women who leave their home countries in search of economic opportunities in other countries. Various international and regional treaties and conventions address the safeguarding of women migrant workers, including CEDAW, ILO conventions, and the Maputo Protocol.

While it is important to focus on specific treaties, it is worth noting that the universal human rights framework also protects women migrants as individuals entitled to rights.

The ILO recognised migrant workers' rights and was the first organisation to call for the protection of migrants in its Constitution. As a sign of its commitment to the welfare of migrant workers' rights, two Conventions were formulated, namely the Migration for Employment and the Migrant Workers Convention. It is important to note that these two Conventions were formed when women migrated to join their spouses and not for work. None of the provisions in the two Conventions focuses on women specifically. The language in the two Conventions fails to consider the vulnerabilities suffered by women migrants.

The ICRMW is a significant treaty that addresses migrant workers' fundamental rights, particularly women's. While the Convention establishes significant principles, emphasises non-discrimination and equitable treatment, and extensively covers migrant labourers' rights, this treaty also faces challenges due to the absence of effective enforcement mechanisms.

Furthermore, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Manila Call to Action, and the Convention on the Elimination of Discrimination against Women (CEDAW) all play critical roles in directly promoting and protecting the rights of women migrant workers. These instruments emphasise non-discrimination, gender equality, equal access to justice, and the abolition of violence and exploitation. They acknowledge the unique problems that women migrants experience and advocate for gender-responsive policies and

strategies to meet their specific requirements. However, the effectiveness of these instruments depends on their national implementation and enforcement, which requires the commitment and collaboration of member states.

The African Charter on Human and Peoples' Rights, along with its Protocol on the Rights of Women in Africa, as well as the SADC Protocol on Gender and Development and SADC Protocol on Employment and Labour, underscore regional and sub-regional endeavours aimed at protecting and advancing women's rights, with a specific focus on the rights of women who migrate. Non-discrimination, access to justice, social support, and the abolition of violence against women are all emphasised in these documents. While these regional protocols provide significant foundations for furthering women's rights, barriers to ratification and domestication of their provisions remain.

In essence, the current human rights frameworks provide a crucial basis for safeguarding the rights of women migrant workers. However, their inadequacies in addressing the unique requirements of female migrants underscore the imperative of adopting a gender-responsive framework. The integration of gender considerations into international normative frameworks and the prioritisation of substantive equality are crucial for protecting and promoting the rights of women migrant workers. States and policymakers must enhance their efforts in integrating a gender perspective into the formulation, execution, and evaluation of pertinent legislation and policies that impact migratory women.

The existing framework of international law on the protection of the rights of female migrant workers is solid but not extensive or explicit. This challenge thus requires that the rights of women migrants be explicitly protected and promoted through more comprehensive inclusion in these human rights instruments. In addition, as elucidated in this chapter, other challenges stem from the constrained ratification, implementation, and enforcement of these instruments by member states. To address these challenges, it is imperative to foster enhanced dedication and collaboration among nations, international organisations, civil society, and other relevant players.

The next chapter discusses South African migration and labour laws and attempts to establish whether or not they meet international or regional standards.

CHAPTER 4: SOUTH AFRICAN LAWS AND POLICIES PROTECTING WOMEN MIGRANT WORKERS' RIGHTS

4.1 INTRODUCTION

In Chapter 3, the international and regional laws that protect the rights of women migrant workers were discussed. While these laws offer protection, they are often insufficient as they do not explicitly protect women migrants from situations of vulnerability linked to their gender. Furthermore, ratification of some of these treaties has been limited, making them suitable on paper but ineffective in practice.

This chapter examines the legal and institutional framework surrounding migration and labour in South Africa, with a particular focus on its effectiveness in protecting the rights of women migrant workers. It begins by outlining the historical development of migration laws from the colonial and apartheid eras to the current democratic system, highlighting how exclusionary practices have shaped contemporary policies. The discussion then moves to key legal documents, including the *Constitution*, the *Immigration Act* with its amendments, the *Refugees Act*, and more recent policy initiatives such as the White Papers and the National Labour Migration Policy, assessing their adequacy in meeting the needs of women migrants. Various labour laws, such as the *Labour Relations Act*, the *Basic Conditions of Employment Act*, the *Employment Equity Act*, and the *Occupational Health and Safety Act*, are also analysed to determine how well they protect migrant women in practical situations, particularly in high-risk sectors like domestic and agricultural work. Ultimately, the chapter evaluates South Africa's migration and labour legislation against international and regional standards concerning equality, dignity, fair working conditions, and social security, concluding that, despite the legal provisions, they are fundamentally flawed, gender-neutral, and poorly enforced in practice.

4.2 HISTORY AND NATURE OF SOUTH AFRICAN MIGRATION LAWS

The complicated historical trajectory of South Africa, marked by colonialism, apartheid, and the shift to a democratic government, was fundamental to the development of the

nation's migration laws. This historical context has permanently influenced the legal system that oversees migration.

The primary purpose of the legislative framework during the colonial and apartheid periods was to enable control and segregation.⁷⁵⁵ The *Natives Land Act*⁷⁵⁶ and other apartheid-era laws, such as the *Abolition of Passes and Coordination of Documents Act*⁷⁵⁷ and the *Aliens Control Act* severely limited the rights and freedoms of non-white people, especially migrants.⁷⁵⁸ These Acts created a legacy of exclusion that significantly impacted subsequent migration policy, serving the political and economic interests of the white minority. In the next section, I discuss the three acts in detail.

4.2.1 The Native Land Act

The *Native Land Act* was an Act of the Parliament of South Africa that regulated land acquisition.⁷⁵⁹ This Act is briefly mentioned in section 1.6. The Act restricted black people from buying or occupying land except as employees of a white master.⁷⁶⁰ The Act defined less than one-tenth of South African land as black “reserves”.⁷⁶¹ It opened the door for white ownership of 87 per cent of the land, leaving black people to scramble for what was left. The law also restricted the terms of tenure under which blacks could live on white-owned farms. The Act has been described as the originating and definitional legislation in establishing the apparatus of segregation and apartheid and dispossessing South Africa’s black populations from land possession and ownership.⁷⁶²

⁷⁵⁵ Christopher 1990:438.

⁷⁵⁶ 27/1913.

⁷⁵⁷ *Abolition of Passes and Coordination of Documents Act Natives (Abolition of Passes and Coordination of Documents) Act* of 1952.

⁷⁵⁸ Peberdy 1998:615-635..

⁷⁵⁹ *Natives Land Act*.

⁷⁶⁰ *Natives Land Act*.

⁷⁶¹ Stanley “Natives Land Act, 1913”, <https://www.whiteswritingwhiteness.ed.ac.uk/traces/land-act/> (accessed on 28 October 2024).

⁷⁶² Stanley “Natives Land Act, 1913”, <https://www.whiteswritingwhiteness.ed.ac.uk/traces/land-act/> (accessed on 28 October 2024):par. 1.2.

4.2.2 The Natives (Abolition of Passes and Co-ordination of Documents) Act of 1952

The *Natives Act*, commonly known as the *Pass Laws Act*, repealed the many regional pass laws and instituted one nationwide pass law. This law made it compulsory for all black South Africans over 16 years to always carry a “passbook”.⁷⁶³ This law severely restricted the movements of Black South Africans and other racial groups by confining them to designated areas. Pass laws remained a vital aspect of the country's apartheid system until their effective termination in 1986.

4.2.3 Aliens Control Act 96 of 1991 & Aliens Control Amendment Act 76 of 1995

The *Aliens Control Act* 96 of 1991 was the cornerstone of the migration policy in the 1990s. This Act regulated foreigners' right to admission to, residence in and departure from South Africa.⁷⁶⁴ In 1991, the *Aliens Control Act* introduced harsh new penalties for unauthorised migration to South Africa (a thinly disguised state assault on displaced people from war-ravaged Mozambique).⁷⁶⁵ The Act also gave sweeping new entry, search, and arrest powers to immigration officers and the police.⁷⁶⁶ Maximum penalties for “harbouring” an “illegal alien” increased to five years imprisonment.⁷⁶⁷ Police immediately launched nationwide raids on informal settlements (Operation Sentry) and began to arrest and deport Mozambican refugees living in the cities.⁷⁶⁸ Brutal tactics reminiscent of the pre-1986 pass laws era came to the fore. In 1991, some 47,000 Mozambicans were arrested and deported.⁷⁶⁹

Maharaj echoes the same point when he states that the *Aliens Control Act* predominantly excluded blacks. He further maintains that between 1913 and 1986, black people could only enter South Africa illegally or as contract workers since they were not allowed to apply for either temporary or permanent residence permits.⁷⁷⁰

In the 1990s, South Africa's immigration policy was based on the 1991 *Aliens Control Act*. In the past two decades, migrant populations in South Africa have been exposed

⁷⁶³ *Native (Abolition of Passes and Co-ordination of Documents) Act* of 1952.

⁷⁶⁴ *Aliens Control Act* 1952:ch 2(5).

⁷⁶⁵ Crush & McDonald 2001:4.

⁷⁶⁶ *Aliens Control Act*:ch. 2(5)5.

⁷⁶⁷ *Aliens Control Act*:ch 32, 57.

⁷⁶⁸ Crush & McDonald 2001:4.

⁷⁶⁹ Crush & McDonald 2001:4.

⁷⁷⁰ Maharaj 2004:3.

to varying changes in the country's migration laws and policies. The *Aliens Control Amendment Act* (1995), passed after South Africa's first democratic elections in 1994, demonstrated a reluctance to accept migrants.⁷⁷¹

The early post-apartheid migration laws, most notably the *Aliens Control Act*,⁷⁷² kept parts of the former regime's security-centric and restrictive policies even after establishing democracy.⁷⁷³ Despite being passed during a transitional period, this legislation was criticised for upholding a history of control and discrimination that contradicted the new constitutional ideals.⁷⁷⁴ The advent of a democratic dispensation in 1994 did not result in any significant shift in South Africa's immigration policy.⁷⁷⁵ Immigration was not a priority issue, so it was not mentioned in key policy documents such as the African National Congress (ANC) Reconstruction and Development Programme. The dominant view during this period was that immigration was not a public policy tool that could benefit the country. Instead, immigrants were often stereotyped as threats to the economic and social interests of South Africans. This view was premised on the assumption that national development is incompatible with immigration.⁷⁷⁶

However, later legal revisions attempted to address these discrepancies. The *Aliens Control Act* was repealed as unconstitutional and replaced with the *Immigration Act* 13 of 2002.⁷⁷⁷ For example, the *Immigration Act*⁷⁷⁸ (which will be discussed below) marked a substantial change towards a more inclusive and open approach to migration management, better conforming to global human rights norms. Amit,⁷⁷⁹ however, contends that restricted migration policies were often implemented despite these improvements, indicating persistent conflicts between the political and socio-economic forces and the principles of the *Constitution*.

Regulations aimed at controlling and managing the admission and stay of foreign nationals were restricted and subject to stringent visa requirements in South Africa.

⁷⁷¹ *Aliens Control Amendment Act* 76/1995.

⁷⁷² *Aliens Control Amendment Act*.

⁷⁷³ *Aliens Control Amendment Act*; Dodson 2010.

⁷⁷⁴ Amit 2012:44-57.

⁷⁷⁵ Mukonza 2011:1387.

⁷⁷⁶ Mukonza 2011:1387.

⁷⁷⁷ Van Hout & Wessels 2023:546.

⁷⁷⁸ *Immigration Act*.

⁷⁷⁹ Amit 2012:44-57.

Countries such as the United States, Canada, and many European countries have strict visa requirements, particularly for work visas. However, these countries often have streamlined pathways for high-skilled immigrants, which South Africa also attempts, but on a smaller scale. Other nations, such as Brazil, Russia, India, and China, also tend to have complex visa requirements; however, they are increasingly streamlining business and tourism visas to attract investments. South Africa has adopted some similar measures, but they are more restrictive overall. African nations such as Rwanda, Ghana, and Kenya have recently relaxed visa requirements, offering more accessible visa-on-arrival options or e-visas for tourists and business travellers from other African nations. This aligns with the African Union's aim for free movement across the continent. South Africa is one of the more restrictive African nations regarding visa policies. It requires visas for many African countries and enforces stringent checks for work permits, including rigorous labour market tests, which make it harder for foreign nationals to secure employment.

In summary, South Africa's visa policies are strict compared to global and African trends. They focus on national security and local employment rather than open access, unlike some African countries that actively support continental mobility and tourism. South Africa's migration laws are still developing due to the complex interaction between the country's historical heritage, constitutional obligations, modern globalisation, and regional integration concerns. Ongoing discussions among academics, decision-makers, and practitioners highlight the need to create a migration policy framework that is both sensitive to the nation's unique historical background and aligned with its international and constitutional human rights commitments.

4.3 LEGAL AND INSTITUTIONAL FRAMEWORK FOR MIGRATION

There have been recent changes to the migration policy landscape in South Africa. I will analyse the legal and policy framework in South Africa to ascertain the level at which the laws protect the rights of women migrant workers.

4.3.1 Constitution of the Republic of South Africa, 1996

The *Constitution of the Republic of South Africa* protects the rights of all people in South Africa, including non-nationals.⁷⁸⁰ Human rights apply to all people; therefore, everyone in the country is entitled to human rights by being human. South Africa's *Constitution* is driven by democratic values, where people are treated equally and with dignity.⁷⁸¹ The *Constitution* prohibits discrimination against anyone on one or more grounds, including, amongst others, race, colour, ethnic or social origin and birth.⁷⁸² South Africa is a lucrative destination for work, especially for migrant domestic workers. In addition, Section 23(1) of the *Constitution* outlines that everyone has the right to fair labour practices. This means that women migrant workers are also included in the concept of “everyone” and can seek protection from unfair employment practices under the *Constitution*. The term “everyone” in the *Constitution* will be examined below.⁷⁸³ Section 27, in the Bill of Rights in the *Constitution*, entrenches the following rights:

- (1) Every person shall have the right to fair labour practices.
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (3) Workers and employers shall have the right to organise and bargain collectively.
- (4) Workers shall have the right to strike for collective bargaining.
- (5) Employers' recourse to the lockout for collective bargaining shall not be impaired, subject to subsection 33(l).

Section 27 of the Constitution is important for this study because these provisions establish the basic labour rights framework in South Africa, ensuring not only fair labour practices but also freedom of association, collective bargaining, and the right to strike. By outlining these rights, the Constitution offers the standard against which the adequacy of South African laws and policies in safeguarding women migrant workers can be assessed.

⁷⁸⁰ *Constitution*.

⁷⁸¹ Section 9(1) of the *Constitution*: “everyone is equal before the law and has the right to equal protection and benefit of the law”.

⁷⁸² Section 9 of the *Constitution*.

⁷⁸³ Twala 2023:21.

The discussion that follows focuses on laws and policies governing migration. The law governing migration in South Africa is central to regulating the entry, sojourn, and work of women migrants within South Africa. With the growing feminisation of migration and women migrants facing specific vulnerabilities, mainly within domestic work, care, agriculture, and informality, such migration laws and policies must be scrutinised not only for comprehensiveness of regulation, but also for whether they are effective at protecting against discrimination and exploitation. The National Labour Migration Policy (2022) stands out among such instruments because it attempts to control foreign labour entry so that it serves national labour market imperatives while ensuring human rights commitments. In addition, it is complemented by the *Immigration Act* 13 of 2002 and the White Paper on International Migration (2017). Taken together, those instruments form South Africa's migration policy. Though said policies affirm the need for fair recruitment and strong linkages between migration and labour systems, they often are deficient in protection that is sensitive to the lived lives of women migrant workers. Thus, a gender-sensitive assessment of said policies and laws must be conducted to fulfil regional and international benchmarks for protecting women migrant workers.

4.3.2 Immigration Act 13 of 2002

The primary legislation dealing with migrants is the *Immigration Act*.⁷⁸⁴ This Act is briefly discussed in section 1.6. The *Immigration Act* governs international migrants. It refines migration policy to support various forms of migration, including visits, vacations, studies, and the movement of skilled labour.⁷⁸⁵ The *Immigration Act* recognises the need for migrant labour to boost the nation's economy.⁷⁸⁶ It provides for different categories of work permits, giving South African employers access to foreign skills. To obtain the required work permits, one undergoes various stringent screening processes, which ultimately leave many migrant women out.⁷⁸⁷ The Act further regulates the admission of migrants to permanent residency in South Africa.⁷⁸⁸ The Act thus reinforces the control and deterrence of migration and establishes the

⁷⁸⁴ *Immigration Act* 2002.

⁷⁸⁵ *Immigration Act* 2002:sec. 9-25.

⁷⁸⁶ *Immigration Act*:sec. 13; Fish 2013:234.

⁷⁸⁷ *Immigration Act*:sec. 19; Fish 2013:235.

⁷⁸⁸ *Immigration Act*:sec. 25.

process for deporting illegal migrants.⁷⁸⁹ The Act does not have provisions which protect migrant workers from exploitation by their employers.⁷⁹⁰ Crush and Ramachandran also weigh in and argue that the *Immigration Act* has failed on occasion to defend the rights of marginalised groups, such as women migrant workers.⁷⁹¹

4.3.2.1 Immigration Amendment Act 19 of 2004

In 2004, the *Immigration Amendment Act* reinforced the restrictive nature of the original *Immigration Act* and expanded the powers of the Minister and the Director-General of Home Affairs. It reduced the number of permits available and adjusted the work permit policy to apply only to persons in a particular “occupation or class.”⁷⁹² Women migrant workers in the informal sectors, which include domestic work, caregiving, and farming, were not included on the occupations list. Male-dominated occupations, such as engineering, finance, information technology, and communications, dominated the list. No gender considerations were incorporated in the occupations list.

4.3.2.2 Immigration Amendment Act 3 of 2007

This amendment act brought about changes in favour of cross-border merchants and many women, and relaxed the obligation of African students to pay repatriation fees.⁷⁹³ This Amendment Act introduced government dispensation projects for Zimbabweans, Angolans, and people from Lesotho. The project aimed to document low-skilled international migrants so that they could work or study in South Africa without the complexity of the *Immigration Act* visa options.⁷⁹⁴ An estimated 180,188 Zimbabweans, 135,370 Basotho (migrants from Lesotho), and 2,049 Angolans benefited from the programme. The Department of Home Affairs provides no gender disaggregated data.

⁷⁸⁹ *Immigration Act*:sec. 34.

⁷⁹⁰ Fish 2013:237.

⁷⁹¹ Crush & Ramachandran 2014.

⁷⁹² Section 21 of the *Immigration Amendment Act* 19/2004, Government Gazette No. 27236, published on 26 January 2005.

⁷⁹³ *Immigration Amendment Act* 3/2007.

⁷⁹⁴ Bimha 2017.

Whilst the Amendment Act was a great relief, it did not change the situation of women migrant workers in South Africa. Whilst the dispensation projects resulted in the documentation of most migrants, no gender considerations were factored into them.

4.3.2.2.1. Background to the Special Dispensation Project for Zimbabweans, Lesotho and Angolans

In 2010, following political and socio-economic turmoil in Zimbabwe, the South African government regularised undocumented Zimbabwean migrants who had fled to the country through the Dispensation Zimbabwe Programme (DZP). DZP permits were valid for four years, from January 2010 to December 2014. When the DZP was closed, the Zimbabwe Special Permit (ZSP) was introduced from January 2014 to December 2017 and replaced with Zimbabwe Exemption Permits (ZEP) from January 2018 to December 2021. The DZP was meant to provide humanitarian relief to thousands of undocumented Zimbabwean migrants in South Africa. The DZP programme enabled many Zimbabweans to gain employment and access different socio-economic services such as healthcare and banking.⁷⁹⁵ Bloch argues that immigration status allows access to the regularised labour market, and this would change the lives and experiences of the most marginalised and vulnerable migrants and their families.⁷⁹⁶

In 2015, the South African Cabinet approved the implementation of a Special Dispensation for Lesotho nationals. The objective of this dispensation was to document Lesotho nationals who were in South Africa illegally due to the socio-economic crisis in Lesotho. It also allowed Lesotho nationals to vacation in the Republic of South Africa in relaxed conditions, provided them with work, study, or business permits, and suspended their deportation. The Lesotho Exemption Permit has replaced the Lesotho Special Permit (LSP), which expired on 31 December 2019.⁷⁹⁷ LEP expired on 31 December 2023, but the South African Minister of Home Affairs, Dr Aaron Motsoaledi, extended the permit for another two years; thus, it will expire on 29 November 2025.

⁷⁹⁵ Nyakabawu 2020:121.

⁷⁹⁶ Bloch 2010:238.

⁷⁹⁷ LENA “Lesotho exemption permit renewal in February”, <https://www.lena.gov.ls/lesotho-exemption-permit-renewal-in-february/> (accessed on 23 October 2024).

South Africa introduced the Angola Special Permit in 2017, which affords the holder a visa valid for four years. Although the holder of the new Angolan Exemption Permit may not apply for permanent residence when the four years expire, the permit will allow the affected persons to continue to live and work in South Africa, thus preventing them from losing their legal status in South Africa. In August 2021, the Department of Home Affairs invited Angolans with various types of documentation to apply for the Angolan Exemption Permit. The Department estimates that about 5,000 Angolans should be eligible for this permit. The invitation has now been extended to those with the Angolan Special Permit issued in 2018, which will expire at the end of 2021. It is also open to those with the Angolan Cessation Permit who had yet to apply for the later replacement permit (ASP) and to Angolan refugees who were issued with section 24 or 22 permits before 31st August 2013. The application process began on 16th August 2021.

Despite the introduction of these three special dispensation projects by the 2007 *Immigration Amendment Act*, they were not reviewed to ensure that the rights of women migrant workers were protected.

4.3.2.3 Immigration Regulation R413 of 2014

The Immigration Regulations of 2014 introduced the Critical Skills Work Visa. The primary aim was to attract highly skilled individuals in occupations experiencing shortages. This visa replaced the quota work permit and the exceptional skills permit (introduced in 2004). To obtain a critical skills visa, older applicants needed to confirm that they had secured employment in South Africa for 12 months and provide proof that they had evaluated their foreign qualifications with the South African Qualifications Authority. The critical skills list mainly highlights male-dominated occupations in areas such as engineering, information and communication technology, quantity surveying and construction, trade and technical roles, and natural and physical sciences. The same applies to the 2022 and 2023 critical skills lists. Most roles on this list remain technical and male-dominated, with Science, Technology, Engineering and Mathematics-related occupations dominating the critical skills list.

Low-skilled women migrant workers were excluded from regularising the work pathway. Chisale argues that South African immigration policy is gender biased and

overlooks the legacies of colonialism that practically encouraged men to study science and mathematics, and channelled the girl child to focus more on art subjects.⁷⁹⁸

4.3.3 The 1998 Refugee Act 130 of 1998

The *Refugee Act* contains provisions that reflect a rights-based approach. It explicitly provides the rights and obligations that refugees and asylum seekers should receive. Applicants are also protected from any form of discrimination. This is of great benefit to women migrant workers, who are often subjected to gender-based discrimination. Refugees have access to social services, which protect women from situations linked to their vulnerability.⁷⁹⁹

4.3.4 Immigration policies (2017, 2024 & 2025 White papers)

The White Paper on Immigration was introduced in 2017, with its primary aim being to amend the *Immigration Act* to facilitate the entry of more skilled labour immigrants into the country. According to the White Paper, halting or slowing international migration is neither desirable nor feasible. Furthermore, international migration, in general, is beneficial if managed in a way that is efficient, secure and respectful of human rights. Therefore, to ensure well-managed international migration, South Africans should embrace international migration for development while safeguarding sovereignty, peace, and security. The 2017 White Paper on International Migration for South Africa (hereafter referred to as WPIM) provides a policy framework for the strategic management of international migration, aligning with the country's national development goals.⁸⁰⁰ WPIM outlines a framework for the systematic review of international migration policy. Its paradigm is the strategic management of international migration to achieve national objectives.

Furthermore, the WPIM provide plans for the state to consider the national policy for integrated migrants, create more vigorous enforcement of immigration and labour laws and combat system abuse. This is in line with the African Union's Migration Policy Framework of 2006, as revised in 2016, which aims to "promote migration and

⁷⁹⁸ Chisale 2015:1.

⁷⁹⁹ CEDAW:art. 11(2).

⁸⁰⁰ DHA 2017.

development and address migration challenges on the continent, such as those related to border management, irregular migration, forced displacement, the human rights of migrants and inter-State cooperation and partnerships.” WPIM highlights that significant levels of irregular migration are particularly problematic, posing a threat to South Africa's economic stability and national sovereignty. The WPIM plans that the State retain talented SADC nationals, particularly those studying at South African colleges. This is a hopeful aspect of the WPIM's new visa ambitions, as it could help young women capitalise on their skills.⁸⁰¹ As of April 2024, the Cabinet accepted the WPIM as the final White Paper, which was subsequently published in the Government Gazette.⁸⁰² Based on this gazetted WPIM: “Asylum seekers and refugees acquire the legal entitlements to residence, employment and study in the Republic”.⁸⁰³ Furthermore, asylum seekers and refugees continue to have rights and privileges, including access to social assistance, primary healthcare services, birth certificates, travel documents, and legal equality.⁸⁰⁴

While the WPIM mentions that young men constitute a significant proportion of those migrating annually, it does not explicitly mention or address the feminisation of migration. Still, it states that women and children are increasingly migrating.⁸⁰⁵ The document mentions women twice but does not focus on their experiences or consider how gender shapes migration drivers.⁸⁰⁶ The White Paper proposes that the state adopt a managed international migration approach, enabling the country to work together to achieve common national goals. It also provides guidance to the State to manage international migration for developmental purposes. Women migrant workers play a significant role in benefiting their countries of origin and destination. They are also key players in global migration. The White Paper makes no mention of them. Chapter 4 of the WPIM discusses proposed policy and strategic interventions. Even

⁸⁰¹ Farley 2019:13.

⁸⁰² South African Government “Minister Aaron Motsoaledi: Release of Final White Paper on Citizenship, Immigration and Refugee Protection”, <https://www.gov.za/news/media-statements/minister-aaron-motsoaledi-release-final-white-paper-citizenship-immigration> (accessed on 4 November 2024).

⁸⁰³ WPIM:par. 32.4

⁸⁰⁴ WPIM:par. 43.

⁸⁰⁵ WPIM:sec. 1.

⁸⁰⁶ Farley 2019:3

though women and men migrants have different needs and interests, the WPIM fails to consider that.⁸⁰⁷

The 2024 White Paper on Citizenship, Immigration and Refugee Protection⁸⁰⁸ is a multifaceted policy document that captures several principal aims. While it is not legally binding, it charts the government's long-term vision for future migration legislation. The 2024 White Paper harmonises migration legislation by consolidating several statutes, including the Citizenship Act, *Immigration Act*, and Refugees Act, into a single comprehensive legal framework.⁸⁰⁹ The primary objective is to reduce fragmentation and enhance governance. The 2024 White Paper plans to reform government structures by establishing an advisory board to enhance the management of immigration, citizenship, and refugee systems, and promoting coordination and accountability within the Home Affairs Department.⁸¹⁰ Another aim of the 2024 White Paper was to strengthen border management and compliance.⁸¹¹ Strategies to be implemented include introducing biometrics, e-visas, and risk-based controls, which would assist in improving security while streamlining the migration process.⁸¹² Lastly, the 2024 White Paper also seeks to align migration laws with economic development and human rights. This would be done by balancing economic objectives with humanitarian principles, South Africa's global obligations, and integrating migration policy into national developmental plans.

The Cabinet approved the 2025 White Paper on National Labour Migration Policy (NLMP).⁸¹³ Its purpose is to provide a structured framework for managing labour migration into and out of South Africa.⁸¹⁴ The NLMP identifies four key intervention areas, and these include governance coordination, data for evidence-based policymaking, regulations for inward labour migration, and support for South Africans working abroad.⁸¹⁵ The NLMP plans to introduce a quota system for the total number

⁸⁰⁷ WPIM:ch. 6, sec. 4.

⁸⁰⁸ 2024 White Paper on Citizenship, Immigration and Refugee Protection (Government Gazette 2024:50530).

⁸⁰⁹ 2024 White Paper on Citizenship, Immigration and Refugee Protection:par. 1.

⁸¹⁰ 2024 White Paper on Citizenship, Immigration and Refugee Protection:par. 93.4.

⁸¹¹ 2024 White Paper on Citizenship, Immigration and Refugee Protection: para 98-11.

⁸¹² 2024 White Paper on Citizenship, Immigration and Refugee Protection: para 98-11.

⁸¹³ GN 3234 Government Gazette 2025:52747.

⁸¹⁴ GN 3234 Government Gazette 2025:52747.

⁸¹⁵ GN 3234 Government Gazette 2025:52747:sec. 5.

of documented foreign nationals with work permits who can be employed in major economic sectors, including agriculture, hospitality, tourism, and construction.⁸¹⁶

4.4 LEGAL AND INSTITUTIONAL FRAMEWORK FOR LABOUR

4.4.1 Labour Relations Act 66 of 1995

The aim of the LRA is to promote economic growth, social justice, labour peace, and the democratisation of the workplace.⁸¹⁷ To achieve these goals, the LRA established a framework for collective bargaining, sectoral engagement, and worker participation in decision-making, as well as the effective and efficient resolution of disputes, while giving effect to both the constitution and South Africa's obligations under international law.⁸¹⁸

The Act preserves the rights of everyone who qualifies as an employee, including vulnerable employees, by guaranteeing that their rights are not arbitrarily taken away.⁸¹⁹ Section 185 of the Act bans employers from arbitrarily dismissing employees, forming the foundation of fair labour practices under Section 1 of the *LRA*. This part will also apply to female migrants. The Act also legalised domestic worker unionisation for the first time, and most migrant women are domestic workers. This opens avenues for their protection.

Research shows that there is a misapprehension that labour laws dealing with unfair dismissal and unfair labour practices do not apply to undocumented migrant workers.⁸²⁰ Section 213 states that an employee is:

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

⁸¹⁶ GN 3234 Government Gazette 2025:52747:sec. 5.

⁸¹⁷ Labour Relations Act 66 of 1995, sec 1.

⁸¹⁸ Labour Relations Act 66 of 1995, sec 1.

⁸¹⁹ Twala 2023:26.

⁸²⁰ Twala 2023:4.

(b) any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have meanings corresponding to that of 'employee'.

Twala explains that Sections 185 and 213 of the *LRA* qualify every person (documented and undocumented migrants, too) as an employee having a right not to be subjected to unfair labour practices. In *National Education, Health and Allied Workers Union v University of Cape Town and Others*,⁸²¹ The Court held that the wording "everyone" should be interpreted broadly, even to include people who do not qualify as employees in terms of the law.⁸²² Thus, migrant women working in South Africa also fall under this category and are subject to protection. Undocumented and documented migrants engaged in employment can have recourse and protection under section 185 of the *LRA*.⁸²³ This study, in a bid to show the law that protects migrant women, submits the view that it does not encourage illegal employment. Still, instead, it is against the exploitation of undocumented migrants, where, for instance, their document status puts them at a disadvantage.

4.4.2 Basic Conditions of Employment Act 75 of 1997

The purpose of the *BCEA* is to give effect to the right to fair labour practices referred to in section 23(1) of the *Constitution* by establishing and making provisions for regulating basic conditions of employment.⁸²⁴ Thus, the Republic is complying with its obligations as a member state of the International Labour Organisation and providing for matters connected.

The Act sets legal minimum working conditions for all employees in South Africa. It covers the number of working hours, overtime, leave, and termination of contracts.⁸²⁵ The *BCEA* was expanded to include domestic workers, particularly migrant women. Nevertheless, it is still challenging to enforce these rules. Many domestic workers, including many foreigners, are still subject to conditions that do not comply with legal

⁸²¹ *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) par 33.

⁸²² *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) par 33.

⁸²³ Twala 2023:4.

⁸²⁴ *Basic Conditions of Employment Act* 75 of 1997.

⁸²⁵ Twala 2023:30.

requirements, such as minimum wages and hours worked, as stated by Skinner.⁸²⁶ The problem is that the legislative framework is at odds with how it is being implemented.

There is little information to conclude whether the law guarantees access to non-discriminatory, accessible, affordable and acceptable services. The law is also silent on whether it provides education or information on the primary conditions of employment to women and other vulnerable groups, like women migrant workers. The law contains provisions that protect women from vulnerability linked to their gender. The Act provides maternity leave, protection of employees before and after birth and family responsibility.⁸²⁷ The Act also sets the minimum age, which is a relief to domestic workers, many of whom are foreigners.

Whilst the Act guarantees procedures for disputes, it is not clear if they are sufficient for women migrants who face intersecting forms of discrimination. The Act also does not contain provisions for gender-disaggregated data. The collection of gender-disaggregated data will help monitor the situation of women. This Act partly meets international standards. A review of the law and inclusion of provisions for effective and accessible remedies, in other words, must be evident in providing free legal aid to women migrants and include provisions for monitoring the situation, especially for women migrant workers.

4.4.3 Employment Equity Act 55 of 1998

The *Employment Equity Act* is another important law that bans workplace discrimination and encourages fair practices. However, it has little effect on women migrant workers. Women migrant workers' experiences are not often covered by existing equality laws such as the *Employment Equity Act* because migrant women often face discrimination in recruitment and employment, according to Crush and Ramachandran. This is one of the areas where women have reportedly faced discrimination. Research also shows that migrant women who work as domestic workers or have disabilities have limited legal protection, making them some of the world's most vulnerable and exploited workers. As a result, they often become

⁸²⁶ Skinner 2014:150-163.

⁸²⁷ BCEA:ch. 25, 26, 27.

irregular migrants working in low-skilled jobs. Most find employment in informal, domestic, and agricultural sectors. When it comes to migrant workers, the Employment Equity Act does not explicitly address factors like gender, immigrant status, or race that may be linked to this discrimination.

4.4.4 The Occupational Safety and Health Act 85 of 1993

The *Occupational Safety and Health Act*⁸²⁸ provides for the safety and health of persons at work and in connection with the use of plants and machinery. It further protects individuals other than those at work from hazards arising out of or in connection with the activities of those at work.⁸²⁹ The primary objective of the Act can be described as a proactive effort by the government to prevent and mitigate work-related injuries and illnesses. The Act governs the health and safety of South Africa's diverse industry. It regulates and controls health and safety in all organisations, from typical office environments to more hazardous environments, such as industrial plants and construction sites. The Act establishes an Occupational Health and Safety Advisory Council and provides for related matters.⁸³⁰

Important to note is that women migrant workers face additional health and safety risks when working in sectors like agriculture and construction. There is evidence of forced sex on South African farms as an issue for foreign women, and other studies on women migrant domestic workers also indicated high rates of sexual violence and abuse.⁸³¹

4.5 ANALYSIS OF SOUTH AFRICAN MIGRATION AND LABOUR LAWS AGAINST INTERNATIONAL AND REGIONAL LAW

As per Crenshaw's theory of intersectionality, women migrants face multiple layers of discrimination, which include gender, race, ethnicity and social origin, and this makes them vulnerable to rights violations in the labour market. A recap of Section 2.3.4 showed that women migrant workers in the domestic and farming sectors are

⁸²⁸ *Occupational Safety and Health Act*.

⁸²⁹ *Occupational Safety and Health Act*.

⁸³⁰ *Occupational Safety and Health Act*:sec. 2.

⁸³¹ Farley 2019:8.

subjected to long working hours, limited rest time, low wages, and no contracts. If they are required to sign contracts, these contracts often contain unclear job descriptions. Furthermore, women migrant workers are physically, emotionally and sexually abused. Women migrants who engage in sex work are sexually abused and face barriers to accessing healthcare due to stigma. The following rights are infringed, and these include the right to equality, the right to human dignity, the right to freedom and security of the person, the right to access healthcare and social security and the right to a clean and safe environment. I analyse South Africa's migration and labour laws to establish whether or not these laws meet international standards in the protection of women migrant workers' rights. I use the violations suffered by women migrants not only as sub-themes but also as the basis of my analysis of South African migration and labour law against international law.

4.5.1 Right to Equality and Non-discrimination

The right to equality and non-discrimination in the protection of women migrant workers is protected in international and regional laws. The ICCPR and ICESCR require states to guarantee rights without discrimination based on sex, nationality or other status.⁸³² CEDAW General Recommendation No. 26 explicitly addresses the situation of women migrant workers by urging states to recognise the heightened vulnerabilities they encounter, such as discrimination, exploitation and violence.⁸³³ CEDAW states that the adoption of substantive equality is essential for achieving equality for women migrant workers. This is vital for this study as women migrant workers are exposed to multiple layers of discrimination, exploitation and violence, hence the need to make use of a gender responsive framework to eliminate discrimination against women migrant workers. Article 1 of the ICPRMW recognises that migrant workers and their families face a range of challenges, including discrimination and exploitation. It sets out fair working conditions.⁸³⁴ The ICPRMW prohibit discrimination based on sex, race, nationality, or other status. Although South

⁸³² ICESCR 1966:art 3; ICCPR 1966:art 2.

⁸³³ CEDAW General recommendation no.26 on Women Migrant Workers 2008:par. 11-13.

⁸³⁴ ICPRMW:art. 7,25 & 26.

Africa has not yet ratified the ICPRMW, it remains a key international instrument that guides migration laws.⁸³⁵

The regional instruments also reflect international statutes regarding equality and discrimination. In Articles 2 and 3, the African Charter states that all forms of discrimination against women must be eliminated for their rights to be protected.⁸³⁶ The Maputo Protocol echoes the same sentiments as the African Charter. It goes a step further, encouraging states to combat all forms of discrimination by drafting and implementing appropriate legislative measures. In fact, the ACHPR and Maputo Protocol favour a substantive equality approach in order to ensure that the rights of women migrant workers are protected.⁸³⁷ The SADC Protocol on Gender and Development, in its preamble, mandates that nations work to abolish discrimination against women in all spheres of society. The SADC (LMAP) 2020-2025 further emphasises the creation of rights-based, gender-sensitive national labour migration policies. These policies aim to address the specific challenges faced by women migrant workers, such as discrimination. This is also confirmed in Article 7 of the SADC Protocol on Employment and Labour, which prohibits discrimination against women.

South Africa's Constitution is very clear and states that everyone is equal before the law and cannot be discriminated against. Unfair discrimination is when a person is discriminated against based on gender, race, ethnicity and social origin. The South African *Constitution* adopts a substantive equality approach, but this is not reflected in its immigration laws.

The discussion in Section 4.3.2 reveals that the Immigration Act's primary role is administrative, governing the entry, stay, exit, and issuance of various types of permits in South Africa.⁸³⁸ The *Immigration Act* or its amendments does not contain clauses/provisions safeguarding the right to equality and non-discrimination for women migrant workers, who face multiple intersecting forms of discrimination on the grounds of gender, race, social origin and migration status. Failure to include a substantive equality clause in the *Immigration Act* or its amendments leaves women migrant workers exposed to structural and gender specific vulnerabilities. From the

⁸³⁵ ICPRMW:art. 7,25.

⁸³⁶ African Charter 1986:art 18(c)

⁸³⁷ ACHPR:art. 2; Maputo Protocol:art. 2.

⁸³⁸ *Immigration Act* (amendments of 2004, 2007 & 2014).

discussion in section 2.4.2, for gender equality to be achieved, substantive equality is one of the critical constitutional values which must be present.

Are there any countries which have taken into consideration or incorporated gender and intersecting vulnerabilities in their immigration policies? A closer look at Canada reveals that a gender-based analysis (GBA+) lens was applied, and this process involved factoring in gender, diversity, and intersectionality in its immigration, citizenship, and refugee policies.⁸³⁹ Sweden followed suit by integrating a gender equality goal in its migration and asylum policies.⁸⁴⁰ The Philippines explicitly protects women domestic workers through bilateral agreements.⁸⁴¹ These bilateral agreements set standards for minimum wage, rest days, and health insurance, and specifically prohibit employers from holding workers' passports.⁸⁴² Failure to include a substantive equality clause in South Africa's immigration laws shows that the laws are neither gender sensitive nor able to protect women migrant workers' rights better. Hence, there is a need for a gender-responsive approach to correct the defect in the law.

The *Employment Equity Act* promotes equity in the workplace. The challenge with the Act is that although it focuses on specific groups, which include black people, women and persons with disabilities⁸⁴³ it fails to acknowledge women migrants and the multiple layers of vulnerabilities they encounter. The *Labour Relations Act* and the *Basic Conditions of Employment Act* are gender-neutral and apply to all employees. Important to note is that they do not protect undocumented or informal sector workers, where most women migrant workers are concentrated.

The formal equality approach adopted by the South African migration and labour laws fails to address the structural and gendered vulnerabilities faced by women migrants, thereby perpetuating *de facto* inequality and undermining the state's international and regional obligations. This study therefore argues in favour of a gender-responsive

⁸³⁹ Government of Canada "Departmental Plan 2023–2024: Gender-Based Analysis Plus (GBA+). Immigration, Refugees and Citizenship", <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/departamental-plan-2023-2024/gender-based-analysis-plus.html> (accessed on 18 July 2025).

⁸⁴⁰ Swedish Migration Agency "Sustainability and Human Rights", <https://www.migrationsverket.se/en/about-the-swedish-migration-agency/this-is-what-the-swedish-migration-agency-does/sustainability-and-human-rights.html> (accessed on 18 July 2025).

⁸⁴¹ Republic of the Philippines *Republic Act No. 10022: An Act Amending the Migrant Workers and Overseas Filipinos Act of 1995 (RA 8042)* (2010) Official Gazette <https://www.officialgazette.gov.ph/2010/03/08/republic-act-no-10022/> (accessed on 18 July 2025).

⁸⁴² *Act Amending the Migrant Workers and Overseas Filipinos Act*.

⁸⁴³ *Employment Equity Act*.

framework which addresses the structural and gendered vulnerabilities faced by women migrants.

4.5.2 Right to Human Dignity and Freedom of the Person

CEDAW General Recommendation No. 35 clearly states that violence against women constitutes a violation of their fundamental rights to human dignity and freedom of the person.⁸⁴⁴ CEDAW defines discrimination to include gender-based violence. Sexual violence is also another form of gender based violence, as evidenced by the CEDAW Committee. Sexual violence is framed as gender based violence, which infringes on the human rights and dignity of women migrant workers.⁸⁴⁵

CEDAW, through General Recommendation No.26, acknowledges the heightened risk of violence faced by women migrant workers, especially in isolated or informal sectors such as the domestic or farm sectors.⁸⁴⁶ International and regional human rights instruments oblige states to prevent, investigate and punish acts of gender-based violence. It urges states to adopt gender sensitive frameworks to protect women migrants from abuse.⁸⁴⁷

The ILO Convention explicitly acknowledges in its preamble that violence and harassment at work constitute human rights violations or abuses and are not compatible with fair working conditions, and affect women in precarious employment.⁸⁴⁸ The Convention encourages member states to adopt an integrated gender-responsive approach per national laws to prevent and eliminate violence and harassment at work.⁸⁴⁹ The Global Compact for Safe, Orderly and Regular Migration (2018) urges states to incorporate a gender perspective in all migration policies, with specific measures to protect women migrants from sexual violence and exploitation.

⁸⁴⁴ CEDAW Committee, General Recommendation No.35 on Gender-Based Violence against Women, updating General Recommendation No. 19, UN Doc CEDAW/C/GC/35 (14 July 2017):par. 1, 6, 21.

⁸⁴⁵ CEDAW Committee, General Recommendation No.26 on Women Migrant Workers, CEDAW/C/2009/WP.1/R (5 December 2008):par. 13 & 26(a).

⁸⁴⁶ CEDAW General Recommendation No. 26 on Women Migrant Workers:par. 11–12.

⁸⁴⁷ CEDAW General Recommendation No. 26 on Women Migrant Workers:par. 11–12.

⁸⁴⁸ ILO Convention Concerning the Elimination of Violence and Harassment in the World of Work (C190), 2019:art. 1–2.(entry into force 25 June 2021).

⁸⁴⁹ ILO Convention Concerning the Elimination of Violence and Harassment in the World of Work:art. 4(2).

The African Charter prohibits gender-based and sexual violence. The African Charter guarantees the right to life and physical integrity, stating that every person shall be entitled to respect for life and the integrity of the person, including protection from all forms of violence.⁸⁵⁰ The Charter protects the dignity inherent in human beings and, most importantly, the right to be free from cruel, inhuman or degrading treatment.⁸⁵¹ The Charter further requires states to eliminate discrimination against women and to ensure the protection of their rights as stipulated in international declarations and conventions.⁸⁵² Although the Charter does not define GBV in any of its provisions, the African Commission on Human and Peoples' Rights interpreted these provisions in its General Comments and Concluding Observations to include a state's obligation to prevent and punish sexual and gender-based violence.⁸⁵³

The Maputo Protocol is specific to GBV and sexual violence. It is the first binding African legal instrument that explicitly defines, prohibits, and obliges states to combat GBV and sexual violence, rather than leaving it open to interpretation.⁸⁵⁴ The state obliges states to enact laws prohibiting all forms of violence against women, including sexual violence, in both public and private spaces.⁸⁵⁵ The Protocol further calls on states to integrate a gender perspective into their immigration laws and policies to protect migrant women. The Protocol further calls on states to investigate, prosecute and punish acts of sexual and gender-based violence. This shows that the drafters of the Maputo Protocol were aware that migrant women were vulnerable and could fall victim to GBV.⁸⁵⁶

The African Union Migration Policy (2018) is a non-binding but soft law recognising that gender is cross-cutting.⁸⁵⁷ It urges member states to protect migrant women from gender-based violence, especially during migration at borders and in employment.

⁸⁵⁰ African Charter:art. 4.

⁸⁵¹ African Charter:art. 5.

⁸⁵² African Charter:art. 18(3).

⁸⁵³ African Commission on Human and Peoples' Rights, General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) (2017) paras 57-61 & African Commission on Human and Peoples' Rights, Guidelines on Combating Sexual Violence and its Consequences in Africa ("Niamey Guidelines"), adopted 5 November 2017.p14-17.

⁸⁵⁴ Maputo Protocol:art art 4–6, 11.

⁸⁵⁵ Maputo Protocol:art. 4.

⁸⁵⁶ Maputo Protocol:art. 8(f).

⁸⁵⁷ African Union Commission, Revised Migration Policy Framework for Africa and Plan of Action (2018–2030), at 34–35.

Furthermore, it is obliged to ensure access to psychosocial, legal and medical support for victims of GBV.

The SADC Protocol on Gender and Development acknowledges the distinct manifestations of gender-based violence encountered by women migrant workers.⁸⁵⁸

This includes instances of sexual violence. States are urged to adopt measures which prevent and address gender-based violence targeting women migrant workers.⁸⁵⁹

According to a 2021 report by Heard, women migrants, particularly those in domestic work, face high levels of GBV due to intersecting vulnerabilities. Women migrant workers in South Africa are not only exposed to labour market discrimination and exploitation but are also victims of sexual violence, as reported in Chapter 2. As evidenced in Chapter 2, it is clear that women migrant workers were afraid to report their abusers/perpetrators, as this could lead them to lose their jobs.

In South Africa, the *Constitution* guarantees the right to freedom and security of the person, including the right to be free from all forms of violence.⁸⁶⁰ The *Immigration Act* and the *Refugees Act* contain no explicit provisions addressing GBV against women migrants.⁸⁶¹ Whilst it is commendable that South Africa has a constitutional and statutory framework against gender-based violence. There are gaps in the *Immigration Act*, as it does not include any provisions or clauses prohibiting GBV.

The *Employment Equity Act* (EEA) includes harassment as a form of unfair discrimination.⁸⁶² However, it does not provide specific protections for migrant workers, and enforcement remains weak in domestic, farm and informal work sectors.⁸⁶³

The *Labour Relations Act* focuses mainly on fair labour practices, specifically the right to freedom of association and protection against unfair dismissal.⁸⁶⁴ It does not mention gender-based violence or sexual harassment protections. The *Basic Conditions of Employment Act*⁸⁶⁵ sets minimum working conditions but does not directly address GBV or sexual harassment. The Code of Good Practice on the Handling of Sexual Harassment Cases (2005), issued under the EEA, is significant in

⁸⁵⁸ SADC Protocol on Gender and Development 2008:sec. 23(2).

⁸⁵⁹ SADC Protocol on Gender and Development:art. 20–25.

⁸⁶⁰ *Constitution*:sec. 12(1)(c).

⁸⁶¹ Bradley 2024.

⁸⁶² *Employment Equity Act*:sec 6(3).

⁸⁶³ Olivier & Govindjee 2018:317.

⁸⁶⁴ *Labour Relations Act*.

⁸⁶⁵ *Basic Conditions of Employment Act*.

providing a framework and guidelines for handling sexual harassment in the workplace. Important to mention that it does not apply directly to women migrant workers in the informal sector or those without formal contracts.⁸⁶⁶

South African labour laws do not address the gendered vulnerabilities of women migrant workers as per the standards under the CEDAW General Recommendations⁸⁶⁷ and the ICPRMW. South Africa has not ratified the ICPRMW or ILO Convention No. 190 on Violence and Harassment (2019). The ILO Convention 190 on Violence and Harassment (2019) obliges states to protect all workers, including migrants, against violence and harassment in the workplace. The lack of ILO Convention No. 190 and ICPRMW ratification further shows a gap between international standards and domestic law.

4.5.3 Right to Fair Working Conditions

International and regional laws recognise the right to just and favourable working conditions and state the basic rules. The ILO Migration for Employment Convention emphasises that migrant workers should not be discriminated against in terms of pay.⁸⁶⁸ The Migrant Workers Convention goes a bit further, directly addressing migrant labour and working conditions to eliminate exploitation, forced labour, and discrimination. It even sets out standards for their treatment, extending cover to encompass wages, recruitment practices, and working conditions.⁸⁶⁹ As was discussed earlier in Chapter 3, Section 3.3.1, these two ILO Conventions were adopted when men were more dominant in the migration streams. The Domestic Workers Convention is more specific and focuses explicitly on the importance of domestic workers' rights, where the majority of workers are women migrants. This Convention sets global standards by promoting decent working conditions similar to those available to other workers in the same country.⁸⁷⁰ These include weekly day-offs, limits to hours of work, minimum wage coverage, overtime compensation and transparent information on the terms and conditions of employment.⁸⁷¹ Article 7 of the

⁸⁶⁶ Benjamin 2015:304.

⁸⁶⁷ CEDAW General Recommendation No.19: 2008:par. 26, 35.

⁸⁶⁸ ILO Migration for Employment Convention 1949:art. 6.

⁸⁶⁹ Migrant Workers Convention 1975:art. 1 & 9-12.

⁸⁷⁰ Domestic Workers Convention 2011:art. 3, 5, 6.

⁸⁷¹ Domestic Workers Convention 2011:art. 3, 5, 6, 10, 11 & 13.

ICESCR and Articles 25-27 of the ICPRMW guarantee equal treatment with nationals on remuneration, hours of work, rest and safety.

CEDAW protects the right to work as an inalienable right for women and ensures equal remuneration and benefits.⁸⁷² CEDAW General Recommendation 26 on Women Migrant Workers 2008 urges states to recognise the vulnerabilities that women migrant workers face so that they ensure equal treatment, fair wages and protection against abuse and exploitation in all sectors of employment.⁸⁷³ This General Recommendation is not generalised but specific to women migrants due to the multiple layers of discrimination that they encounter.

The Maputo Protocol acknowledges the exploitation of women and demands preventive and punitive actions by states.⁸⁷⁴ The SADC Protocol on Employment and Labour (2014) and the SADC Labour Migration Policy Framework (2020-2030) call on member states to ensure migrant workers receive equal and decent working conditions.

South Africa's *Immigration Act* 2002 does not contain any provisions specifically detailing fair work conditions. The labour laws *LRA*, *BCEA* and *Occupational Health and Safety* apply to all workers irrespective of nationality. Unfortunately, enforcement in practice is weak or non-existent in informal sectors such as domestic work and agriculture, where women migrant workers are concentrated and exploitative practices such as long working hours, underpayment and lack of contracts are mostly reported. Women migrant workers do not report these cases as they fear losing their jobs or being deported.

While South Africa's labour laws recognise basic rights related to working conditions, they fail to include gender-responsive standards mandated by CEDAW. As a result, labour and migration laws do not adequately secure fair working conditions for women.

⁸⁷² CEDAW:art. 11(1).

⁸⁷³ CEDAW General Recommendation No 26 & CEDAW General Recommendation No. 35.

⁸⁷⁴ Maputo Protocol:art. 4.

4.5.4 Right to Social Security and Healthcare

Denial of access to health and social security affects the right to equality and dignity. The right to access social security for women migrant workers is protected under international law. The Migration for Employment Convention stipulates that migrant workers should be provided with social security and medical care.⁸⁷⁵ The Migrant Workers Convention weighs in by explicitly setting out standards for social security and access to healthcare for migrant workers.⁸⁷⁶ A migrant worker can claim social security in situations of illness, injury, maternity, disability and old age.⁸⁷⁷ The Migrant Workers Convention goes on to guarantee urgent medical care to all migrant workers and their family members. The Domestic Workers Convention also acknowledges and makes provision for social security.⁸⁷⁸ CEDAW General Recommendation No. 26 requires states to ensure that migrant women have access to healthcare and social services. This is especially so in employment contexts where women are vulnerable to abuse and exploitation.⁸⁷⁹ The right to social security is recognised in the ICESCR, ICPRMW and Maputo Protocol.⁸⁸⁰ These instruments explicitly instruct states to ensure that all individuals, including migrants, enjoy an adequate standard of health and access to social security without discrimination. The SADC Protocol on Gender and Development recognises the importance of social security and healthcare for women and emphasises that women migrant workers face multiple layers of discrimination. The state is encouraged to implement measures that ensure all women have access.⁸⁸¹

South Africa's *Constitution*⁸⁸² guarantees the right to healthcare and social security to everyone residing in South Africa. It is important to note that the rights are, however, limited based on migration status. In the case of *Khosa v Minister of Social Development*, the Court held that it would be unconstitutional to exclude permanent residents from social grants. The *Social Assistance Act* limits benefits to South African citizens and permanent residents, excluding temporary and undocumented

⁸⁷⁵ ILO Migration for Employment Convention 1949:art. 9.

⁸⁷⁶ ILO Migrant Workers Convention 1975:art. 1, 9-12, 14.

⁸⁷⁷ ILO Migrant Workers Convention 1975:art. 27.

⁸⁷⁸ ILO Domestic Workers Convention 2011.

⁸⁷⁹ CEDAW Committee General Recommendation No. 26 on Women Migrant Workers 2008:par. 206.

⁸⁸⁰ ICESCR 1966:art. 9; ICPRMW 1966:art. 25-27; Maputo Protocol 2003:art. 13.

⁸⁸¹ SADC Protocol on Gender and Development 2008:art. 23(2).

⁸⁸² *Constitution* 1996:sec. 27 1 (a) & (c).

migrants.⁸⁸³ Most of whom are women migrant workers. The *National Health Act* 61 of 2003 provides for access to basic healthcare services for all, but in practice, institutional discrimination and administrative barriers restrict undocumented migrants. In sectors such as domestic work, women migrants are often excluded from formal occupational health coverage as a result of informal employment arrangements. This was illustrated in the case *Mahlangu* case already discussed in section 2.4.2.

The discussion in section 2.3.5.2 showed that women migrant workers who were injured at work were not allowed to report that they had been injured at work. This indicates that, even though the case of *Mahlangu* was a groundbreaking ruling that extended compensation rights to domestic workers, other groups of migrant workers continued to suffer in silence and not benefit from COIDA. Women migrant workers who engage in sex work to supplement their low wages are not able to access healthcare services due to the prevailing stigma associated with sex work.

4.6 CONCLUSION

In summary, this chapter has shown that despite South Africa's array of constitutional, migration, and labour laws that afford certain protections to women migrant workers, these measures are insufficient. Even though the Constitution outlines robust guarantees for equality, dignity, and fair labour practices, the *Immigration Act* and associated policies remain limiting, largely neutral in terms of gender, and neglectful of the unique vulnerabilities faced by women. Labour laws do provide minimum protections, but enforcement is weak in the informal sectors, where a significant number of women migrants work. Importantly, South Africa's migration laws and policies continue to reflect exclusionary practices rooted in the colonial and apartheid periods, exemplified by the *Native Land Act*, which established control and dispossession. This historical impact is evident in current strategies that emphasise control and skills-based entry rather than inclusive safeguards. When measured against international and regional criteria, South Africa's legal structure is inadequate in providing substantive equality, sufficient remedies, and protections that effectively respond to gender concerns. Therefore, in addressing the research question, it is clear

⁸⁸³ *Social Assistance Act* 59/1992.

that while South Africa has laws in place, they do not adequately protect the rights of women migrant workers, highlighting the urgent need for the GLI, which can aid laws in becoming more gender responsive and better able to protect the rights of women migrant workers in South Africa.

CHAPTER 5: METHODOLOGICAL TOOL TO MEASURE GENDER RESPONSIVENESS IN LEGISLATION

5.1 INTRODUCTION

Chapter 4 discussed the South African laws and policies. This chapter introduces and thoroughly discusses the methodological tool used to assess gender responsiveness in legislation, the Gender Legislative Index (GLI). The primary objective is to provide a comprehensive understanding of the GLI, its underlying framework, and its practical application in evaluating laws for their gender-sensitive qualities. The chapter begins by exploring the foundational aspects of the GLI, examining its structure and elucidating how it grades laws on a spectrum ranging from gender-regressive to gender-responsive. A unique feature of the GLI is its capacity to differentiate between a law's stated intention and its likely effect, which will be a central point of discussion, highlighting how these two aspects can diverge and impact the actual gender outcomes of legislation. Following this, the chapter provides a detailed analysis of the GLI's criteria, which comprise seven key questions used to evaluate laws and policies. To substantiate the GLI's credibility and viability as an assessment tool, examples of its implementation in various countries, including Australia, Indonesia, the Philippines, and Sri Lanka, will be presented. The discussion will also address the inherent challenges and successes encountered during the GLI's application, providing a balanced perspective on its utility. A comparative analysis will then be undertaken, contrasting the GLI with other existing tools to underscore why the GLI stands out as the most suitable instrument for evaluating laws for gender responsiveness.

Furthermore, the chapter will address a critical aspect often overlooked in legislative assessment: the monitoring of implementation. While the GLI excels at evaluating the text of laws, it does not inherently monitor their post-enactment implementation. This section will discuss mechanisms and bodies, both international and national, that can effectively monitor these laws to enhance accountability and transparency. Finally, the chapter will position the GLI within the broader global development agenda, specifically examining its crucial role in achieving the Sustainable Development Goals (SDGs) 2030 Agenda and the African Union Agenda 2063. The chapter concludes by applying the GLI to the South African legislative framework, assessing the gender

responsiveness of its migration and labour laws, and discussing their capacity to address the vulnerabilities faced by women migrant workers.

The next section therefore turns to the conceptual foundations of the Gender Legislative Index, outlining its historical development, structure and underlying assumptions, and then demonstrating how it operates as a tool for assessing gender responsiveness in law.

5.2 GENDER LEGISLATIVE INDEX

After introducing the purpose of the GLI and its relevance to gender-responsive law-making, this section sets out the origins and conceptual basis of the Index, establishing the framework for subsequent analysis.

5.2.1 Background of the Gender Legislative Index

A Gender Legislative Index (GLI) is a tool used to evaluate and score legislation by grading it from gender regressive to gender-responsive when set against global benchmarks from international law, such as CEDAW.⁸⁸⁴ The GLI builds on the premise that countries that have ratified CEDAW have committed to ensuring women thoroughly enjoy their rights. Furthermore, it is based on the idea that gender should be considered at the outset of the drafting process in all areas of law. Warren, however, notes that while this might be the general view in areas of law such as domestic violence and reproductive law, a gender lens is not often used in areas of law such as bankruptcy or taxation, which are often erroneously considered gender-neutral.⁸⁸⁵ When laws are appropriately drafted with gender incorporated, this enhances the protection of women's rights. GLI is designed to help legislators, activists, and advocates develop a body of law that works better for women. It aims to get the law right in the first place rather than invest in poor or average laws that later need amending.⁸⁸⁶ At a higher level, Vijayarasa argues that it seeks to reveal how

⁸⁸⁴ Vijayarasa 2019:275.

⁸⁸⁵ Warren 2002:23.

⁸⁸⁶ Vijayarasa 2019:276.

domestic law, enacted and evaluated, has addressed the underlying gendered inequalities that women face.⁸⁸⁷

As seen in Chapter 2, women and other gender minorities have historically faced systemic discrimination and unequal treatment under the law. By considering gender, laws can help rectify these long-standing disparities. A failure to consider gender means laws may unintentionally perpetuate or exacerbate gender inequalities. For example, policies that appear neutral on the surface may have disproportionately negative impacts on women. The GLI is comprehensive and not only measures the gender responsiveness of laws. It also assesses the intention of legislation and policies against their likely effect.

To understand how these conceptual elements are operationalised in practice, the following subsection unpacks the GLI's framework and the two-scale assessment structure that underpins the Index.

5.2.2 Framework for a Gender Legislative Index

Building on the background above, this section explains the technical design of the GLI, detailing the evaluative scales through which intention and likely effect are assessed.

The GLI establishes two scales by which an evaluator assesses laws. The first scale is from gender regressive to gender responsive.⁸⁸⁸ The GLI considers the law's intention and likely effect necessary. Therefore, the GLI measures the gender responsiveness of laws based on their intended effect and likely outcome.⁸⁸⁹ The first scale evaluates the law for its intention to ascertain where it fits on the scale. The scale will also evaluate the law for its likely effect to ascertain its point on the scale. This topic is further discussed in the next section.

The second scale establishes an overall assessment of legislation ranging from “[c]omplete disregard for international standards” to “[m]eeting international

⁸⁸⁷ Vijayarasa 2022:68.

⁸⁸⁸ Vijayarasa 2019:275.

⁸⁸⁹ Vijayarasa 2019:278.

standards.”⁸⁹⁰ Where the law's intention is gender responsive, and the likely effect is also gender responsive, then that law meets international standards. Where, however, the intention of the law is gender responsive, but its likely effect will be gender regressive, the result is that the law will be in complete disregard of international law. The two scales of assessments will be discussed below.

To anchor these scales within the broader gender-equality discourse, the next section clarifies the distinctions among gender-responsive, gender-neutral, gender-blind and gender-regressive legislation, which form the interpretive backbone of the GLI's scoring process.

Gender-responsive legislation recognises and addresses individuals' needs, challenges, and opportunities based on gender norms, roles, and relations.⁸⁹¹ It involves understanding how gender influences people's experiences and outcomes in various contexts, such as education, health, employment, and social services, and taking deliberate actions to ensure that policies, programmes, and initiatives are equitable and effective for all genders.⁸⁹²

Gender-responsive laws and policies address gender based barriers, respect gender differences and enable structures, systems, and methodologies to be sensitive to gender to close gaps and eradicate gender-based discrimination. In financial law, a regulation that simplifies banking practices to reach more women, such as reducing the minimum deposit and other requirements for opening a bank account for female applicants, would be considered gender-responsive.⁸⁹³ In some contexts, this type of legislation would be classified as affirmative action or positive discrimination. Reducing the minimum deposit would enable more women to open bank accounts. Furthermore, this would help provide financial independence, and a lower minimum is required because women, on average, earn less than men. In health, a law that guarantees all women, including married and unmarried individuals, adolescents, and adult women,

⁸⁹⁰ Vijayarasa 2019:278.

⁸⁹¹ INEE “Gender responsive”, <https://inee.org/eie-glossary/gender-responsive> (accessed on 21 October 2024).

⁸⁹² INEE “Gender responsive”, <https://inee.org/eie-glossary/gender-responsive> (accessed on 21 October 2024)

⁸⁹³ Beijing Declaration and Platform of Action, Adopted at the Fourth World Conference on Women 1995 (UN Doc. A/CONF. 177/20 (1995) and A/CONF. 177/20/Add. 1 (1995)) 63(c).

access to age-appropriate, scientifically evidence-based, comprehensive family planning services and information would be gender-responsive.⁸⁹⁴

Legislation which is gender-responsive in the context of women migrant workers would aim to recognise and address the unique challenges and vulnerabilities they face due to their gender and origin. In Chapter Two, I discussed how women migrant workers are often at higher risk of exploitation, harassment, and abuse. Gender-responsive migration laws and policies would include provisions that explicitly address these vulnerabilities faced by women migrant workers by ensuring that there are well-established, effective legal redress systems that are easily accessible and provide safer working conditions.

A gender-responsive framework recognises that universal human rights principles must be translated into context-specific protections to uphold the rights of vulnerable groups. It actively confronts gender inequalities and discrimination.⁸⁹⁵ They make legislative systems more responsive to explicit and implicit gender issues, including violence and abuse disproportionately affecting women and girls.⁸⁹⁶ Vijayarasa affirms that gender-responsive legislation enables greater accountability in law and policy implementation, considering the specific needs of different sexes and different gendered perspectives on pivotal social, economic, and political issues.⁸⁹⁷

Vijayarasa argues that a gender-responsive framework is essential to ensure the adequate protection of the rights of women migrant workers.⁸⁹⁸ Consequently, scholars emphasise the need to move beyond gender neutrality, which embodies universal human rights principles and adopt a targeted, contextualised, gender-responsive approach.⁸⁹⁹ For it to be effective, gender-responsive law-making must include measures to secure and monitor the legislation's implementation, including the allocation of adequate resources and gender-responsive budgeting. The following

⁸⁹⁴ GLI “Scoring legislation and ranking countries”, <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

⁸⁹⁵ Mandhane 2018:344-360.

⁸⁹⁶ UN Women “From evidence to action: Tackling gender-based violence against migrant women and girls”, <https://www.unwomen.org/en/digital-library/publications/2021/10/policy-brief-from-evidence-to-action-tackling-gbv-against-migrant-women-and-girls> (accessed on 14 July 2025).

⁸⁹⁷ Vijayarasa 2019:274-279.

⁸⁹⁸ Vijayarasa 2019:274-279.

⁸⁹⁹ Vijayarasa 2019; Götzmann & Bainton 2021:171.

section defines gender-neutral legislation and explains its differences from gender-responsive legislation.

Gender-neutral legislation makes no distinctions based on gender or sex.⁹⁰⁰ This was clearly illustrated in 1948, when the UN General Assembly proclaimed the Universal Declaration of Human Rights in gender-neutral terms, underlining the equal rights of men and women and the prohibition of discrimination based on sex.⁹⁰¹ The UN Human Rights Commission drafted the Declaration, chaired by Eleanor Roosevelt.⁹⁰² This was a good start in theory, and it was belatedly followed by the two International Covenants of 1966.⁹⁰³ General human rights treaties prohibit discrimination on the grounds of sex and obligate state parties to ensure equal rights for men and women.⁹⁰⁴ But in practice, UN member states had to admit the obvious in 1979, that “extensive discrimination against women continued to exist”, hence the need for a gender-specific convention, culminating in the adoption of CEDAW.⁹⁰⁵

Stereotyped roles for “superior” men and “inferior” women have long been deeply entrenched in the cultural and religious traditions of many societies.⁹⁰⁶ Thus, while CEDAW is one of the most widely accepted of the nine core human rights treaties at the UN level, it is also riddled with the most far-reaching and impermissible reservations by states. These states fear the practical realisation of women’s rights and the creation of substantive equality with men because that inevitably requires “a change in the traditional role of men as well as the role of women in society and the family”, as the preamble of CEDAW expressly and rightly states.⁹⁰⁷

Scholars contend that human rights treaties are framed in such a way that they often utilise gender-neutral language to be all-inclusive. Still, they overlook the distinct vulnerabilities and discrimination experienced by female migrants.⁹⁰⁸ For instance, the everyday use of the term “migrant worker” masks significant differences in the lived

⁹⁰⁰ Vijayarasa 2019:274-79.

⁹⁰¹ Universal Declaration of Human Rights, 1948. UN General Assembly Resolution 217 A (III).

⁹⁰² Glendon 2001.

⁹⁰³ The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). On December 16th, 1966, the United Nations General Assembly adopted two covenants in its resolution 2200 A (XXI).

⁹⁰⁴ ICCPR:art.2(1), 3 & 26; ICESCR:art. 2(2), 3.

⁹⁰⁵ Preamble of CEDAW.

⁹⁰⁶ Vujadinovic et al. 2023:4.

⁹⁰⁷ Vujadinovic et al. 2023:4.

⁹⁰⁸ Boyd & Grieco 2003.

realities between males and females in the migrant workforce.⁹⁰⁹ Generalised treaties also tend to lack specific mechanisms tailored to prevent the exploitation or abuse of women migrants, who confront risks such as workplace sexual violence, trafficking, and unequal wages.⁹¹⁰ While general human rights frameworks establish important protections, it has been argued that they frequently fail to address the multidimensional challenges encountered specifically by marginalised groups like women migrant workers.⁹¹¹ An amendment of gender neutral migration legislation to include substantive provisions protecting women's rights would provide a gender-responsive perspective on the law.

However, there may be instances where a gender perspective is deemed unnecessary, such as a law amending the definition of a legal term that seems inconsequential from a gender perspective.⁹¹² The adverse effect is that such neutrality may become "gender blind", overlooking situations where gender considerations should have been considered.⁹¹³ Often, the term "gender neutral" has positive connotations.⁹¹⁴ Gender neutrality signifies a commitment to equality and fairness, ensuring that all individuals, regardless of gender, have an equal opportunity. In the area of financial services regulation, a law that guarantees women access to a bank loan without needing the signature of a male counterpart would often be considered gender-neutral for guaranteeing neutral treatment of male and female applicants, countering past practices that tended to require a male relative's signature for a female's application.⁹¹⁵ However, the GLI, discussed in the next section, would not classify such a law as "neutral," as a gender perspective is indeed required.⁹¹⁶ Instead, the law may be classified as gender-blind if it fails to recognise that, despite making the loan requirements the same for men and women, they often face other barriers to accessing credit, including insufficient collateral.⁹¹⁷ Laws should be drafted

⁹⁰⁹ Hune 1991.

⁹¹⁰ Satterthwaite 2005.

⁹¹¹ Chinkin 2019:270.

⁹¹² GLI "Scoring legislation and ranking countries", <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

⁹¹³ Vijayarasa 2019:274-279.

⁹¹⁴ GLI "Scoring legislation and ranking countries", <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

⁹¹⁵ Buttner 1993:59.

⁹¹⁶ GLI "Scoring legislation and ranking countries", <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

⁹¹⁷ GLI "Scoring legislation and ranking countries", <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

to reduce or eliminate these barriers. A law could be classified as gender-responsive if, in addition to treating men and women equally in terms of the signatories required, it created additional pathways for women to more easily access credit despite not having property or collateral in their name.⁹¹⁸

It is essential to recognise that a seemingly gender-neutral law could be gender-blind. For example, the decision to rename a street, district, province, hospital or school may not require a gender perspective; however, if ten main streets in a town were renamed to reflect male national heroes without including a single female national hero, such a law would be considered gender blind.⁹¹⁹

Acknowledging the limitations of gender-neutral and gender-blind laws and policies in effectively safeguarding women's rights is crucial. The absence of gender-specific provisions within these frameworks often leads to disregarding or neglecting the consequences of systemic gender discrimination. This should be a cause for concern and a strong motivation to address these issues.⁹²⁰ There is a close link between gender-blind and gender-neutral legislation.

Gender blind migration laws fail to show the different gendered realities faced by male and female migrants.⁹²¹ Gender-blind legislation must recognise men's and women's distinct needs and experiences.⁹²² For instance, if legislation is enacted to make low-cost public transport available in urban areas while seemingly gender-responsive, such laws could be evaluated as gender-blind in their likely effect if they fail to consider women's specific needs, as reflected in a spate of global studies on women's experiences of unsafe cities.⁹²³ A law would be considered gender-blind if it failed to guarantee access to transportation at relevant hours for women who are informal workers or those doing shift work, ignored the need for street lighting at night near bus

⁹¹⁸ GLI "Scoring legislation and ranking countries", <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

⁹¹⁹ GLI "Scoring legislation and ranking countries", <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

⁹²⁰ Chinkin 2019:270.

⁹²¹ Hune 1991.

⁹²² Peberdy 2008.

⁹²³ ACTIONAID "Safe cities for women and girls", <https://www.actionaidusa.org/work/safe-cities/> (accessed on 3 June 2024).

terminals and other transportation hubs, and lacked penalties for sexual harassment in public spaces.⁹²⁴ The following section discusses gender-regressive legislation.

Gender-regressive legislation directly opposes global women's rights standards.⁹²⁵ Gender-regressive legislation refers to laws and policies that roll back existing rights, protections, or advances towards gender equality. These laws can disproportionately impact women, non-binary individuals, lesbians, gays, bisexual, transsexual and queer or questioning persons, other sexual orientations, gender identities, and expressions that are not explicitly included in the LGBTQI+ acronym, such as pansexual, asexual, non-binary, intersex, and others. The laws further undermine their legal standing, economic opportunities, access to healthcare, and personal freedoms. It overtly ignores gender and entrenches women's inequality across social, financial and political realms.⁹²⁶ Legislation which excludes women migrant workers from accessing social services is an example of gender-regressive legislation as it leaves them vulnerable to exploitation, abuse and human trafficking. Laws that prohibit women's access to safe and legal abortion or criminalise women and their providers are also gender regressive.⁹²⁷ In this context, "their providers" refers to healthcare professionals who offer abortion services. These include doctors, nurses, midwives, and other medical practitioners involved in providing safe and legal abortion care. Laws that criminalise abortion often apply not only to the women seeking abortions but also to these healthcare providers, who can face legal penalties for performing or assisting in the procedure.

These laws often impose significant barriers to accessing abortion services, thereby reversing progress made in reproductive rights. In the case of *Roe v Wade*,⁹²⁸ the Supreme Court of the United States of America, on 22 January 1973, struck down Texas's criminal ban on abortion. It held that the right to abortion is a "fundamental right."⁹²⁹ The Court held that, along with decisions relating to marriage, contraception, education, and family relationships, the decision about whether to continue or end a pregnancy is fundamental to "personal liberty."⁹³⁰ In doing so, the Court recognised

⁹²⁴ Vijayarasa 2019:278.

⁹²⁵ Vijayarasa 2019:274-279.

⁹²⁶ Vijayarasa 2020.

⁹²⁷ Zampas & Gher 2008:249.

⁹²⁸ *Roe v Wade* 410 U.S 113(1973) 155:164.

⁹²⁹ *Roe v Wade*:155, 164.

⁹³⁰ *Roe v Wade*:153.

the great “detriment that the State would impose upon the pregnant woman by denying this choice,” including the health and economic risks of being forced to continue a pregnancy.⁹³¹ *Roe v Wade* had two key parts: First, the Court ruled that, before viability, it is a pregnant person’s decision, not the government’s, whether to continue a pregnancy. Accordingly, the government cannot ban abortion for any reason before viability.⁹³² Second, *Roe v Wade* held that, as with other fundamental rights, restrictions on the right to abortion were subject to the most stringent level of constitutional review, often called “strict scrutiny.” This legal standard required that infringements on the right be narrowly tailored to serve a compelling government interest.⁹³³ Applying a trimester framework, *Roe v Wade* permitted more regulation of abortion as pregnancy advanced, but only when that regulation was evidence-based and consistent with how other similar medical procedures were treated; crucially, under *Roe v Wade*, the government was not permitted to put its thumb on the scale to pressure pregnant people about their decision whether to continue or end a pregnancy.⁹³⁴ The *Roe v Wade* decision made state abortion bans unconstitutional and abortion care legal, more accessible, and safer throughout the country.

Soon after, abortion opponents pressed state and federal lawmakers to enact a wide range of restrictive abortion laws, attempting to reverse, directly or indirectly, *Roe v. Wade*’s guarantee of reproductive freedom. Lawsuits against such restrictions multiplied, with some reaching the Supreme Court. In a devastating decision that will reverberate for generations to come, on 24 June 2022, the United States Supreme Court eliminated the federal constitutional right to abortion in its ruling in *Dobbs v Jackson Women’s Health Organisation*.⁹³⁵ Ignoring almost 50 years of precedent, the ruling overturned *Roe v Wade* and returned regulatory authority over abortion to the states. While critics such as Siegel, Ziegler, Murray and Shaw argue that the ruling signifies the removal of a previously recognised constitutional right,⁹³⁶ it may more accurately be characterised as a restriction or withdrawal of precedent, a power the Court has exercised before and which aligns with constitutional doctrine.

⁹³¹ *Roe v Wade*:153.

⁹³² *Roe v Wade*:163.

⁹³³ *Roe v Wade*:164-165.

⁹³⁴ *Roe v Wade*:164-165.

⁹³⁵ *Dobbs v Jackson Women’s Health Organization* 142 S. Ct. 2228 (2022).

⁹³⁶ Siegel 2021:12-16.,Ziegler 2023:210-215 ,Murray&Shaw 2022:5-9.

This research advocates for gender-responsive legislation rather than gender-regressive legislation. The following section discusses how the GLI measures the intention of laws versus their likely effect.

5.2.3 Intention vs Likely Effect

The GLI evaluates laws in two stages. First, it evaluates the law's 'intention' on a scale from gender regressive to gender-responsive.⁹³⁷ The GLI's mandate is to establish the aim and purpose of the law's enactment by focusing on its intention. The second stage the GLI evaluates is the law's likely effect.⁹³⁸ The GLI, on a gender regressive to gender responsive scale, also measures the likely impact the law will have based on its drafting.⁹³⁹ The two-stage evaluation approach is significant because the GLI acknowledges that the law may have one stated intention. Still, including or excluding a key provision from the law's text could undermine the law's achievement of that intention or goal.⁹⁴⁰ To determine the intention, an evaluator must determine what the law is attempting to accomplish. In other words, an important question is, what is the stated goal of the law's enactment?⁹⁴¹ To demonstrate the likely effect, an evaluator can ask what likely effect this law will have in this situation based on the drafting.⁹⁴² For instance, where a law seeks to criminalise sexual violence in schools but fails to provide victims access to information about their legal rights or services for survivors of violence or fails to protect victims' confidentiality, a well-intentioned law may not, in the end, achieve gender-responsive outcomes.⁹⁴³ While the law's aim may be to address gender-based violence and protect victims, its failure to address these practical and systemic factors might render it gender-regressive in practice rather than delivering the gender-responsive outcomes it seeks.

⁹³⁷ Vijayarasa 2019:5.

⁹³⁸ Vijayarasa 2019:5.

⁹³⁹ Vijayarasa 2019:5.

⁹⁴⁰ Vijayarasa 2019:5.

⁹⁴¹ Vijayarasa 2019:5.

⁹⁴² Vijayarasa 2019:5.

⁹⁴³ GLI "Scoring legislation and ranking countries", <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

In summary, the law is to prevent sexual violence in schools and punish perpetrators. However, where victims have no access to information about their legal rights, they may not be able to know where to report the sexual violence so that perpetrators are punished. Furthermore, where victims' confidentiality is not protected, this might place the victim's lives in danger and make them more vulnerable to intimidation or sexual violence the law seeks to prevent. Failure to provide victims with services might also leave them vulnerable and prone to experiencing more sexual violence, defeating the enactment of the law. How the law has been drafted or, in this case, the absence of key provisions within the written text could mean that it has a likely effect different from its intention. If the law, in addition to criminalising sexual offenders, also protected victims' confidentiality and provided them with services on their legal rights, the law, in other words, has managed to accomplish its goal and resulted in its likely effect having achieved its purpose. Where intention and likely effect are gender responsive, the law can be said to meet international standards overall.

The GLI includes a secondary, subjective assessment of the law, referred to as “the band” or “overall assessment,” provided by an independent evaluator.⁹⁴⁴ The band or overall assessment ranges from meeting international standards to mostly meeting international standards, partially meeting international standards, not meeting international standards, complete disregard for international standards, and insufficient information to make an evaluation.⁹⁴⁵ The following section discusses the different indicators.

Once a law has been assigned one of the above scores regarding its intention and likely effect, the GLI evaluators determine an appropriate score. The scores place the law on a continuum from ‘complete disregard for international standards’ to ‘meeting international standards.’ The GLI also generates its overall score for the law using a system-learned algorithm derived from the data that all evaluators have entered.

The following scores are available across the continuum:

- a) Meeting international standards.
- b) Mostly meeting international standards.
- c) Partially meeting international standards.

⁹⁴⁴ Vijeyarasa 2021.

⁹⁴⁵ Vijeyarasa 2021.

- d) Not meeting international standards.
- e) Complete disregard for international standards.
- f) Insufficient information to make an evaluation.

As the evaluative structure of the GLI has been set out, the chapter now turns to the seven assessment questions that constitute the criteria against which laws are measured.

5.3 CRITERIA USED BY THE GLI TO EVALUATE GENDER RESPONSIVENESS IN LAWS AND POLICIES

The GLI uses a foundational set of seven common questions to assess all laws and policies which form the criteria. The seven assessment questions were extracted from identifying and grouping the legal obligations required by the CEDAW Convention and the CEDAW Committee's 39 General Recommendations.⁹⁴⁶ Therefore, only substantial recommendations that included instructions for state parties were methodically categorised or examined. According to Vijeyarasa, “[r]ecalling that”, “[b]earing in mind that”, or “[h]aving considered” contextual information from the CEDAW Committee was not examined.⁹⁴⁷ Statements such as “[w]e recommend that” were among those gathered and reviewed to create the seven assessment questions.⁹⁴⁸

The seven criteria were made relevant to specific areas of law by using benchmarks. The GLI contains benchmarks for the following seven areas of the law, which bridge the gap between issues typically considered and those that are not typically considered regarding gender-related topics.⁹⁴⁹ The areas of law include employment law, family law, financial services, gender-based violence, reproductive health, extractives and taxation laws. The purpose of applying the criteria to the different areas of law is not to be exhaustive, but rather to establish standards across all seven categories, demonstrating the approach's viability.⁹⁵⁰ The GLI develops sector-specific benchmarks based on CEDAW, other international human rights treaties, and

⁹⁴⁶ CEDAW Convention & CEDAW Committee. General Recommendation No. 39 on the Rights of Indigenous Women and Girls. CEDAW/C/GC/39 (2022).

⁹⁴⁷ Vijeyarasa 2019:2.

⁹⁴⁸ Vijeyarasa 2019:2.

⁹⁴⁹ Vijeyarasa 2019:2.

⁹⁵⁰ Vijeyarasa 2019:2.

International Labour Organization conventions.⁹⁵¹ In instances where international law at the global level does not establish gendered standards in a particular area of law, as seen in areas such as individual taxation and extractives, multilateral and regional instruments are considered.⁹⁵²

In the following section, I use the GLI to assess the different areas of law against the set of seven assessment questions to determine the gender responsiveness of laws. Vijeyarasa notes that what is needed in the law to fulfil these assessment questions would differ depending on the law's area.⁹⁵³ Each area of the law is benchmarked against international law, and it becomes essential to consider what international law has to say regarding gender responsiveness. However, where international law has made limited progress on establishing global commitments from a gender perspective, such as with taxation, trade or the extractive industry, Vijeyarasa notes that in cases where CEDAW proves insufficient, evaluators can make use of other related international norms or regional agreements or treaties.⁹⁵⁴ The GLI, for instance, incorporates guiding principles from the Organisation for Economic Cooperation and Development,⁹⁵⁵ in extractive law and the European Parliament in taxation, to fill gaps left by international law's inadequacies.⁹⁵⁶ It is essential to highlight that the GLI is a tool guided by international laws, further enhancing its credibility.

The seven assessment questions are as follows:

5.3.1 Non-discriminatory, accessible, affordable and acceptable services

In this section, I will define the key terms of non-discrimination, accessibility, affordability, and acceptability and then apply the assessment question to the law.

5.3.1.1 Non-discrimination

Non-discrimination and equality are fundamental components of international human rights law and essential to exercising and enjoying economic, social, and cultural

⁹⁵¹ Vijeyarasa 2019.

⁹⁵² Vijeyarasa 2021:344.

⁹⁵³ Vijeyarasa 2019:279.

⁹⁵⁴ Vijeyarasa 2019:279.

⁹⁵⁵ Reiner et al. 2022

⁹⁵⁶ Vijeyarasa 2019.

rights. The United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR)⁹⁵⁷ obliges each state party to guarantee that the rights contained in the Covenant are exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.⁹⁵⁸

As described in section 3.4.1, CEDAW describes discrimination as any action that distinguishes, excludes, limits or favours one group over another based on prohibited grounds. Such treatment, whether intentional or not, results in the denial or reduction of equal recognition, enjoyment, or exercise of the rights outlined in the Covenant.⁹⁵⁹ Additionally, discrimination encompasses both incitement to discriminate and acts of harassment.⁹⁶⁰ In the CESCR, it was observed that non-discrimination is an immediate and cross-cutting obligation.⁹⁶¹ This means states must enforce non-discrimination without delay, postponement or gradual implementation. Non-discrimination applies to all aspects of economic, social, and cultural rights, meaning it must be considered in every policy, law, and action related to these rights. State parties are encouraged to eliminate formal (de jure) and substantive (de facto) discrimination.⁹⁶² This means that states must guarantee that their laws and regulations do not discriminate on their face (formal discrimination) and address activities that, while appearing neutral, have discriminatory impacts in practice (substantive discrimination). The Committee emphasises that achieving substantive equality may involve targeted efforts to overcome inequities. To eliminate formal discrimination, state parties must ensure that their constitutions, laws and policy documents do not discriminate on prohibited grounds.⁹⁶³

According to the CESCR, denying equal access to social security benefits to women based on their marital status is contrary to the obligation to eliminate formal discrimination.⁹⁶⁴ However, the CESCR adds that eliminating formal discrimination does not necessarily achieve substantive equality.⁹⁶⁵ Hence, eliminating substantive

⁹⁵⁷ Ssenyonjo 2016.

⁹⁵⁸ Ssenyonjo 2016.

⁹⁵⁹ Ssenyonjo 2016.

⁹⁶⁰ Ssenyonjo 2016.

⁹⁶¹ Ssenyonjo 2016.

⁹⁶² Ssenyonjo 2016.

⁹⁶³ Ssenyonjo 2016

⁹⁶⁴ Ssenyonjo 2016

⁹⁶⁵ Ssenyonjo 2016

discrimination requires that state parties pay sufficient attention to individuals or groups suffering historical and persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.⁹⁶⁶ Therefore, they should adopt measures to prevent, diminish, and eliminate the conditions and attitudes that cause or perpetuate substantive discrimination.⁹⁶⁷ Although the CESCR recognises that special measures such as affirmative action may be required to address substantive discrimination, these measures must be reasonable, objective, and proportionate to redressing substantive discrimination and must be discontinued once substantive equality is sustainably achieved.⁹⁶⁸

Prohibition of discrimination is essential in ensuring that individuals thoroughly enjoy their socio-economic rights. As noted by the CESCR, discrimination ‘undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world’s population’.⁹⁶⁹ The CESCR further adds that non-discrimination is ‘essential to exercising and enjoying economic, social and cultural rights’.⁹⁷⁰ Therefore, adopting General Comment 20 is crucial in advancing socio-economic rights, as it clarifies what states must do to ensure equal enjoyment of these rights.⁹⁷¹

5.3.1.2 Accessible services

This includes geographic accessibility, meaning services are located within safe and easy reach. Physical accessibility also requires that it accommodate those with disabilities and provide informational accessibility, which is clear and understandable. Physical access would also require that benefits be provided on time, and beneficiaries must have physical access to receive benefits and information. Particular attention must be paid in this regard to persons with disabilities, migrants and persons living in remote, disaster-prone or conflict areas.⁹⁷²

⁹⁶⁶ UN CESCR 2009:par.8.

⁹⁶⁷ UN CESCR 2009:par. 8.

⁹⁶⁸ UN CESCR 2009:par. 9.

⁹⁶⁹ UN CESCR 2009:par. 1.

⁹⁷⁰ UN CESCR 2009:par. 2.

⁹⁷¹ UN Committee on Economic, Social and Cultural Rights *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (art 2(2) of the International Covenant on Economic, Social and Cultural Rights)* (2009) UN Doc E/C.12/GC/20 para 7.

⁹⁷² UN CESCR 2009:par. 12(b).

For remedies to be accessible, they must first be transparent.⁹⁷³ This means that information about their existence needs to be widely available in different forms and languages to ensure the population is aware of the existence of such remedies. However, simply making information available is insufficient.⁹⁷⁴ The obligation of transparency also implies that the state must adequately invest financial resources in providing information on the existence of remedies,⁹⁷⁵ so there must be an apparent effort to communicate the existence of available remedies to the broadest possible audience. For remedies to be accessible, they also need to be simple,⁹⁷⁶ or at the very least, they must not be unreasonably complicated.⁹⁷⁷

This is particularly important to ensure the rights of those living in poverty, as without the resources to obtain private legal assistance, they are often forced to navigate the judicial system alone. In doing so, they encounter complex laws, traditions and interactions, legal jargon and mainstream languages, and restrictive time limits, all of which can deter the people living in situations of poverty from seeking justice under formal systems.⁹⁷⁸ In this sense, simple remedies that are stripped of formalities are those that can be most accessible for all human rights victims. As a fundamental prerequisite for the accessibility of remedies for human rights violations, states must ensure that legal advice is available for those requiring it⁹⁷⁹ A state needs to be able

⁹⁷³ UN CESCR 2009:par. 49h.

⁹⁷⁴ Scottish Human Rights Commission “Adequate and effective remedies for economic, social and cultural rights”, <https://www.scottishhumanrights.com/media/2163/remedies-for-economic-social-and-cultural-rights.pdf> (accessed on 16 February 2025).

⁹⁷⁵ Scottish Human Rights Commission “Adequate and effective remedies for economic, social and cultural rights”, <https://www.scottishhumanrights.com/media/2163/remedies-for-economic-social-and-cultural-rights.pdf> (accessed on 16 February 2025).

⁹⁷⁶ Organization of American States (OAS) Inter-American Commission on Human Rights “Access to justice as a guarantee of economic, social, and cultural rights: A review of the standards adopted by the Inter-American System of Human Rights”. OEA/Ser.L/V/II.129., <https://www.cidh.org/pdf%20files/ACCESS%20TO%20JUSTICE%20DESC.pdf> (accessed on 23 July 2024).

⁹⁷⁷ Organisation of American States (OAS) Inter-American Commission on Human Rights “Access to justice as a guarantee of economic, social, and cultural rights: A review of the standards adopted by the Inter-American System of Human Rights”, OEA/Ser.L/V/II.129. <https://www.cidh.org/pdf%20files/ACCESS%20TO%20JUSTICE%20DESC.pdf> (accessed 23 July 2024):par. 52.

⁹⁷⁸ Donald & Sepúlveda Carmona “Access to justice for persons living in poverty: A human rights approach. United Nations”, <https://socialprotection-humanrights.org/wp-content/uploads/2015/06/A2Justice-publication.pdf> (accessed on 16 February 2025).

⁹⁷⁹ Donald & Sepúlveda Carmona “Access to justice for persons living in poverty: A human rights approach. United Nations”, <https://socialprotection-humanrights.org/wp-content/uploads/2015/06/A2Justice-publication.pdf> (accessed on 16 February 2025).

to provide free and competent legal advice and assistance through whatever institution or mechanism it finds ideal for those who cannot afford it.⁹⁸⁰ A final essential requirement to ensure remedies are accessible is the existence of public interest litigation. State parties need to ensure that legal standing is extended to civil society organisations that can support victims or bring cases on their behalf, reducing the financial and personal burden of legal action for individuals who might not have the means or the capacity to do so themselves.⁹⁸¹

5.3.1.3 Affordable services

Services should be economically accessible to migrant workers.⁹⁸² This means they should not be prohibitively expensive and should consider the typically lower earning power and financial constraints faced by many migrant workers, with consideration for women migrants.⁹⁸³ Affordable services ensure that cost does not hinder access to necessary services. If a social protection programme requires contributions, then the contributions must be stipulated in advance.⁹⁸⁴ The direct and indirect costs and charges associated with making contributions must be affordable.⁹⁸⁵

Legal aid is essential for ensuring affordable remedies when a person needs legal redress. The availability of legal assistance to those without the means to pay for all litigation costs is of incalculable instrumental value in ensuring the enforceability of economic, social, and cultural rights.⁹⁸⁶ On the contrary, the lack of legal aid can seriously hamper the rights and interests of persons living in poverty, for example,

⁹⁸⁰ Donald & Sepúlveda Carmona “Access to justice for persons living in poverty: A human rights approach. United Nations”, <https://socialprotection-humanrights.org/wp-content/uploads/2015/06/A2Justice-publication.pdf> (accessed on 16 February 2025).

⁹⁸¹ Tucker 2018.

⁹⁸² CESC 2000:paras. 1–2.

⁹⁸³ CESC 2000:paras. 1–2.

⁹⁸⁴ CESC 2000:par. 1.

⁹⁸⁵ CESC 2000:par 1.

⁹⁸⁶ Organization of American States (OAS) Inter-American Commission on Human Rights “Access to justice as a guarantee of economic, social, and cultural rights: A review of the standards adopted by the Inter-American System of Human Rights”. OEA/Ser.L/V/II.129.”, <https://www.cidh.org/pdf%20files/ACCESS%20TO%20JUSTICE%20DESC.pdf> (accessed on 23 July 2024):par. 48.

when they are unable to contest tenancy disputes, eviction decisions, eligibility for social security benefits, and abusive working conditions.⁹⁸⁷

5.3.1.4 Acceptable services

Services must be delivered in a way that respects people's dignity, privacy, culture, and needs.⁹⁸⁸ This involves providing services that are respectful of gender, culture, and ethnic differences and that are provided in a manner that is acceptable to the beneficiaries, ensuring they are comfortable and confident in using these services.

Acceptability in social protection programmes involves addressing discrimination from intersections of race, gender, class, ethnicity, disability, and other identities.⁹⁸⁹ For example, indigenous peoples may find it challenging to use health centres where their mother tongue is not spoken (in such instances, translation services must be made available) or where no efforts are made to reconcile modern healthcare with their traditional practices.⁹⁹⁰ Similarly, when women come to complain or seek entitlements, patriarchal views toward them can frequently result in situations where they are not treated with respect.⁹⁹¹ In accordance with this idea, social protection services programs should consult the relevant rights-holder groups widely to evaluate the power imbalances in communities.⁹⁹² When creating, implementing, and overseeing programs to fulfil the commitments made under human rights agreements, special

⁹⁸⁷ UN OHCHR “Report of the UN Special Rapporteur on Extreme Poverty and Human Rights Magdalena Sepúlveda”, <https://www.un.org/esa/socdev/egms/docs/2013/EmpowermentPolicies/Report%20of%20the%20Special%20Rapporteur%20on%20extreme%20poverty%20and%20human%20rights.pdf> (accessed on 12 July 2024).

⁹⁸⁸ UN OHCHR “General Comment No. 4: The right to adequate housing (art. 11(1) of the Covenant)”

⁹⁸⁹ Social Protection and Human Rights. “Standards of Accessibility, Adaptability and Acceptability”. <https://socialprotection-humanrights.org/framework/principles/standards-of-accessibility-adaptability-and-acceptability/> (accessed on 17 February 2025).

⁹⁹⁰ Social Protection and Human Rights. “Standards of accessibility, adaptability and acceptability”, <https://socialprotection-humanrights.org/framework/principles/standards-of-accessibility-adaptability-and-acceptability/> (accessed on 17 February 2025).

⁹⁹¹ Social Protection and Human Rights. “Standards of accessibility, adaptability and acceptability”, <https://socialprotection-humanrights.org/framework/principles/standards-of-accessibility-adaptability-and-acceptability/> (accessed on 17 February 2025).

⁹⁹² Social Protection and Human Rights. “Standards of accessibility, adaptability and acceptability”, <https://socialprotection-humanrights.org/framework/principles/standards-of-accessibility-adaptability-and-acceptability/> (accessed on 17 February 2025).

attention should unavoidably be given to groups that experience structural discrimination as a priority.⁹⁹³

5.3.1.5 Practical application of Criteria 1 to law

This assessment question is focused on an amenity, resource or form of assistance.⁹⁹⁴ The GLI has interpreted it broadly to encompass a wide range of assistance, from a physical benefit to a wage dispute settlement scheme.⁹⁹⁵ For instance, when it comes to gender-based violence law, the CEDAW Committee recommends the existence of provisions which offer support services for women who are victims.⁹⁹⁶ The support services must be accessible, affordable and ideally free and acceptable. The services must be such that they do not discriminate against any woman, including women migrant workers. While a gender-based violence law that provides support services to victims is gender-responsive in its intent to advance women's rights, the failure to ensure that these services are accessible to women in remote areas has the likely effect of leaving women victims in need of the support services in remote areas vulnerable and open to abuse and result in the likely effect being gender-regressive and not meeting assessment question one.

Labour laws and policies should include provisions offering services, such as vocational training, to aid women's entry into non-gender-stereotypical work sectors.⁹⁹⁷ In the extractives sector, laws and policies must include provisions offering services like seed finance, output marketing, and other technical assistance services for women in artisanal and small-scale mining to enhance women's equal participation in the sector.⁹⁹⁸

A financial services law or policy with a user-pay system applied similarly to all users might be seemingly neutral.⁹⁹⁹ However, such a law would fail to acknowledge the financial barriers particular groups of women may face, including those that do not

⁹⁹³ Social Protection and Human Rights. "Standards of accessibility, adaptability and acceptability", <https://socialprotection-humanrights.org/framework/principles/standards-of-accessibility-adaptability-and-acceptability/> (accessed on 17 February 2025).

⁹⁹⁴ Vijayarasa 2019:2.

⁹⁹⁵ Vijayarasa 2019:2.

⁹⁹⁶ CEDAW: General Recommendation 35:par. 40(c).

⁹⁹⁷ Vijayarasa 2019:2.

⁹⁹⁸ Vijayarasa 2019:2.

⁹⁹⁹ Vijayarasa 2019:2.

have control over the family income, women single heads of households and low-income women or women living in poverty.¹⁰⁰⁰ This would, in essence, fail to meet CEDAW's recommendation that the law provide free services where necessary.¹⁰⁰¹ In other words, a law or policy offering financial services to be gender-responsive cannot apply a user-pay system to all users similarly. The financial law would need to consider the economic barriers that groups of women encounter and, therefore, contain provisions that cater for that group. The provision could, for instance, contain clauses which ensure women can access the services and provide simplified information about the services.

Furthermore, in cases where a deposit is required, such a requirement could be waived. To satisfy criterion one, a gender-responsive law or policy on reproductive health would contain provisions guaranteeing access to all reproductive-related health services, including family planning, antenatal, maternity, and post-natal services for all women.¹⁰⁰² For a law in the extractive industry to satisfy criterion one, a gender-responsive law would need to contain provisions guaranteeing all women workers in large-scale, artisanal, and small-scale mining access to sufficient and suitable gender-specific facilities (toilets, showers, washbasins, and changing facilities).¹⁰⁰³

In 2008, CEDAW adopted a specific General Recommendation No. 26¹⁰⁰⁴ on "Women migrant workers", in which it affirmed that migrant women, like all women, should not be discriminated against in any sphere of their lives and reiterated that CEDAW protects all women, including migrant women, against sex- and gender-based discrimination.¹⁰⁰⁵ Therefore, to meet criterion one, a gender-responsive law under labour law would need to explicitly prohibit sex and gender-based discrimination and further ensure that women migrant workers who were victims of either sex or gender-based violence had access to redress mechanisms, including free legal aid services. For women migrant workers, this means ensuring they are not treated unfairly or unequally due to their gender and nationality in employment, housing, healthcare, and other areas. In summary, for a law to satisfy criteria one and be termed gender-

¹⁰⁰⁰ Vijayarasa 2019:2.

¹⁰⁰¹ CEDAW 1999:par. 17.

¹⁰⁰² CEDAW 1999:par. 5.

¹⁰⁰³ ILO Safety and Health in Mines Recommendation (No. 183) (1995).

¹⁰⁰⁴ CEDAW 2008:par. 2.

¹⁰⁰⁵ CEDAW 2008:par. 2

responsive, the services must not discriminate, be accessible to women without barriers, and be acceptable. Having discussed the first assessment question, the second assessment question applied within the GLI framework is discussed in the next section.

5.3.2 Access to Informal Education or the Provision of Information and Education on the Issue

This assessment question has been interpreted in two ways. In some contexts, a law has been assessed for containing provisions requiring that women be educated on the subject matter. For instance, a law creating financial services for rural women should provide rural women equal access to financial skills-building programmes, including innovative methods that consider illiteracy concerns.¹⁰⁰⁶ In other instances, the law has been assessed to determine whether it provides women with information about a particular law and its protections contained in that law.¹⁰⁰⁷ An example is when a law prohibits discrimination against women at work, and this assessment criterion would require that men and women are educated or have access to information about the right to non-discrimination.¹⁰⁰⁸

CEDAW emphasises the importance of access to education, including informal education, and providing information and education regarding the rights of women migrant workers.¹⁰⁰⁹ Furthermore, it specifically mentions the importance of access to educational information to ensure the health and well-being of families, including information and advice on family planning.¹⁰¹⁰

The General Recommendation of CEDAW No. 26 focuses on women migrant workers and highlights the need for states to ensure that women migrants have access to education and training opportunities.¹⁰¹¹ It further emphasises that states should provide information on the rights of women migrant workers and the services available

¹⁰⁰⁶ CEDAW 2016:par. 69(c).

¹⁰⁰⁷ Vjjeyarasa 2019:2.

¹⁰⁰⁸ Vjjeyarasa 2019:2.

¹⁰⁰⁹ CEDAW 2008:par. 24(b).

¹⁰¹⁰ CEDAW 2008:par. 26(g).

¹⁰¹¹ CEDAW 2008:par. 24(d).

to them, including legal aid and health services, labour rights and access to social services.¹⁰¹²

The CEDAW Committee recommends that state parties that are countries of destination for migrants provide mandatory awareness-raising programmes concerning the rights of migrant women workers and gender sensitivity for relevant public and private recruitment agencies and employers, and appropriate state employees such as criminal justice officers, immigration authorities, border police, and social services and healthcare providers.¹⁰¹³

To satisfy assessment question two, a gender-responsive migration law would include a substantive provision that provides information or education on the rights of women migrant workers, including services available to them, such as legal aid, health, and social services. When women migrant workers are provided with information on their rights, they become empowered and better able to report rights violations.

Having discussed the second assessment question, the next section discusses the third assessment question applied within the GLI framework.

5.3.3 Non-coerced and Informed Decision-making and, where relevant, Protect Women's Confidentiality

This assessment question focuses on how the law protects women's rights to make free decisions and protect their confidentiality. For instance, the law should contain provisions guaranteeing free and informed consent for using alternative dispute resolution procedures, such as mediation and conciliation, in situations of violence.¹⁰¹⁴ It also requires the law to protect women's confidentiality concerning employment or employment disputes, or when seeking to access a bank loan.¹⁰¹⁵

A gender-responsive law under reproductive health law would contain provisions which guarantee women's non-coerced and informed decision-making and the right of

¹⁰¹² CEDAW 2008:par. 24(d).

¹⁰¹³ CEDAW 2008:par. 26(g).

¹⁰¹⁴ CEDAW 2017:par. 32.

¹⁰¹⁵ CEDAW 2010:par.18.

couples and individuals to choose their children's number, spacing, and timing.¹⁰¹⁶ A gender-responsive approach requires that healthcare services be delivered following women's fully informed consent and in a way that respects a woman's dignity, guarantees her confidentiality, and is sensitive to her needs and perspectives.¹⁰¹⁷ A law that fails to provide a supportive environment for women to breastfeed and ensure women's access to appropriate services concerning adequate nutrition during pregnancy and lactation could prove blind to women's needs.¹⁰¹⁸ A gender-regressive law would permit medically harmful, medically unnecessary or coercive medical interventions as well as inappropriate medication, which is contrary to global commitments.¹⁰¹⁹ Female genital mutilation (FGM) comprises all procedures that involve partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.¹⁰²⁰ The practice has no health benefits for girls and women as it causes severe bleeding, problems urinating, and later cyst infections, as well as complications in childbirth and an increased risk of newborn deaths.¹⁰²¹

The practice of FGM is recognised internationally as a violation of the human rights of girls and women.¹⁰²² It reflects deep-rooted inequality between the sexes and constitutes an extreme form of discrimination against girls and women. Traditional practitioners nearly always carry it out on minors, and it is a violation of the rights of children. The practice also violates a person's rights to health, security and physical integrity, the right to be free from torture and cruel, inhuman or degrading treatment, and the right to life in instances when the procedure results in death. In several settings, there is evidence suggesting a more significant involvement of healthcare providers in performing FGM due to the belief that the method is safer when

¹⁰¹⁶ CEDAW 1994:par. 22.

¹⁰¹⁷ CEDAW 1999:par. 22.

¹⁰¹⁸ CEDAW 1999:par. 22.

¹⁰¹⁹ Rajvanshi, "Gambia's move to repeal female genital mutilation ban risks women's rights globally. Time", <https://time.com/6981349/gambia-africa-female-genital-mutilation-fgm-fgc/> (accessed 23 on October 2024).

¹⁰²⁰ WHO "Female genital mutilation", <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (accessed on 25 October 2024).

¹⁰²¹ WHO "Female genital mutilation", <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (accessed on 25 October 2024).

¹⁰²² Rajvanshi, "Gambia's move to repeal female genital mutilation ban risks women's rights globally. Time", <https://time.com/6981349/gambia-africa-female-genital-mutilation-fgm-fgc/> (accessed 23 on October 2024).

medicalised.¹⁰²³ World Health Organisation strongly urges healthcare providers not to perform FGM and has developed a global strategy and specific materials to support healthcare providers against medicalisation. Gambian lawmakers, on the 15th July 2024, rejected all parts of the Women's (Amendment) Bill, which aimed to overturn the 2015 ban on female genital mutilation in The Gambia. This prevented the Bill from moving forward to a final reading, thus maintaining the ban.¹⁰²⁴ The Women's (Amendment) Bill 2024, which had sought to decriminalise the practice of female circumcision, had passed a second reading in March 2024 with only five out of 53 lawmakers voting against it, raising concerns among rights groups that Gambia would become the first country to reverse a ban on the practice. The Women's (Amendment) Bill 2024 represents a regressive step, as it proposes the reversal of a legal ban on female genital mutilation (FGM) (also referred to as female circumcision). This practice is widely recognised as a violation of human rights and gender equality because it causes physical harm, psychological trauma, and denies women autonomy over their bodies. The Amendment Bill would not be able to satisfy assessment criterion three as it does not guarantee non-coercion. The next criterion assesses whether the law promotes equal relations between men and women.

5.3.4 Equal Relations between Men and Women

The GLI is premised on the role of the law in redressing underlying inequality between men and women.¹⁰²⁵ For instance, laws and policies should contain provisions which provide public information and education programmes to overcome attitudes, customs and practices that perpetuate violence against women.¹⁰²⁶ Furthermore, the law should guarantee men and women the same employment opportunities, applying the same selection criteria, the right to free choice of profession and employment and the right to promotion, job security, vocational training and retraining.¹⁰²⁷

¹⁰²³ WHO "Female genital mutilation", <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (accessed on 25 October 2024).

¹⁰²⁴ Al Jazeera & News Agencies "Gambia's parliament upholds ban on female genital mutilation", <https://www.aljazeera.com/news/2024/7/15/gambias-parliament-upholds-ban-on-female-genital-mutilation> (accessed on 25 October 2024).

¹⁰²⁵ Vijayarasa 2022:68.

¹⁰²⁶ CEDAW 1992:par. 24(ii).

¹⁰²⁷ CEDAW 1992:par.1(a-f).

As discussed in Chapter 3, formal and substantive equality represent two approaches to understanding and achieving societal equality. The text of CEDAW actively moves beyond a commitment to formal equality for women. The discrimination definition in Article 1 includes distinctions, exclusions, or restrictions based on sex that have the “effect or purpose” of impairing women’s equality.¹⁰²⁸

Gender-responsive laws strive to achieve substantive equality by directly confronting discriminatory social processes and structural disparities.¹⁰²⁹ Scholars acknowledge that providing equal opportunities may be insufficient due to historical, social, and structural disadvantages. Substantive equality requires addressing underlying disparities to achieve fair outcomes for all individuals.¹⁰³⁰

To meet criteria four under labour law, a gender-responsive law would contain provisions which explicitly recognise unionisation and collective bargaining as a right and an essential mechanism for eliminating wage inequality for women and improving working conditions.¹⁰³¹ Collective bargaining is the process in which employees, through their unions, negotiate contracts with their employers to determine their terms of employment, including pay, benefits, hours, leave, job health and safety policies, ways to balance work and family, and more. This process would benefit women migrants as they could negotiate for better salaries. A law that facilitates trade union representation may be seemingly neutral.¹⁰³² A law that, however, fails to promote the election of women trade union officials and ensures that trade union officials elected to represent women are given job protection and physical security in connection with the discharge of their functions would be gender-blind.¹⁰³³ Instead, the law should recognise unionisation and collective bargaining as a right and an essential mechanism for eliminating wage inequality for women and improving working conditions.¹⁰³⁴ A law that denies women-only unions could move into the realms of regressive if it leaves groups of at-risk or vulnerable women unrepresented.¹⁰³⁵

¹⁰²⁸ UN Convention on the Elimination of Violence Against Women 1979:art.1.

¹⁰²⁹ Collins & Bilge 2020:117; Mandhane 2018.

¹⁰³⁰ Vijayarasa 2022:68.

¹⁰³¹ ILO 2011:art. 3 & CPRMW:par.54.

¹⁰³² Vijayarasa 2019.

¹⁰³³ Beijing Declaration and Platform of Action1995:par. 178 (h).

¹⁰³⁴ Beijing Declaration and Platform of Action1995:par. 178 (h).

¹⁰³⁵ Vijayarasa 2019.

In answer to this assessment question, under labour law, a gender-responsive law would guarantee men and women the same employment opportunities, application of the same selection criteria,¹⁰³⁶ the right to free choice of profession and employment, promotion, job security, vocational training and retraining.¹⁰³⁷ However, against the same question in tax law, a gender-responsive legislation that promotes equal relations between men and women would not impose tax deductions for a dependent spouse.¹⁰³⁸

The next section discusses assessment question 5.

5.3.5 Woman are Protected from Situations of Vulnerability Linked to their Gender

This assessment question examines how women face discrimination or exclusion, particularly due to biological and societal reasons.¹⁰³⁹ It covers issues as diverse as the exemption of female hygiene products from value-added tax to a prohibition on direct and indirect gender discrimination in the labour market, including marriage, maternity/family status, pregnancy, and paid maternity leave.¹⁰⁴⁰ Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.¹⁰⁴¹ Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions.¹⁰⁴² Such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.¹⁰⁴³

¹⁰³⁶ CEDAW:art. 11 (1) (b).

¹⁰³⁷ CEDAW:art. 11 (1) (c).

¹⁰³⁸ European Parliament "Gender Equality and Taxation Policies in the EU (No 2018/2095(INI), 15 January 2019", http://www.europarl.europa.eu/doceo/document/A-8-2018-0416_EN.html (accessed on 2 January 2025).

¹⁰³⁹ Vijayarasa 2019:3.

¹⁰⁴⁰ Vijayarasa 2019:3.

¹⁰⁴¹ CEDAW 1992:par. 7.

¹⁰⁴² ILO 1992:5.

¹⁰⁴³ CEDAW 1992:par. 18.

Women migrant workers often experience intersectional forms of discrimination, suffering not only sex and gender-based discrimination but also discrimination based on nationality and race. Women migrant workers are more vulnerable to sexual abuse, sexual harassment and physical violence, especially in sectors where women predominate.¹⁰⁴⁴ As seen in the discussion in Chapter 2, domestic workers are particularly vulnerable to physical and sexual assault, food and sleep deprivation and cruelty by their employers.¹⁰⁴⁵ Sexual harassment of women migrant workers in other work environments, such as on farms or in the industrial sector, is a problem worldwide.¹⁰⁴⁶ Women migrant workers who migrate as spouses of male migrant workers or along with family members face an added risk of domestic violence from their spouses or relatives if they come from a culture that values the submissive role of the woman in the family.¹⁰⁴⁷

To satisfy this criterion, a gender-responsive law under labour law would contain provisions which prohibit violence and harassment against women, including physical, sexual, psychological and economic violence and harassment in the world of work.¹⁰⁴⁸ This law would be gender-regressive if it explicitly excluded domestic and migrant workers and those at risk of forced and exploitative labour from these protections.¹⁰⁴⁹ A gender-responsive law would also contain provisions prohibiting direct and indirect gender discrimination in the labour market, including marriage, maternity/family status, pregnancy, and paid maternity leave.¹⁰⁵⁰ This right to equality and non-discrimination encompasses older women workers, as well as domestic, migrant, and informal women workers.¹⁰⁵¹ It should also include effective enforcement mechanisms to ensure employers' compliance and workers' access to remedies and legal redress systems.

The sixth assessment question is discussed in the next section

¹⁰⁴⁴ CEDAW 2008:par. 20.

¹⁰⁴⁵ CEDAW 2008:par. 20.

¹⁰⁴⁶ UN OHCHR "Report of the Secretary-General on Violence Against Women Migrant Workers", <https://www.refworld.org/reference/themreport/unchr/1998/en/39204> (accessed on 14 November 2024).

¹⁰⁴⁷ CEDAW 2008:par. 20.

¹⁰⁴⁸ UN OHCHR 2017:par. 30(f); ILO 2011:art. 5; UN OHCHR 2013:par. 21–22.

¹⁰⁴⁹ Beijing Declaration and Platform of Action:par.180(c); UN OHCHR 2017.

¹⁰⁵⁰ Beijing Declaration and Platform of Action 1995: para165(b) and ILO 1958:art. 2.

¹⁰⁵¹ ICPRMW:art. 7; ILO 2011:art. 6, 7; UN "Transforming our world: the 2030 Agenda for Sustainable Development", <https://sdgs.un.org/2030agenda> (accessed on 20 June 2021):Goal 8.8.

5.3.6 Accessible and Effective Remedies (i.e. Access to Justice)

Women migrant workers encounter challenges in accessing justice. According to the CEDAW committee, in some countries, restrictions are imposed on the use of the legal system by women migrant workers such that they find it difficult to obtain remedies for discriminatory labour standards, employment discrimination or sex and gender-based violence.¹⁰⁵² Furthermore, women migrant workers may not be eligible for free government legal aid.¹⁰⁵³ In addition, formal practical barriers, like language barriers, may prevent access to remedies. Furthermore, women migrant workers may lack mobility because they may be confined by employers to their work or living sites, prohibited from using telephones or banned from joining groups or cultural associations. They often lack knowledge of their embassies or services available due to their dependence on employers or spouses for such information. It is difficult for women migrant domestic workers who are scarcely ever out of sight of their employers to even register with their embassies or file complaints.¹⁰⁵⁴

Undocumented women migrant workers are particularly vulnerable to exploitation and abuse because of their irregular immigration status, which exacerbates their exclusion and the risk of exploitation.¹⁰⁵⁵ They may be exploited as forced labour, and their access to minimum labour rights may be limited by fear of denunciation.¹⁰⁵⁶ They may also face harassment by the police. If they are apprehended, they are usually prosecuted for violations of immigration laws and placed in detention centres where they are vulnerable to sexual abuse and deportation.

When it comes to the criteria of guaranteeing accessible and effective remedies (access to justice), a gender-responsive law will contain provisions which guarantee all women workers access to judicial and quasi-judicial mechanisms and treatments for women, especially in relation to labour relations, including equal remuneration, social security entitlements, equal opportunities to be hired and promoted and equal remuneration for civil servants.¹⁰⁵⁷ The law should incentivise the private sector to

¹⁰⁵² CEDAW 2008:par. 21.

¹⁰⁵³ CEDAW 2008:par. 21.

¹⁰⁵⁴ CEDAW 2008:par. 21.

¹⁰⁵⁵ CEDAW 2008:par. 21.

¹⁰⁵⁶ CEDAW 2008:par. 21.

¹⁰⁵⁷ CEDAW 2015.

adopt protocols and procedures addressing all forms of gender-based violence that may occur in the workplace or affect women workers, including practical and accessible internal complaints procedures, the use of which should not exclude recourse to law enforcement authorities and should also address workplace entitlements for victim/survivors.¹⁰⁵⁸

The law should also ensure that a person can lodge an independent review following international standards.¹⁰⁵⁹ If the review is rejected, a provision must allow an appeal process to a competent body.¹⁰⁶⁰ The remedies available must be explained to employees, and for women migrants, they must be explained in a language they understand, or a translator must be used.¹⁰⁶¹

The CEDAW Committee recommends that states, which are countries of destination, promulgate and enforce laws and regulations that include adequate legal remedies and complaint mechanisms and put in place easily accessible dispute resolution mechanisms, protecting both documented and undocumented women migrant workers from discrimination or sex-based exploitation and abuse.¹⁰⁶² The CEDAW Committee also recommends repealing or amending laws that prevent women migrants from using the courts and other systems of redress.¹⁰⁶³ The Committee encourages states to ensure that women migrant workers have access to legal assistance, including free legal aid, to the courts and regulatory systems that enforce labour and employment laws.¹⁰⁶⁴ States are encouraged to provide temporary shelters for women migrant workers who wish to leave abusive husbands, employers, husbands or other relatives and proffer facilities for safe accommodation during the trial.¹⁰⁶⁵

The CEDAW committee contend that state parties should protect the fundamental human rights of undocumented women and migrant workers regardless of their immigration status.¹⁰⁶⁶ They argue that undocumented women migrant workers must

¹⁰⁵⁸ OHCHR 2017.

¹⁰⁵⁹ CEDAW 2015:art. 53.

¹⁰⁶⁰ CEDAW 2024.

¹⁰⁶¹ CEDAW 2008.

¹⁰⁶² CEDAW 2008:par. 26 (i).

¹⁰⁶³ CEDAW 2008:par. 26 (ii)

¹⁰⁶⁴ CEDAW 2008:par. 26 (iii)

¹⁰⁶⁵ CEDAW 2008:par. 26 (iii)

¹⁰⁶⁶ CEDAW 2008:par. 26 (i.)

have access to legal remedies and justice in cases of risk to life and cruel and degrading treatment or if they are coerced into forced labour, face deprivation of fulfilment of basic needs, including in times of health emergencies or pregnancy and maternity or if they are abused physically or sexually by employers or others.¹⁰⁶⁷ Where they are arrested or detained, the state parties must ensure that undocumented women migrant workers receive humane treatment and have access to due process of the law, including free legal advice.¹⁰⁶⁸ In that regard, state parties are encouraged to repeal or amend laws and practices that prevent undocumented women migrant workers from using the courts and other systems of redress.¹⁰⁶⁹ Where deportations cannot be avoided, state parties need to treat each case individually, with due consideration to the gender-related circumstances and risks of human rights violations in the country of origin.¹⁰⁷⁰

A gender-blind law would fail to acknowledge gender bias in judicial decision-making, would fail to allow for independent review with international standards by all decisions of administrative bodies, and would fail to ensure that a decision rejecting an application is reasoned. Such a law could easily become gender regressive.

The seventh assessment question is discussed in the next section.

5.3.7 Comprehensive Monitoring of Women's Situations

This assessment question considers whether the law requires collecting and disseminating statistical data on women's situations in absolute numbers and percentages.¹⁰⁷¹ Monitoring the situation of women migrants and documenting all challenges and violations of their rights is essential. In recent years, the CEDAW Committee has recommended disaggregation on multiple issues, including marital status, rural status, ethnicity, and disability, to acknowledge how best women's intersecting and various identities affect their enjoyment of their rights.¹⁰⁷² This would assist in devising more targeted advocacy initiatives and law and policy reforms. The data would also be used to raise awareness among civil society, community members,

¹⁰⁶⁷ CEDAW 2008:par. 26 (l).

¹⁰⁶⁸ CEDAW 2008:par. 26 (l).

¹⁰⁶⁹ CEDAW 2008:par. 26 (l).

¹⁰⁷⁰ CEDAW 2008:art. 2(c) ,(e) and (f).

¹⁰⁷¹ Vijayarasa 2019:3.

¹⁰⁷² Vijayarasa 2019:3.

and law enforcement of the importance of protecting the rights of women migrant workers.

When violations are reported, a body of evidence is created that can be used to advocate for laws that better protect their rights and enact stiffer penalties for perpetrators of such offences. A gender-responsive labour law would provide a system that monitors and documents challenges or violations of women migrants in the workplace.¹⁰⁷³

In addition, the CEDAW Committee urges state parties to adopt regulations and design monitoring systems to ensure that recruiting agents and employers respect the rights of all women migrant workers. State parties are encouraged to closely monitor recruiting agencies and prosecute them for acts of violence, coercion, deception or exploitation.¹⁰⁷⁴

In the next section, I discuss the countries where the GLI was used and explore the laws to which it was applied.

5.4 COUNTRIES WHERE THE GLI HAS BEEN USED

5.4.1 Australia

5.4.1.1 Work Health and Safety Act¹⁰⁷⁵

The *Workplace Health and Safety Act (WHS Act)* is an essential legislation in Australia that establishes the framework for ensuring the health and safety of workers and workplaces. Its primary purpose is to protect the health, safety, and welfare of employees and others by setting out duties and responsibilities for employers, employees, and others involved. The *WHS Act* aims to prevent workplace accidents, injuries, and illnesses. To ascertain whether the *WHS Act* was gender responsive and met international standards, three evaluators measured it against the GLI. The Act was first measured for its intention, and the procedure was repeated for its likely effect.

¹⁰⁷³ CEDAW 1991.

¹⁰⁷⁴ CEDAW 2008:art. 2(e).

¹⁰⁷⁵ *Work Health and Safety Act* 137/2011.

Overall, the result was measured against international standards to determine whether it met or fell short of them.

The following section discusses the results of the *WHS Act* assessment. I use a table to show the results of each evaluation against the seven assessment questions outlined in section 4.3 above (see Table 5.1). The colours in the table represent different gender analysis categories, likely used to assess policies, programmes, or laws for their gender responsiveness. The colour brown (Gender Regressive) – policies or frameworks that actively reinforce gender inequalities or worsen disparities, Orange (Gender Blind) – policies that do not consider gender at all, treating everyone as the same without addressing specific needs or inequalities, blue (Gender Neutral) – policies that acknowledge gender but do not take action to correct disparities. They assume gender differences do not impact the issue, and green (Gender Responsive) policies that actively address gender disparities and work to improve gender equity. The colour-coded blocks indicate assessments where gender analysis has been conducted and a classification was possible. The presence of a fraction such as 2/3 or 3/3 means that two out of three evaluators rated the law and agreed that the law is, for example, gender blind and three out of three means three evaluators agreed with the rating, for instance, if the 3/3 is on gender responsiveness. The blank cells show that no evaluator agreed with the gender category, for instance, 0/3.

The overall result is then assessed to ascertain whether it meets international standards. I also provide my rating and analysis of each assessment question against the *WHS Act* and discuss whether the *WHS Act* meets international standards or not.

5.4.1.2 Assessment of the Work Health and Safety Act against the GLI

Intention refers to what the law is trying to achieve, and likely effect focuses on the law's effect based on its drafting.¹⁰⁷⁶ The *WHS Act* establishes standards to protect the health and safety of workers and workplaces in Australia. The standards apply to all workers regardless of their gender.¹⁰⁷⁷ Three people evaluated this *WHS Act*.

¹⁰⁷⁶ Vijayarasa 2022:67.

¹⁰⁷⁷ *WHS Act*:part 1(3).

5.4.1.2.1 Assessment question one: Does the Act guarantee non-discriminatory, accessible, acceptable and affordable services

The first evaluator rated the *WHS Act's* intention regarding the first assessment question as gender-blind.¹⁰⁷⁸ According to the first evaluator, whilst the goal of the *WHS Act* is to protect the health and safety of all employees and the workplace, it fails to make specific reference to the health and safety needs of pregnant women.¹⁰⁷⁹ The drafters of the *WHS Act* ignored significant gender concerns. The likely effect is that pregnant women are discriminated against and not covered under the *WHS Act*, which leaves them vulnerable and without any protection in the workplace.¹⁰⁸⁰ The third evaluator also rated the intention and likely effect as gender blind.¹⁰⁸¹ The third evaluator noted that although the *WHS Act* sought to guarantee workers a right to safety and work, including health, safety and welfare from hazards and risks, it made no specific reference to women workers, harassment or violence at work as a hazard.¹⁰⁸² The result is that the law is blind to women's specific workplace and health and safety concerns.¹⁰⁸³

Contrary to the views of the first and third evaluators, the second evaluator rated the *WHS Act's* intention as gender-neutral.¹⁰⁸⁴ According to the second evaluator, the *WHS Act* established standards to protect workers' health and safety irrespective of gender.¹⁰⁸⁵ An evaluation of gender neutrality is given, where a gendered perspective

¹⁰⁷⁸ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹⁰⁷⁹ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹⁰⁸⁰ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹⁰⁸¹ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹⁰⁸² GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹⁰⁸³ GLI "Work Health and Safety Act 2011. Australia. Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹⁰⁸⁴ GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹⁰⁸⁵ GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

has been considered, and it has been determined that a gendered perspective is not necessary.¹⁰⁸⁶ In other words, according to the second evaluator, the drafters of the *WHS* Act were correct not to consider gender. Vijeyarasa argues that whilst gender neutrality has positive connotations, such neutrality can easily slip into “gender blind” where evaluators determine that a gendered perspective should have been considered.¹⁰⁸⁷ The second evaluator notes that in an attempt to have the *WHS* Act apply to everyone, the likely effect was gender blind.¹⁰⁸⁸ The reason is that the *WHS* Act failed to recognise the differentiated adverse impacts, risks and obstacles women could encounter in the workplace.¹⁰⁸⁹

My analysis concurs with the first and third evaluators who rated the *WHS* Act's intention as gender-blind. The *WHS* Act requires that workplaces provide a safe and healthy environment for all workers, regardless of gender, disability, or other personal characteristics. According to the *WHS* Act, employers must eliminate risks as far as reasonably practicable.¹⁰⁹⁰ To rate the intention of the *WHS* Act as gender neutral is not accurate, the reason being that gender considerations are essential to take into account women's specific needs. Significant gender considerations should have been considered to cover pregnant women, but were overlooked by the drafters of the *WHS* Act. The challenge is where significant gender considerations were supposed to have been considered but overlooked; such neutrality easily slips into gender blindness.¹⁰⁹¹ The *WHS* Act formally applies to everyone, but the likely effect is that it substantially discriminates against pregnant women. The *WHS* Act is silent on protections offered to pregnant women. This poses a significant challenge as they are not protected in relation to their health and safety at work. Further, the *WHS* Act¹⁰⁹² covers psycho-social hazards, but it does not explicitly define gender-based violence or sexual harassment as a health and safety hazard risk. Women, including migrant women, are disproportionately affected by gender-based violence and sexual harassment in the

¹⁰⁸⁶ Vijeyarasa 2022:78.

¹⁰⁸⁷ Vijeyarasa 2022:78.

¹⁰⁸⁸ GLI “Work Health and Safety Act 2011. Australia. Evaluator 2”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹⁰⁸⁹ GLI “Work Health and Safety Act 2011. Australia. Evaluator 2”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹⁰⁹⁰ *WHS Act*:Part 2, sec: 17-19.

¹⁰⁹¹ Vijeyarasa 2022:78.

¹⁰⁹² *WHS Act*: Part 2, sec. 19.

workplace. This leaves victims exposed and vulnerable. The likely effect of the *WHS* Act is that it discriminates against women, who are a vulnerable group and is thus gender blind.

The *WHS* Act grants all workers access to work in a safe environment regardless of gender.¹⁰⁹³ Again, the drafters of the *WHS* Act adopted a gender neutral approach, failing to incorporate gender considerations where they should have. Gender neutrality easily falls into the gender-blind response. The intention remains gender-blind, overlooking important gender considerations. The likely effect is that pregnant women are left out with no protection from a safe working environment. The *WHS* Act further promotes providing advice, information, and education concerning workplace health and safety.¹⁰⁹⁴ This means that employees have access to information. Gender considerations are not taken into account when promoting access to information. The *WHS* Act sets acceptable health and safety standards. It provides a platform for worker consultation in safety and decision-making, ensuring that workers have a say in policies that affect them.¹⁰⁹⁵ The *WHS* Act acknowledges mental health risks, which include stress and fatigue, as part of workplace safety, aligning with modern safety expectations.¹⁰⁹⁶ The *WHS* Act does not, however, explicitly address gender-based risks, which include workplace violence and reproductive health hazards. The *WHS* Act is silent on providing affordable health services for women. This serves to confirm both the intention and likely effect as gender blind.

Strengthening gender-responsive provisions will ensure safer working conditions. The provisions need to include specific provisions ensuring workplace adjustments for pregnant workers. The *WHS* Act should also explicitly recognise gender-based risks, including workplace violence and sexual harassment.

¹⁰⁹³ *WHS* Act: Part 2, sec. 19.

¹⁰⁹⁴ *WHS* Act: Part 1, sec. (3) (d).

¹⁰⁹⁵ *WHS* Act: Part 5, sec. 50.

¹⁰⁹⁶ *WHS* Act: Part 2, sec. 19.

5.4.1.2.2 Assessment question two: Does the Act guarantee access to informal education or require the provision of information and education on the issue?

Regarding access to information and education, the first evaluator rated the intention and likely effect as gender-neutral.¹⁰⁹⁷ The first evaluator notes that the *WHS* Act aims to promote the provision of advice, information, education, and training on work health and safety.¹⁰⁹⁸ It also provides for certain events to be made public to ensure the information is accessible (concerning a *WHS* undertaking and in relation to prosecutions of offences under the Act).¹⁰⁹⁹ According to the first evaluator, the likely effect is that the law promotes education and training related to work health and safety, such promotion benefits both men and women without the need to treat them differently.¹¹⁰⁰

The second evaluator rated the *WHS* Act's intention in respect of information sharing and education as gender-blind.¹¹⁰¹ The Act undoubtedly promotes worker consultation regarding work and safety.¹¹⁰² These consultations involve sharing information with workers, allowing them to provide their opinions, and advising them of the outcome of the consultation.¹¹⁰³ These standards apply to all workers, regardless of their gender. During the consultations, no gender considerations are taken into account. The second evaluator rated the likely effect as gender blind.¹¹⁰⁴ Information sharing fails to consider the distinct differences between men and women. It also fails to promote

¹⁰⁹⁷ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹⁰⁹⁸ *WHS Act*:sec. 3,217, 221 & 230/2011 & GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹⁰⁹⁹ *WHS Act*:sec. 3,217, 221 & 230/2011 & GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹⁰⁰ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹⁰¹ GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁰² GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025) & *WHS Act*:Part 5, Division 2.

¹¹⁰³ *WHS Act*:Part 5, Division 2.

¹¹⁰⁴ GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

information sharing regarding the equal treatment of men and women regarding health and safety.¹¹⁰⁵

The third evaluator agreed with the second and rated the intention and likely effect as gender blind.¹¹⁰⁶ The third evaluator notes that the *WHS* Act intends to guarantee workers a right to safety and work, including health, safety and welfare from hazards and risks.¹¹⁰⁷ However, the *WHS* Act makes no specific reference to women workers, harassment or violence at work as a hazard.¹¹⁰⁸ The likely effect is that by defining the concept of 'work health and safety' in a superficial manner, the Act becomes gender-blind and fails to educate workers and citizens about workplace health and safety risks, particularly those experienced by women.¹¹⁰⁹ This includes harassment and discrimination at work. While the primary duty of care consists of an obligation to provide information and training to protect all workers from risk, the Act is not explicit in the duty to provide both male and female workers with information about their rights.¹¹¹⁰

The second and third evaluators rated the intention and likely effect as gender-blind, and I concur with them. The *WHS* Act's drafters did not consider the clear distinctions between men and women. The informal education and information sessions did not include crucial gendered information that could benefit women. This is likely to have the effect of excluding the specific hazards that women face, such as harassment and violence; additionally, the *WHS* Act does not include any information on pregnant women. The law will be gender-responsive if it contains substantive provisions that

¹¹⁰⁵ GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁰⁶ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁰⁷ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁰⁸ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁰⁹ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹¹⁰ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

address harassment and violence against women as a health and safety hazard and outline how pregnant women will be protected.

5.4.1.2.3 Assessment question three: Does the Act guarantee non-coerced and informed decision-making and, where relevant, protect women's confidentiality?

The three evaluators agreed and rated the Act's intention as gender neutral.¹¹¹¹ This was because the Act allows for negotiations and resolutions between employers and workers who form a work group regarding health and safety concerns.¹¹¹² The Act also allows the regulator to obtain information from a person about a possible violation of the law.¹¹¹³ The Act further applies to negotiations and issue resolutions between employers and employees who form a working group regarding health and safety concerns.¹¹¹⁴ These standards apply to all persons, irrespective of gender.

The first evaluator noted that although the *WHS* Act's intention was gender neutral, its likely effect was gender-responsive, as the consultations allowed women to participate in the decision-making process even if they were not part of the health and safety team.¹¹¹⁵ In other words, the consultation process allowed women to make informed decisions on health and safety matters.

Although the second evaluator rated the intention of the *WHS* Act as gender neutral, the likely effect was gender-blind. The Act fails to explicitly promote the participation of women in the representation, negotiation, and decision-making of women.¹¹¹⁶ The Act thus fails to recognise the specific risks women face in the workplace and the

¹¹¹¹ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025); "GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025); GLI "Work Health and Safety Act 2011. Australia. Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹¹² *WHS Act*:Part 5, sec. 52-59, 56-58, 80-82.

¹¹¹³ *WHS Act*:Part 8, Division 2; Part 9:171-175.

¹¹¹⁴ *WHS Act*:Part 8, Division 2; Part 9:171-175.

¹¹¹⁵ *WHS Act*:sec. 46, 47 & GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹¹⁶ *WHS Act*:sec. 46, 47 & GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

significance of their contribution to health and safety policy-making.¹¹¹⁷ The Act allows the regulator to obtain information from a person about a possible violation of the law.¹¹¹⁸ The drafters of the Act should have recognised the differentiated impacts women may face regarding sharing their information and included provisions which established additional safeguards to protect women's confidential information. Instead, the Act is silent on the matter.¹¹¹⁹ The third evaluator noted that whilst the intention was gender neutral, the likely effect was also gender neutral, applying to men and women equally.¹¹²⁰

In my analysis, the *WHS* Act's intention regarding assessment question three is gender neutral. The *WHS* Act includes provisions that indirectly protect women from coercion, support informed decision-making, and ensure confidentiality in workplace health and safety matters. However, these protections are general and not explicitly gender-specific. The *WHS* Act prohibits coercion, undue influence, or threats against workers, including women, concerning health and safety matters.¹¹²¹ Workers have the right to cease unsafe work if they reasonably believe it poses a risk to health and safety. They cannot be forced or coerced to continue working in hazardous conditions.¹¹²²

The challenge, however, is that the *WHS* Act does not explicitly address gender-based coercion in the workplace, such as coercion to tolerate unsafe conditions affecting women disproportionately, which include a lack of pregnancy accommodations or exposure to gender-based violence. Furthermore, some industries with high levels of female workers, such as healthcare, domestic work, and retail, may have power

¹¹¹⁷ *WHS Act*:sec. 46, 47 & GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹¹⁸ *WHS Act*:sec. 46, 47 & GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025)..

¹¹¹⁹ *WHS Act*:Part 5:52-54, 56-58, 80-82; Part 8: Division 2; Part 9:171-175 GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹²⁰ GLI "Work Health and Safety Act 2011. Australia. Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹²¹ *WHS Act*: Part 6, sec. 104-109.

¹¹²² *WHS Act*: Part 5, sec, 85.

imbalances where women feel pressured to accept unsafe conditions despite legal protections. Hence, the likely effect is that it is gender blind.

The *WHS Act* ensures that workers have the right to receive sufficient information and training to make informed decisions about workplace safety. It states that employers must provide all workers with adequate information, instruction, and training on workplace risks and how to protect themselves.¹¹²³ Workers must be consulted on workplace safety decisions, including risk management policies that affect them.¹¹²⁴ The *WHS Act*, however, is gender blind in its likely effect as it does not explicitly mandate gender-sensitive training on risks unique to women, such as reproductive health hazards, gender based violence, or harassment-related psychological stress. Furthermore, migrant and informal female workers often lack access to information in a language they understand, which limits their ability to make informed decisions.

Confidentiality protections under the *WHS Act* are mainly related to health records, complaints, and workplace investigations.¹¹²⁵ Employers cannot disclose workers' health information without consent unless the law requires it.¹¹²⁶ The confidentiality protections help ensure that workers, including women, can report safety concerns without fear of exposure or retaliation.¹¹²⁷ The challenge with the *WHS Act* is that it does not explicitly protect women's confidentiality in cases of workplace harassment, sexual violence, or reproductive health concerns, especially pregnancy-related accommodations. Furthermore, the reporting mechanisms may not always ensure complete anonymity, which can lead to fears of retaliation, particularly in male-dominated industries. Therefore, as much as the *WHS Act*'s intention is gender neutral, its likely effect is gender blind.

5.4.1.2.4 Assessment question four: Does the Act promote equal relations between men and women?

The three evaluators concur that the Act is gender blind in its intention and likely effect. However, the evaluators had different reasoning. The first evaluator rated the intention

¹¹²³ *WHS Act*:Part 2, sec. 19.

¹¹²⁴ *WHS Act*:Part 5, sec. 47-49.

¹¹²⁵ *WHS Act*:Part 14, sec. 271.

¹¹²⁶ *WHS Act*:Part 5, sec. 70.

¹¹²⁷ *WHS Act*:Part 5, sec. 70(1).

as gender blind because the *WHS* Act does not promote the election of women as health and safety representatives, and this does not promote gender equality.¹¹²⁸ The likely effect is also gender-blind.¹¹²⁹ The *WHS* Act does not promote the election of women as health and safety representatives, which does not promote gender equality.¹¹³⁰

The second evaluator rated intention as gender blind.¹¹³¹ The Act specifically prohibits discriminatory conduct for a prohibited reason. These rules apply to all workers, irrespective of gender, as demonstrated by the Act's use of the pronouns 'his' and 'her'.¹¹³² The drafters of the *WHS* Act failed to address gender-specific concerns that disproportionately affect women. The *WHS* Act evidently lacks awareness of men's and women's specific and different needs. According to the second evaluator, the likely effect is a failure to identify and respond to the specific risks women face in the workplace.¹¹³³

The third evaluator rated the intention as gender blind.¹¹³⁴ The *WHS* Act promotes fair workplace representation and consultation for all workers. However, it is generally gender blind and does not explicitly state that it aims to ensure equal representation for men and women, give a voice to women's representatives, or raise awareness of workplace risks and harms experienced by women in particular.¹¹³⁵ The likely effect is

¹¹²⁸ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹²⁹ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹³⁰ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹³¹ GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹³² GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹³³ GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹³⁴ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹³⁵ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

that there is no equal representation of women as health and safety representatives.¹¹³⁶

I agree with the three evaluators who rated the Act's intention and likely effect on promoting equal relations between men and women as gender blind. The *WHS* Act failed to consider or acknowledge women's specific needs and risks. The situation worsened because the *WHS* Act was not explicit in guaranteeing that women's health and safety officers would be selected. This not only leads to male domination of health and safety committees but also to an underrepresentation of women workers' health and safety needs. A women's health and safety representative would be better positioned to protect and safeguard women's issues, including ensuring that the health and safety of pregnant women are acknowledged in the Act. The *WHS* Act will be gender responsive if the Act can be amended to reflect hazards faced by women, including those who are pregnant. Furthermore, the *WHS* Act would also need to be amended to promote the election of women employees.

5.4.1.2.5 Assessment question five: Does the Act protect women from situations of vulnerability linked to their gender?

The three evaluators agreed that the *WHS* Act did not protect women from situations of vulnerability linked to their gender. The first evaluator noted that workers have the right to cease unsafe work.¹¹³⁷ Therefore, the Act intends to protect workers in a situation of vulnerability. However, a specific reference to the health conditions of certain women, including pregnant women, is missing.¹¹³⁸ The likely effect is that the *WHS* Act does not enable the protection of pregnant women, whom the Act should cover.¹¹³⁹ The likely effect is thus gender blind.

¹¹³⁶ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹³⁷ *WHS Act*: Part 5, sec. 83-86.

¹¹³⁸ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹³⁹ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

The second evaluator maintains that the Act should contain provisions which explicitly recognise the health and safety risks women face in the workplace, which include, among others, physical, psychological and sexual harassment.¹¹⁴⁰ The state is mandated by international laws and instruments to protect women from gender-specific workplace harm.¹¹⁴¹ The likely effect is that the Act fails to protect women from situations of vulnerability linked to their gender and is thus gender blind.¹¹⁴²

The third evaluator also maintained that the *WHS* Act's intention in respect to assessment question five was gender blind. The law Act not protect women from gender-specific workplace harms. Work health is defined narrowly in the Act.¹¹⁴³ Discriminatory conduct is only prohibited if the victim of the discriminatory treatment is part of the workplace health and safety committee or is a health and safety representative.¹¹⁴⁴

Regarding the fifth assessment question, I lean in favour of the three evaluators who rated the intention and likely effect as gender-blind. The *WHS* Act was enacted to cover both men and women. Failure to acknowledge and incorporate the gendered risks faced by women leaves them exposed with no protection. The drafters of the Act should not have overlooked significant gender differences. In order to rectify the *WHS* Act, provisions acknowledging the gendered risks women face should be included, including how women will be protected. Pregnancy should explicitly be acknowledged as a workplace risk. The *WHS* Act should include provisions which promote and encourage women to be elected as health and safety officials. That way, the interests and needs of women employees are better safeguarded.

¹¹⁴⁰ *WHS Act*:Part 5, Division 6; Part 6; Part 7.

¹¹⁴¹ UN OHCHR 2017:par. 30(f); UN OHCHR 2013:par. 21, 22.

¹¹⁴² GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁴³ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁴⁴ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

5.4.1.2.6 Assessment question six: Does the Act guarantee accessible and effective remedies?

The first evaluator rated the intention as gender neutral. The Act aims to create procedures for access to justice and remedies in cases where employees who have filed a complaint for work-related health and safety are subjected to discrimination.¹¹⁴⁵ The *WHS* Act stipulates civil and criminal penalties, temporary improvement notices issued by the health and safety representative, and enforcement actions in cases of non-compliance.¹¹⁴⁶ However, these measures apply to both men and women, and treating them differently is unnecessary.¹¹⁴⁷ The likely effect is that the *WHS* Act will enable workers to access justice, but there is no need to treat men and women differently in their ability to access justice.¹¹⁴⁸

The second evaluator also rated the intention as gender neutral, reasoning that the law provides for civil and criminal proceedings concerning discriminatory conduct in the workplace. Furthermore, it also provides for dispute mechanisms in relation to the right of entry of *WHS* permit holders.¹¹⁴⁹ These standards apply to all employees and employers, irrespective of their gender.¹¹⁵⁰ The likely effect is that the law is gender blind.¹¹⁵¹ The reason is that the Act should have taken into account the unique problems women face when they try to get justice, especially when they have been victims of violence or harassment at work, which primarily affects women. However, the *WHS* Act is silent on the matter.¹¹⁵²

¹¹⁴⁵ GLI “Work Health and Safety Act 2011. Australia. Evaluator 1”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹⁴⁶ *WHS Act* 137/2011:Part 5, Division 6, Part 6, Part 7 & GLI “Work Health and Safety Act 2011. Australia. Evaluator 1”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹⁴⁷ GLI “Work Health and Safety Act 2011. Australia. Evaluator 1”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹⁴⁸ GLI “Work Health and Safety Act 2011. Australia. Evaluator 1”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹⁴⁹ *WHS Act*: Part 9, Division 4.

¹¹⁵⁰ GLI “Work Health and Safety Act 2011. Australia. Evaluator 2”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁵¹ GLI “Work Health and Safety Act 2011. Australia. Evaluator 2”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁵² GLI “Work Health and Safety Act 2011. Australia. Evaluator 2”,

The third evaluator rated the intention as gender blind.¹¹⁵³ The Act includes a stated intention of ensuring appropriate scrutiny and review of actions taken by persons performing functions according to the law.¹¹⁵⁴ As the Act is essentially gender blind, it is unclear how well these provisions will work for women who experience unsafe conditions at work.¹¹⁵⁵ The likely effect is that the Act is gender blind.¹¹⁵⁶ It is unclear how well this law will work for women in practice. As a gender blind law with a narrow definition of workplace safety, the *WHS* Act may not protect women from gender-specific risks, and it may not give rise to appeals based on decisions that are not in the best interest of women workers.¹¹⁵⁷

In my analysis, the *WHS* Act gives workers the right to cease unsafe work if they reasonably believe it poses a risk to their health and safety.¹¹⁵⁸ Employers cannot take discriminatory or retaliatory action against workers who raise safety concerns.¹¹⁵⁹ My rating of the intention of the *WHS* Act is gender neutral as it applies to all workers; the likely effect, however, would be gender blind, the reason being that women in male-dominated industries, such as construction and mining, may fear retaliation or workplace exclusion if they report safety concerns. Furthermore, casual and migrant women workers may be hesitant to report violations due to job insecurity, language barriers, or visa restrictions.

<https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁵³ GLI “Work Health and Safety Act 2011. Australia. Evaluator 2”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁵⁴ GLI “Work Health and Safety Act 2011. Australia. Evaluator 2”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁵⁵ GLI “Work Health and Safety Act 2011. Australia Evaluator 3”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁵⁶ GLI “Work Health and Safety Act 2011. Australia Evaluator 3”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁵⁷ GLI “Work Health and Safety Act 2011. Australia Evaluator 3”, <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁵⁸ *WHS Act*: Part 5, sec. 85.

¹¹⁵⁹ *WHS Act*: Part 6, sec. 104-109.

5.4.1.2.7 Assessment question seven: Does the Act promote the comprehensive monitoring of women's situations?

The first evaluator rated the *WHS* Act's intention as gender-blind because the Act does not provide for monitoring women's situations.¹¹⁶⁰ The likely effect is gender blind as the law will not enable the collection of gender-disaggregated data, and no evidence of how women experience the *WHS* Act.¹¹⁶¹ The second evaluator also rated the intention of the *WHS* Act as gender blind, as it is silent on the matter of monitoring the situation of women.¹¹⁶² The likely effect is also gender blind as the *WHS* Act fails to provide for the collection of gender-disaggregated data concerning the health and safety risks and work conditions faced by women.¹¹⁶³ The third evaluator, like the first and second, rated the intention as gender-blind.¹¹⁶⁴ The third evaluator noted that the *WHS* Act failed to require data collection to understand best how women were affected by workplace hazards/unsafe work conditions, how often women complain, and for what incidents.¹¹⁶⁵ Without data collection, it may also remain unknown how many women act as workplace health representatives.¹¹⁶⁶ The likely effect is, therefore, gender-blind, as the situation of women remains unknown.

My rating for the intention and likely effect of the *WHS* Act is gender-blind. The *WHS* Act provides for keeping records concerning health and safety incidents.¹¹⁶⁷ The record-keeping provisions do not refer to monitoring women's situations. The *WHS* Act does not explicitly mention the importance of this data collection, which is necessary

¹¹⁶⁰ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹⁶¹ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹⁶² GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁶³ GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁶⁴ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁶⁵ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁶⁶ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁶⁷ *WHS Act*.

to understand how women experience gender-based hazards and safety concerns at work.¹¹⁶⁸ Furthermore, the lack of data collection also means that we will likely not understand how women are protected by the *WHS* Act, which gender-based hazards are raised, and what proportion of inspectors are women.

5.4.1.2.8 How well does the *WHS* Act meet international standards

Overall, the first evaluator rated the *WHS* Act as 'partially meeting international standards'.¹¹⁶⁹ While the law provides significant benefits to workers in vulnerable situations, including women, it lacks specific provisions addressing the unique needs of pregnant women.¹¹⁷⁰ Given the health and occupational risks they may face, it would be beneficial to incorporate protections for pregnant workers within the *WHS* Act.¹¹⁷¹

The second evaluator's overall score of the *WHS* Act was that it did not meet international standards.¹¹⁷² While the law sets standards to protect the health and safety of workers and workplaces, it does not account for the distinct challenges, risks, and barriers that women face in the workplace.¹¹⁷³ Additionally, it fails to promote gender equality by neglecting measures that ensure women's equal participation and representation.¹¹⁷⁴

The third evaluator's overall score of the *WHS* Act was "not meeting international standards".¹¹⁷⁵ The law falls short of international standards. While it references

¹¹⁶⁸ CEDAW 1991.

¹¹⁶⁹ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹⁷⁰ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹⁷¹ GLI "Work Health and Safety Act 2011. Australia. Evaluator 1", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/01b317c8-5a8d-4150-8753-4bee563dd69c/effect> (accessed on 26 February 2025).

¹¹⁷² GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁷³ GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁷⁴ GLI "Work Health and Safety Act 2011. Australia. Evaluator 2", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/935ada64-c706-4b62-a4cb-3cd80ab8befd> (accessed on 26 February 2025).

¹¹⁷⁵ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

psychological hazards, its definition of workplace health and safety remains overly narrow, making it unlikely to support complaints related to harassment, violence, and other gender-based risks.¹¹⁷⁶ Additionally, it lacks provisions for fair representation based on sex and fails to recognise women worker representatives and unions as essential in addressing workplace safety and gender-specific risks.¹¹⁷⁷ The absence of data collection further limits understanding of whether women benefit from the law, the gender-based hazards they face, and the representation of women among workplace inspectors.¹¹⁷⁸

I agree with the second and third evaluators who rated the *WHS* Act as not meeting international standards. CEDAW, ratified by Australia in 1983, mandates that women have equal rights to safe and healthy working conditions.¹¹⁷⁹ CEDAW recognises gender-based violence as a form of discrimination affecting women's workplace rights.¹¹⁸⁰ It also calls for stronger legal protections against workplace sexual harassment and violence.¹¹⁸¹ Unlike CEDAW, which advocates for gender-responsive workplace policies, the *WHS* Act does not explicitly address gender-based risks. As a result, workplace risk assessments and safety measures often fail to consider gender-specific concerns such as violence, reproductive health hazards, and differential exposure to harmful substances. This gap leaves women migrant workers more vulnerable to unsafe working conditions.

While workplace violence is recognised as a psychosocial hazard, the *WHS* Act does not explicitly mandate the prevention of gender-based violence, as required by CEDAW's General Recommendation. Additionally, Australia has yet to ratify the ILO Convention on workplace harassment, which aligns with CEDAW standards.¹¹⁸² Migrant women workers, domestic workers, and those in insecure employment often lack equal protection under the *WHS* Act. While CEDAW calls for stronger

¹¹⁷⁶ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁷⁷ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁷⁸ GLI "Work Health and Safety Act 2011. Australia Evaluator 3", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d/584157f0-80c9-42cb-a7b5-cac71a8ef3a5/intention> (accessed on 26 February 2025).

¹¹⁷⁹ CEDAW 1979:art. 11, par. 7.

¹¹⁸⁰ CEDAW 1992:par 1.

¹¹⁸¹ CEDAW 2017:par. 24.

¹¹⁸² CEDAW 1992; CEDAW 2017; CEDAW 2017 & 2019 (not yet ratified by Australia).

accountability measures to prevent discrimination and workplace violence, these safeguards are not fully integrated into the *WHS* Act's enforcement mechanisms.

Recommendations to strengthen the *WHS* Act in line with CEDAW: Several key reforms are necessary to enhance the *WHS* Act in alignment with CEDAW. First, the Act should explicitly recognise gender-based risks in workplace health and safety regulations, ensuring that issues such as workplace violence and reproductive health hazards are adequately addressed. Additionally, gender-sensitive risk assessments must be mandated, incorporating considerations such as workplace design, properly fitted personal protective equipment for women, and exposure to harmful substances affecting reproductive health. To further enhance protections, Australia should ratify ILO Convention No. 190, aligning its workplace safety laws with CEDAW's standards on gender-based violence. Moreover, *WHS* protections must be extended to informal workers, who often face precarious conditions without adequate safeguards. Finally, compliance and reporting mechanisms for workplace harassment and gender-based violence should be strengthened to ensure effective enforcement and accountability.

Table 0.1: Work Health and Safety Act 2011 Australia¹¹⁸³

Intention vs Likely Effect

	Inconclusive/N/A	Gender regressive	Gender Blind	Gender Neutral	Gender responsive		Inconclusive/N/A	Gender regressive	Gender Blind	Gender Neutral	Gender responsive
1. Does the law guarantee access to non-discriminatory and accessible, affordable, acceptable services?	0/3	0/3	2/3	1/3	0/3		0/3	0/3	3/3	0/3	0/3
2. Does the law guarantee access to information and education or require the provision of information and education on the issue?	0/3	0/3	1/3	2/3	0/3		0/3	0/3	2/3	1/3	0/3
3. Does the law guarantee non-coerced and informed decision-making and, where relevant, protect women's confidentiality?	0/3	0/3	0/3	3/3	0/3		0/3	0/3	2/3	0/3	0/3
4. Does the law promote equal relations between men and women?	0/3	0/3	3/3	0/3	0/3		0/3	0/3	3/3	0/3	0/3
5. Does the law protect women from situations of vulnerability linked to their gender?	0/3	0/3	3/3	0/3	0/3		0/3	0/3	3/3	0/3	0/3
6. Does the law guarantee accessible and effective remedies (i.e. access to justice)?	0/3	0/3	1/3	2/3	0/3		0/3	0/3	2/3	1/3	0/3
7. Does the law promote the comprehensive monitoring of the situation of women? This includes promoting gender-disaggregated data collection on the nature of the problem.	0/3	0/3	3/3	0/3	0/3		0/3	0/3	3/3	0/3	0/3

The following section discusses the use of the GLI in Indonesia.

5.4.2 Indonesia

5.4.2.1 Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad¹¹⁸⁴

The *Law Concerning Placement and Protection of Indonesian Overseas Workers* (hereinafter the Law) aims to set out regulations to protect Indonesian workers in

¹¹⁸³ Vijayarasa 2020 "Evaluation: Work Health and Safety Act 2011, Australia. Gender Legislative Index", <https://www.genderlawindex.org/laws/c6e8f079-f263-4b0a-a28e-8f172778f72d> (accessed on 30 May 2025).

¹¹⁸⁴ Republic of Indonesia. *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad Act 39/2004*.

employment overseas. The law promotes equal access to opportunities and equal rights at work for men and women. This law is particularly relevant to the current study regarding migrant workers.

5.4.2.2 Assessment question one: Does the law guarantee non-discriminatory, accessible, acceptable and affordable services

Three evaluators assessed the law on the GLI using the seven assessment questions to determine its gender responsiveness and whether it met international standards.

The three evaluators had different views on the first assessment question. The first evaluator noted that the law's intention was gender neutral, as the law was not discriminatory and provided for the placement of Indonesian overseas workers, which is a service for both men and women.¹¹⁸⁵ It had an equally gender-neutral effect, as service was provided for both men and women without needing to differentiate between them.¹¹⁸⁶ The second evaluator notes that the law allows recruitment agencies to place workers abroad.¹¹⁸⁷ A positive aspect of the Act is that placements can only occur in countries with regulations protecting foreign workers.¹¹⁸⁸ The second evaluator notes that the intention of the Act is thus gender responsive.¹¹⁸⁹ The fact that placement can only take place in countries with regulations protecting migrants suggests that the Act has a gender responsive effect, as women migrants will be protected in their countries of destination.¹¹⁹⁰ The third evaluator contends that the law's intention is gender-blind in that it arranges for workers to be placed abroad and provides pre-departure training, counselling, and health checks. No specific training is

¹¹⁸⁵ GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 1", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/5c28bd86-f70f-4fa9-8817-af5fea5fa914/intention> (accessed on 26 May 2025).

¹¹⁸⁶ GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 1", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/5c28bd86-f70f-4fa9-8817-af5fea5fa914/intention> (accessed on 26 May 2025).

¹¹⁸⁷ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*

¹¹⁸⁸ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 11-26 & 27 & GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 2", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/79505245-bb3e-4f7d-9ab1-8dc3d0b31299> (accessed on 26 May 2025).

¹¹⁸⁹ GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 2", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/79505245-bb3e-4f7d-9ab1-8dc3d0b31299> (accessed on 26 May 2025).

¹¹⁹⁰ GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 2", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/79505245-bb3e-4f7d-9ab1-8dc3d0b31299> (accessed on 26 May 2025).

offered to women.¹¹⁹¹ The likely effect is, therefore, gender blind as the law fails to show awareness of men's and women's specific and differentiated needs and interests altogether.¹¹⁹²

From my assessment, the intention of the law is gender responsive. The Act contains clauses which state that workers will only be placed in countries where there are regulations protecting migrants. Furthermore, the Act also has provisions which arrange for pre-departure training, counselling, and health checks. The only weakness of the Act is that it fails to make provision for gender-specific training; thus, the likely effect of the Act is that it is gender-blind. Gender-specific training is essential for women migrant workers as they face distinct vulnerabilities, highlighted by Crenshaw's intersectional theory. The Act must contain provisions that expressly guarantee gender-specific training and counselling, empowering and equipping women migrant workers to be gender-responsive.

5.4.2.3: Assessment question two: Does the law guarantee access to informal education or require the provision of information and education on the issue?

The three evaluators were divided on the second assessment question on whether the law guaranteed access to information and education. The first evaluator noted that the intention of the Act was gender-neutral as it guaranteed workers access to information and education.¹¹⁹³ The likely effect of the Act was gender neutral, as the law did not seek to distinguish between men and women.¹¹⁹⁴ The second evaluator stated that whilst a worker's placement service allows overseas workers to gain information about working overseas, the placement is based on "gender equivalent and non-discrimination".¹¹⁹⁵ The intention is thus gender-responsive. However, the likely effect

¹¹⁹¹ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 31.& GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 3", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/a71f8c45-1542-46b1-b9e2-e3566d8bc235> (accessed on 26 May 2025).

¹¹⁹² GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 3", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/a71f8c45-1542-46b1-b9e2-e3566d8bc235> (accessed on 26 May 2025).

¹¹⁹³ GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 1", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/5c28bd86-f70f-4fa9-8817-af5fea5fa914/intention> (accessed on 26 May 2025).

¹¹⁹⁴ GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 1", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/5c28bd86-f70f-4fa9-8817-af5fea5fa914/intention> (accessed on 26 May 2025).

¹¹⁹⁵ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 42 (b).

is that the law is genderblind. While the law has provisions for training, it does not seem to target women specifically.¹¹⁹⁶ The third evaluator rated the intention of the law as gender blind.¹¹⁹⁷ The third evaluator reasoned that although the law had made provision for training and access to information available, the challenge is that it is non-gendered training and may put women at significant risk, reducing their awareness of the harms they may face and leaving them without knowledge of emergency procedures.¹¹⁹⁸ Furthermore, as part of its General Recommendation, the CEDAW Committee requires appropriate education and gender-specific awareness-raising programmes for women migrant workers.¹¹⁹⁹ The likely effect was thus gender blind as no gender considerations were considered when they should have been considered.¹²⁰⁰

I lean more in favour of the third evaluator. As much as the law guarantees access to information and education for workers placed abroad, the intention is gender blind, as from the drafting, no gender considerations are acknowledged. The likely effect is gender blindness, as no consideration is provided to the distinct differences between men and women. The main challenge with the law is that it had the likely effect of being gender blind, as no provision was made to make access to gender specific educational information.

5.4.2.4 Third assessment question: Does the law guarantee non-coerced and informed decision making, and where relevant, protect women's confidentiality

On the assessment question of whether the law guarantees non-coerced and informed decision-making and, where relevant, protects women's confidentiality, the first evaluator notes that the law's intention is gender neutral in that it provides for

¹¹⁹⁶ GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 2", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/79505245-bb3e-4f7d-9ab1-8dc3d0b31299> (accessed on 26 May 2025).

¹¹⁹⁷ GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 3", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/a71f8c45-1542-46b1-b9e2-e3566d8bc235> (accessed on 26 May 2025).

¹¹⁹⁸ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 34(1).

¹¹⁹⁹ CEDAW 2008:par. 24(b)(i); International Convention on the Rights of Migrant Workers, General Comment 1 on Migrant Domestic Workers:par. 28, 29 & 30.

¹²⁰⁰ GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 3", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/a71f8c45-1542-46b1-b9e2-e3566d8bc235> (accessed on 26 May 2025).

prospective workers to be informed of their rights and duties, conditions, situations, and protection procedures, and this applies to both men and women.¹²⁰¹

The first evaluator, therefore, notes that the likely effect that the law will have is that it will be gender neutral. The second evaluator states that the law is gender blind in both its intention and likely effect, as it does not differentiate between men and women.¹²⁰²

The third evaluator observed that the law requires written permission from a husband or wife to go overseas.¹²⁰³ In situations where a woman willing to migrate is denied written permission by her husband, her informed decision is undermined.¹²⁰⁴ Whilst the drafters of the law intended that the law applies to both men and women, the fact that it has a clause that requires the other party's signature shows that the likely effect will be gender regressive. Power imbalances and economic dependence mean women are more likely than men to be denied consent, further reinforcing patriarchal control. The clause thus entrenches gender-regressive outcomes under the guise of gender neutrality.

Whilst article 34 of the Act makes provision for prospective overseas workers to be informed of their rights and duties and protection procedures, its weakness is that it contains a clause in article 51, which requires the spouse of the prospective worker to provide written permission. The law, in its intention, is gender regressive, with its likely effect also regressive, as it serves to perpetuate gender inequality. Prospective women migrant workers will, in most cases, not be allowed by their spouses due to entrenched gender norms, which were already discussed in section 2.2.1.

5.4.2.5 Does the law promote equal relations between men and women

Regarding the fourth assessment question, the first and second evaluators concurred that the intention of the law and the likely effect it sought to achieve were gender

¹²⁰¹ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 34 & GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 1", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/5c28bd86-f70f-4fa9-8817-af5fea5fa914/intention> (accessed on 26 May 2025).

¹²⁰² GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 2", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/79505245-bb3e-4f7d-9ab1-8dc3d0b31299> (accessed on 26 on May 2025).

¹²⁰³ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 51(c).

¹²⁰⁴ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 51(c).

regressive.¹²⁰⁵ The first and second evaluators note that the Act contains provisions which prohibit pregnant women from employment overseas, thereby discriminating against this group of women.¹²⁰⁶ Secondly, they also argue that prospective employees are required by the law to obtain written permission from their husband/or wife.¹²⁰⁷ A requirement that discriminates against women in other types of relationships.¹²⁰⁸ The intention of the law is, therefore, gender regressive, with the likely effect also being gender regressive.¹²⁰⁹ The third evaluator notes that the intention of the Act was gender responsive as it sought to promote equality between men and women.¹²¹⁰ The likely effect, however, was gender regressive as the Act contains provisions which prohibit pregnant women from employment abroad and also require written permission for prospective employees with spouses.¹²¹¹

I agree with the first and second evaluator that the Act does not promote equal relations between men and women. A careful analysis of the Act shows that whilst in theory it sought to promote equal relations between men and women, in practice the

¹²⁰⁵ GLI “Law on Placement and Protection of Indonesian Workers Abroad. Indonesia 2004. Summary”, <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25> (accessed on 27 May 2025).

¹²⁰⁶ GLI “Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 1”, <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/5c28bd86-f70f-4fa9-8817-af5fea5fa914/intention> (accessed 26 May 2025) & “GLI “Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 2”, <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/79505245-bb3e-4f7d-9ab1-8dc3d0b31299> (accessed 26 May 2025).

¹²⁰⁷ GLI “Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 1”, <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/5c28bd86-f70f-4fa9-8817-af5fea5fa914/intention> (accessed 26 May 2025) & “GLI “Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 2”, <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/79505245-bb3e-4f7d-9ab1-8dc3d0b31299> (accessed 26 May 2025).

¹²⁰⁸ GLI “Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 1”, <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/5c28bd86-f70f-4fa9-8817-af5fea5fa914/intention> (accessed 26 May 2025) & “GLI “Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 2”, <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/79505245-bb3e-4f7d-9ab1-8dc3d0b31299> (accessed 26 May 2025).

¹²⁰⁹ GLI “Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 1”, <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/5c28bd86-f70f-4fa9-8817-af5fea5fa914/intention> (accessed 26 May 2025) & “GLI “Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 2”, <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/79505245-bb3e-4f7d-9ab1-8dc3d0b31299> (accessed 26 May 2025).

¹²¹⁰ GLI “Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 3”, <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/a71f8c45-1542-46b1-b9e2-e3566d8bc235> (accessed 26 May 2025).

¹²¹¹ GLI “Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 3”, <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/a71f8c45-1542-46b1-b9e2-e3566d8bc235> (accessed 26 May 2025).

inclusion of provisions prohibiting pregnant women from going to work abroad discriminates against them. The intention of the law is, in effect, gender regressive as it rolls back the existing rights of women. Furthermore, a prospective worker would need their spouse's written permission, an act which perpetuates gender inequality.

5.4.2.6 Fifth assessment question: Does the Law protect women from situations of vulnerability?

The first evaluator rated the law's intention and likely effect on the fifth assessment question as gender blind.¹²¹² The Act acknowledges the risk of sexual harassment abroad, thereby making the minimum age for a female worker 21 years. Article 35(a) of the Act does not explicitly require recruiting agencies to participate in awareness-raising programmes regarding sex and gender-based discrimination and exploitation of women, which impairs their ability to impart information to women travelling abroad.¹²¹³ When trained, women become empowered to identify and report a rights violation.

In contrast, the second evaluator maintained that the law's intention is gender-responsive, as it includes a provision for the rights and entitlements of migrant workers, including legal protection, labour rights, and equal opportunities and treatment.¹²¹⁴ Therefore, the likely effect is gender responsive, as women migrant workers can access information and enjoy equal rights and treatment.¹²¹⁵

The third evaluator notes that the intention of the Act was gender regressive, the reason being that it discriminated against prospective female workers based on

¹²¹² GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 1", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/5c28bd86-f70f-4fa9-8817-af5fea5fa914/intention> (accessed 26 May 2025).

¹²¹³ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 35 (a) & GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 1", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/5c28bd86-f70f-4fa9-8817-af5fea5fa914/intention> (accessed 26 May 2025)

¹²¹⁴ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 8; The International Convention on the Rights of Migrant Workers:art. 7.

¹²¹⁵ GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 2", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/79505245-bb3e-4f7d-9ab1-8dc3d0b31299> (accessed 26 May 2025).

pregnancy, and it prohibited them from being recruited to work overseas. It required a husband or wife to get written permission to work abroad.¹²¹⁶

With respect to this assessment question, I view this law's intention and likely effect as gender blind. The Act aims to address the rights and protections of Indonesian prospective migrant workers. The Act provides general protections, including the importance of contracts, outlines the responsibilities of agencies, and defines the roles of the government. Whilst the Act provides these general protections, it fails to address the gender specific vulnerabilities that could be faced by Indonesian women migrants, which include sexual harassment, gender-based violence, discrimination and exploitation, which is rampant in the informal sector. It is worth mentioning that the revised Law No. 18/2017 enhanced protections for Indonesian women abroad and specifically addressed the needs of women. The laws in countries of origin require recruiting agencies to participate in awareness-raising and training programs that educate migrant women about their rights.¹²¹⁷ However, a gap will remain if the same training is not extended to recruitment agencies in the destination countries.

5.4.2.7 Sixth assessment question: Assessment question six: Does the law guarantee accessible and effective remedies?

Regarding the sixth assessment, the first evaluator notes that the law's intention and likely effect are gender neutral in its ability to guarantee accessible and effective remedies. The law provides all workers with access to justice.¹²¹⁸ International law mandates that all women workers have access to judicial and quasi-judicial mechanisms and remedies. This is so specifically with labour relations, including equal remuneration and social security entitlements.¹²¹⁹

The second evaluator noted that the law's intention and likely effect are gender blind because while the law provides for legal protection during placement abroad (through

¹²¹⁶ GLI "Law on Placement and Protection of Indonesian Workers Abroad 2004. Evaluator 2", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25/79505245-bb3e-4f7d-9ab1-8dc3d0b31299> (accessed 26 May 2025)

¹²¹⁷ CEDAW 2008:art. 26.

¹²¹⁸ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 22.

¹²¹⁹ CEDAW 2015:par. 52.

legal assistance, advocacy and negotiation), the measures provided do not consider the specific circumstances of women workers.¹²²⁰

The third evaluator states that there are limited avenues for redress if a dispute arises between the worker and the placement agency.¹²²¹ Negotiation is encouraged, but beyond this, the law is still being determined. As a result, the third evaluator agrees with the second evaluator, maintaining that the intention and likely effect of the law are both gender blind.

I agree with the second and third evaluators that the intention and likely effect of the Act are gender blind. While the Act contains a general framework for protection, it does not provide accessible or effective remedies for women migrant workers who face gender-specific vulnerabilities, such as sexual harassment, violence, or abuse in the workplace.

5.4.2.8 Does the law allow for comprehensive monitoring of women's situation, including collecting gender disaggregated data on the nature of the problem?

The seventh assessment question focuses on the collection of disaggregated data. All three evaluators concur that the law, in its intention and likely effect, is gender-blind. Although the law contains provisions that guarantee data collection, the challenge with the law is that the data collection is not disaggregated.¹²²² The law only allows private agencies to collect data on prospective workers, but does not emphasise that the data should be gender-disaggregated.¹²²³

I agree with the three evaluators that the intention and legal effect of the Act is gender blind. International law encourages or provides for research and experimental studies to measure women's unremunerated domestic activities, for example, by conducting time-use surveys as part of their national household survey programmes and

¹²²⁰ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 80-81, 85, 100-104.

¹²²¹ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 85, 100, 101.

¹²²² *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 22(c).

¹²²³ *Law Concerning Placement and Protection of Indonesian Overseas Workers Abroad*:art. 22(a).

collecting statistics disaggregated by gender on time spent on activities both in the household and on the labour market.¹²²⁴

Failure to provide gender-disaggregated data poses a challenge, as no record of women migrant workers' experiences is documented. Gender-disaggregated data can assist in lobbying and advocating for policymakers to enact laws that better protect women migrant workers' rights.

5.4.2.8.1 Does the law meet International standards

The Act is particularly concerned with ensuring men and women are given equal opportunities and rights in the workplace.¹²²⁵ The bill includes, however, some deficient provisions that negatively affect a number of women's rights. For instance, in the international setting, the issue of sexual harassment is dealt with without requiring recruitment agencies to establish awareness-raising campaigns against sex- and gender-based discrimination, the exploitation of women, and specifically in regard to the prescribed age at which a female employee is considered 21. The ban on admission of pregnant women indirectly promotes discrimination against a particular subgroup of women. In addition, the duties and responsibilities entailed by husbands and wives can have especially harmful consequences on the decision-making capacity of women.

¹²²⁴ CEDAW 1991.

¹²²⁵ GLI "Law on Placement and Protection of Indonesian Workers Abroad. Indonesia 2004. Summary", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25> (accessed on 27 May 2025).

Intention vs Likely Effect

Table 0.2: The Law Concerning Placement of Workers Abroad ¹²²⁶

	Inconclusive/ N/A	Gender regressive	Gender Blind	Gender Neutral	Gender responsive		Inconclusive/ N/A	Gender regressive	Gender Blind	Gender Neutral	Gender responsive
1. Does the law guarantee access to non-discriminatory and accessible, affordable, acceptable services?	0/3	0/3	1/3	1/3	1/3		0/3	0/3	1/3	1/3	1/3
2. Does the law guarantee access to information and education or require the provision of information and education on the issue?	0/3	0/3	1/3	1/3	1/3		0/3	0/3	2/3	1/3	0/3
3. Does the law guarantee non-coerced and informed decision-making and, where relevant, protect women's confidentiality?	0/3	1/3	1/3	1/3	0/3		0/3	1/3	1/3	1/3	0/3
4. Does the law promote equal relations between men and women?	0/3	2/3	0/3	0/3	1/3		0/3	3/3	0/3	0/3	0/3
5. Does the law protect women from situations of vulnerability linked to their gender?	0/3	1/3	1/3	0/3	1/3		0/3	1/3	1/3	0/3	1/3
6. Does the law guarantee accessible and effective remedies (i.e. access to justice)?	0/3	0/3	2/3	1/3	0/3		0/3	0/3	2/3	1/3	0/3
7. Does the law promote the comprehensive monitoring of the situation of women? This includes promoting gender-disaggregated data collection on the nature of the problem.	0/3	0/3	3/3	0/3	0/3		0/3	0/3	3/3	0/3	0/3

The Following section discusses the use of the GLI in the Philippines.

5.4.3. Philippines

5.4.3.1 An Act to Institute Policies to Eliminate Trafficking in Persons, especially Women and Children, 2003

The Act seeks to specifically protect women and children from their exposure to exploitation through trafficking.¹²²⁷

¹²²⁶ GLI "Law on Placement and Protection of Indonesian Workers Abroad. Indonesia 2004. Summary", <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25> (accessed on 27 May 2025).

¹²²⁷ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons, especially Women and Children, Philippines 2003" <https://www.genderlawindex.org/laws/6621ec05-bdee-4384-ad24-d99c6607db25> (accessed on 27 May 2025).

5.4.3.1.1 Does the Law guarantee access to non-discriminatory, accessible, affordable, acceptable services

The four evaluators concur that the Act's intention and likely effect regarding access to non-discriminatory and accessible services is gender responsive.¹²²⁸

The first evaluator notes that the Act's intention is gender responsive, as it contains provisions that establish preventive and rehabilitative programmes for victims.¹²²⁹ The likely effect is that women migrants will also have access to the preventative and rehabilitative programmes in the event that there are victims.¹²³⁰ The second evaluator supports the first evaluator and confirms that the Law intends to guarantee access to services for all victims of violence.¹²³¹ The likely effect is that affected women migrant workers will have access to gender appropriate services.¹²³²

The third evaluator concurs with the first and second evaluators, adding that while the intention of the Act is to provide various mandatory services, these include shelter, counselling, free legal advice, medical or psychological support, livelihood skills training, and education.¹²³³ The likely effect is that the Act is likely to increase women migrant victims' access to these services.¹²³⁴ The fourth evaluator weighs in and adds that, as the intention of the Act makes it mandatory for victims of trafficking to obtain services.¹²³⁵ The likely effect is that women migrant workers who become victims of

¹²²⁸ *Act to Institute Policies to Eliminate Trafficking in Persons, especially Women and Children (Trafficking Act)*, 2003.

¹²²⁹ *Act to Institute Policies to Eliminate Trafficking in Persons, especially Women and Children (Trafficking Act)*, 2003:sec. 16, 23, 24.

¹²³⁰ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 1", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/eee4763f-9dc7-4ad0-a327-0273ee2f09cb/effect> (accessed on 29 May 2025).

¹²³¹ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 1", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/eee4763f-9dc7-4ad0-a327-0273ee2f09cb/effect> (accessed on 29 May 2025). See also the *Trafficking Act*:sec. 13-16 &23-25.

¹²³² GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Summary", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31> (accessed on 29 May 2025).

¹²³³ *Trafficking Act*:sec. 23-25.

¹²³⁴ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 3", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/6bb3701c-d58c-4623-b922-4f8bf35676a7/effect> (accessed on 29 May 2025).

¹²³⁵ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 4", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/4f7c49b8-ccfe-48ce-9499-f1ad64c1bcc5/intention> (accessed on 29 May 2025). & *Trafficking Act*:sec. 23-24.

trafficking will have access to a wide range of services fully funded by the government.¹²³⁶

I agree with the four evaluators that the intention of the Act is gender responsive, as it makes it mandatory for victims to access a wide range of government-funded programmes without being discriminated against.

5.4.3.1.2 Does the Act guarantee access to information and education or require the provision of information and education on the issue?

Evaluators one, two and four rated the intention and likely effect of the law as gender responsive. Evaluator one observed that the Act makes provision for the creation of the Inter-Agency Council Against Trafficking will ensure access to information and education.¹²³⁷ This provision is supported by international law, which emphasises ensuring that the Act needs to ensure that victims receive adequate and timely information on available support services and legal measures in a language they understand.¹²³⁸

Three evaluators state that the Act's intention and likely effect are gender-responsive. Creating an Inter-Agency Council Against Trafficking will ensure access to information and education.¹²³⁹ The likely effect is that women migrants will access and benefit from the information from the Inter-Agency Council. The CEDAW Committee requires that the Act ensure that victims receive adequate and timely information in a language they understand on available support services and legal measures.¹²⁴⁰

The second evaluator states that the Act provides for information dissemination, with the likely effect being that women will gain access to information that they need.¹²⁴¹ The fourth evaluator concurs with the first and second evaluators and argues that the

¹²³⁶ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 4", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/4f7c49b8-ccfe-48ce-9499-f1ad64c1bcc5/intention> (accessed on 29 May 2025).

¹²³⁷ Section 21 of the *Trafficking Act*.

¹²³⁸ CEDAW 2017:par. 43.

¹²³⁹ *Trafficking Act*:sec. 21.

¹²⁴⁰ UN OHCHR 2017:par. 43.

¹²⁴¹ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 2", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31-4d89-b268-1262111cb666/effect> (accessed on 29 May 2025) & *Trafficking Act*:sec. 21(a)-(f).

Act contains mandatory information for legal services, including information about rights and other legal services.¹²⁴² The likely effect is that women who are victims will be able to access free legal services, including information about their rights, making complaints and other legal remedies.¹²⁴³

The third evaluator argues that the intention of the Act is more gender blind as it does not explicitly state the right of victims to access information about their rights and the services available to them.¹²⁴⁴ The likely effect is that it is unclear the extent to which the Act will facilitate access to information about their rights and the services available.¹²⁴⁵

I agree with the first, second and fourth evaluator who rated the intention and likely effect of the Act as gender responsive. The Act creates an Inter-Agency Council Against Trafficking, which, as has been stated above, enables access to information, education and support services for victims of trafficking. The support services are comprehensive, enabling women to benefit greatly. I disagree with the third evaluator. The Act is clear on how a victim can access information about their rights and the services available to them. The Act provides free legal advice where a trafficked victim is informed about his/her rights, procedure for filing complaints, claiming compensation and such other legal remedies available to the trafficked victim.¹²⁴⁶ Evaluator two confirms that because the right to privacy is guaranteed, the likelihood of a victim's nationality not being disclosed is guaranteed. The Fourth evaluator also concurs, adding that the Act is clear on its protection of women's confidentiality.

¹²⁴² GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 4", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/4f7c49b8-ccfe-48ce-9499-f1ad64c1bcc5/intention> (accessed on 29 May 2025).

¹²⁴³ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 4", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/4f7c49b8-ccfe-48ce-9499-f1ad64c1bcc5/intention> (accessed on 29 May 2025).

¹²⁴⁴ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 3", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/6bb3701c-d58c-4623-b922-4f8bf35676a7/effect> (accessed on 29 May 2025).

¹²⁴⁵ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 3", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/6bb3701c-d58c-4623-b922-4f8bf35676a7/effect> (accessed on 29 May 2025).

¹²⁴⁶ *Trafficking Act*:sec. 23(c).

5.4.3.1.3 Does the Act guarantee non-coerced and informed decision-making, and where relevant, protect women's confidentiality

Evaluators one, three and four note that the Act is gender-responsive in its intention and likely effect. The Act explicitly recognises the right to privacy of the trafficked person.¹²⁴⁷ Evaluator one observed that confidentiality is guaranteed under the Act.¹²⁴⁸ As the Act recognises the privacy and confidentiality of the person, the likely effect is that the name/identity of victims will not be disclosed. The confidentiality of women is, therefore, to be protected. This is strongly supported by international law. The CEDAW committee guarantees women's privacy and confidentiality by institutions providing services for survivors of gender-based violence against women.¹²⁴⁹

The second evaluator observes that the Act intends to protect the confidentiality of a trafficked victim; therefore, its likely effect is gender responsive as the confidentiality of women who are trafficked is addressed and protected.¹²⁵⁰ The second evaluator, however, argues that the Act does not mention women's specific circumstances.¹²⁵¹ As a result second evaluator maintains that the intention of the Act is gender blind as the drafters did not take into account women's specific circumstances.¹²⁵²

I agree with evaluators one, three and four who rated the intention and likely effect of the Act as gender responsive. The Act is clear when it states that the confidentiality of trafficked victims is protected. The likely effect of the Act is gender responsive, as more women will have their confidentiality protected. I disagree with the second evaluator who states that the Act does not have specific considerations for women. The Act explicitly states that before they are provided with services, victims of trafficking are informed of their rights so that they are able to make informed decisions.

¹²⁴⁷ *Trafficking Act*:sec. 6.

¹²⁴⁸ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 1", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/eee4763f-9dc7-4ad0-a327-0273ee2f09cb/effect> (accessed on 29 May 2025).

¹²⁴⁹ UN OHCHR 2017:par. 38 (C).

¹²⁵⁰ Vijayarasa "Evaluator 2 Evaluation" <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31-4d89-b268-1262111cb666/effect> (accessed on 29 May 2025)

¹²⁵¹ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 2", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31-4d89-b268-1262111cb666/effect> (accessed on 29 May 2025) & CEDAW 2017:par. 38(c).

¹²⁵² GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 2", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31-4d89-b268-1262111cb666/effect> (accessed on 29 May 2025).

5.4.3.1.4 Does the Act promote equal relations between men and women?

The first and the third evaluator noted that the intention of the Act and likely effect were both gender responsive, thus more likely to promote equal relations between men and women. The Act states that it shall be State policy to recognise the equal rights and inherent human dignity of women and men.¹²⁵³ The first evaluator states that the Act provides public information and education programmes which aim to overcome attitudes, customs and practices that perpetuate women trafficking.¹²⁵⁴ The likely effect is that the information dissemination and education assist in overcoming attitudes, customs and practices that perpetuate the trafficking of women.¹²⁵⁵

The Act provides public information and education programmes to overcome attitudes, customs, and practices that perpetuate women's trafficking.¹²⁵⁶ The CEDAW Committee also supports public information and education in order to overcome attitudes, customs and practices that perpetuate women's trafficking.¹²⁵⁷

The second evaluator rated the intention as gender responsive, as there is evidence to show that it sought to address the specific risks of trafficking encountered by women.¹²⁵⁸ The second evaluator noted that the likely intention of the Act was that it was gender blind as it did not address the differentiated risks and impacts that men and women could face.¹²⁵⁹

The fourth evaluator observed that the Act did not address equality between men and women and rated it as gender blind.¹²⁶⁰ There is no evidence from the text which

¹²⁵³ UDHR, UNCRC & UN Convention on the Protection of Migrant workers and members of their families.

¹²⁵⁴ *Trafficking Act*:sec. 20 -21.

¹²⁵⁵ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 1", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/eee4763f-9dc7-4ad0-a327-0273ee2f09cb/effect> (accessed on 29 May 2025).

¹²⁵⁶ *Trafficking Act*:sec. 2.

¹²⁵⁷ CEDAW 1992:par. 24 (f) (t)

¹²⁵⁸ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 2", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31-4d89-b268-1262111cb666/effect> (accessed on 29 May 2025).

¹²⁵⁹ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 2", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31-4d89-b268-1262111cb666/effect> (accessed on 29 May 2025).

¹²⁶⁰ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 4", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/4f7c49b8-ccfe-48ce-9499-f1ad64c1bcc5/intention> (accessed on 29 May 2025).

shows that the drafters of the Act took into consideration gender. The likely effect was that the Act is gender responsive, the reason being that whilst equality was not explicitly addressed, the Act makes provision for the protection of all trafficked persons regardless of their gender.¹²⁶¹

My rating of the intention and likely effect of the Act is gender responsive. The Act recognises equality rights and the inherent dignity of men and women.¹²⁶² The establishment of the Inter-Agency is critical as it enables the dissemination of information which will assist in overcoming attitudes, customs and practices which perpetuate women trafficking. The likely effect is that people become more educated when information is disseminated.

5.4.3.1.5 Does the Act protect women from situations of vulnerability linked to their gender?

All four evaluators rated the intention and likely effect of the Act as gender responsive. The first evaluator states that the intention and likely effect of the Act are gender responsive. The Act criminalises trafficking.¹²⁶³ The Act further provides for criminal action and specific penalties and sanctions.¹²⁶⁴ The likely effect is that the specific penalties and sanctions will act as a deterrent for those contemplating committing such an offence. Women are protected, as perpetrators know they will be held to account for committing an offence.

The second evaluator concurs with the first evaluator and adds that the Act criminalises women trafficking and rape.¹²⁶⁵ This was also supported by the CEDAW Committee, which criminalises sexual harassment and gender-based violence as forms of discrimination against women (violence directed against a woman or that affects a woman disproportionately). The Act should, however, also add provisions which include acts that inflict physical, mental or sexual harm or suffering, threats of

¹²⁶¹ GLI “An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 4”, <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/4f7c49b8-ccfe-48ce-9499-f1ad64c1bcc5/intention> (accessed on 29 May 2025) & *Trafficking Act*:sec. 21 (n) & (o).

¹²⁶² *Trafficking Act*:sec. 2.

¹²⁶³ *Trafficking Act*:sec. 4

¹²⁶⁴ *Trafficking Act*:sec. 9, 10.

¹²⁶⁵ *Trafficking Act*:sec. C.

such acts or deprivations of liberty.¹²⁶⁶ The third evaluator observed that the Act criminalised forced sex work.¹²⁶⁷ The likely effect was that women would be protected from forced sex work. The fourth evaluator noted that the Act protected women from situations such as being trafficked for prostitution, marriage and sexual exploitation.¹²⁶⁸ The likely effect is that women will be protected from being trafficked for prostitution and sexual exploitation.

I agree with the four evaluators. The drafters of the Trafficking Act included provisions which protected women from situations of vulnerability linked to their gender. The Act is specific in that it criminalises trafficking and rape. It further recognises sexual assault and gender based violence as forms of discrimination against women. The Act provides for penalties and sanctions towards perpetrators.

5.4.3.1.6 Does the Act guarantee accessible and effective remedies (access to justice)?

The four evaluators all agreed that the Act's intention makes provision for accessible and effective remedies. The first evaluator noted that the intention of the Law makes provision for access to justice.¹²⁶⁹ The likely effect is that women will be able to access justice.¹²⁷⁰ The second evaluator concurs and adds that the Act provides not only access to justice but also remedies¹²⁷¹. Although the second evaluator notes that the likely effect was that women would be able to access these remedies, the evaluator raises significant points. The first point raised by the second evaluator is that, in terms of implementation, women might not be motivated to access the justice system.¹²⁷²

¹²⁶⁶ CEDAW 1992:par. 19(6).

¹²⁶⁷ *Trafficking Act*:sec. 3(c).

¹²⁶⁸ *Trafficking Act*:sec. 4 (b), (c), (d), (e) & (f).

¹²⁶⁹ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 1", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/eee4763f-9dc7-4ad0-a327-0273ee2f09cb/effect> (accessed on 29 May 2025) & *Trafficking Act*:sec. 10,11,14.

¹²⁷⁰ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 1", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/eee4763f-9dc7-4ad0-a327-0273ee2f09cb/effect> (accessed on 29 May 2025)

¹²⁷¹ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 2", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31-4d89-b268-1262111cb666/effect> (accessed on 29 May 2025) & *Trafficking Act*:sec. 8-12, 14, 17, 18 & 21(h).

¹²⁷² GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 2", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31-4d89-b268-1262111cb666/effect> (accessed on 29 May 2025).

Firstly, the Act mandates that a criminal action arising from the violation of the Trafficking Law can only be filed where the offence was committed, where any of its elements occurred or where the trafficked person actually resides.¹²⁷³ The evaluator observes that the requirement of the place where action should be filed does not in any way take into consideration the risks of stigma that women are likely to encounter, and even makes them more vulnerable to stigma and retaliation.¹²⁷⁴ The Act further states that the prescriptive period for filing a claim of trafficking is within 10 years, and in the case of a syndicate or large group committing trafficking, it is 20 years.¹²⁷⁵ Second evaluator notes that the condition of prescription fails to take into account women's specific circumstances, for instance, the trauma they could be going through.¹²⁷⁶ Important to mention at this point is the fact that the Trafficking Act of 2003 was amended in 2012 and 2022. As far as the 2012 amendment is concerned, no changes were made to the venue. In the 2022 amendments, the drafters of the Act reinforced, confirmed, and clarified the venue, highlighting the multiple accessible venues for victims.¹²⁷⁷ The victim can report the matter where it took place or where he or she resides.

I agree with all four assessors that both the intention and likely effect of the Trafficking Act are gender responsive. The Act provides accessible and effective remedies, and all evaluators concur that it allows for penalties and sanctions for perpetrators. The Act further provides access to justice and remedies. The Trafficking Act can basically be applauded for having taken all necessary steps to cater for the gender specific vulnerabilities faced by women.

¹²⁷³ *Trafficking Act*:sec. 9.

¹²⁷⁴ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 2", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31-4d89-b268-1262111cb666/effect> (accessed on 29 May 2025).

¹²⁷⁵ *Trafficking Act*:sec. 9.

¹²⁷⁶ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 2", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31-4d89-b268-1262111cb666/effect> (accessed on 29 May 2025).

¹²⁷⁷ *Republic Act No 11862 (2022)*:sec. 9(i).

5.4.3.1.6 Does the Act guarantee access to information and education or require the provision of information and education on the issue?

All the evaluators agree that the law, in its intention, does not provide for data collection.¹²⁷⁸ Evaluators one and two noted that the likely effect is that no gender-disaggregated data will be available. The third and fourth evaluators were of a different view when they stated that the likely effect is that the inclusion of sponsorship for a national research programme would likely enhance the situation of women.

Although the Act provides for data gathering on cases of trafficking in persons, it does not disaggregate data collection.¹²⁷⁹ The CEDAW Committee provides for data collection on the number of complaints, the number and types of protection orders, the rates of dismissal and withdrawal of complaints, prosecution and conviction rates and the time taken to complete cases.¹²⁸⁰

¹²⁷⁸ GLI “An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Evaluator 1”, <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/eee4763f-9dc7-4ad0-a327-0273ee2f09cb/effect> (accessed on 29 May 2025).

¹²⁷⁹ CEDAW 2013:par.82.

¹²⁸⁰ CEDAW 2013:par.82.

Intention vs Likely Effect

Table 0.3: An Act to Institute Policies to Eliminate Trafficking in Persons, especially Women and Children¹²⁸¹

	Inconclusive/ N/A	Gender regressive	Gender Blind	Gender Neutral	Gender responsive		Inconclusive/ N/A	Gender regressive	Gender Blind	Gender Neutral	Gender responsive
1. Does the law guarantee access to non-discriminatory and accessible, affordable, acceptable services?	0/4	0/4	1/4	0/4	4/4		0/4	0/4	0/4	0/4	4/4
2. Does the law guarantee access to information and education or require the provision of information and education on the issue?	0/4	0/4	1/4	0/4	3/4		0/4	0/4	1/4	0/4	3/4
3. Does the law guarantee non-coerced and informed decision-making and, where relevant, protect women's confidentiality?	0/4	0/4	1/4	0/4	3/4		0/4	0/4	0/4	0/4	4/4
4. Does the law promote equal relations between men and women?	0/4	0/4	1/4	0/4	3/4		0/4	0/4	1/4	0/4	3/4
5. Does the law protect women from situations of vulnerability linked to their gender?	0/4	0/4	0/4	0/4	4/4		0/4	0/4	1/4	0/4	3/4
6. Does the law guarantee accessible and effective remedies (i.e. access to justice)?	0/4	0/4	0/4	0/4	4/4		0/4	0/4	0/4	0/4	4/4
7. Does the law promote the comprehensive monitoring of the situation of women? This includes promoting gender-disaggregated data collection on the nature of the problem.	0/4	0/4	4/4	0/4	0/4		0/4	0/4	2/4	0/4	2/4

The following section discusses the use of the GLI in Sri Lanka.

5.4.4 Sri Lanka

5.4.4.1 The Prevention of Domestic Violence Act 34 of 2005

5.4.4.1.2 Does the Act guarantee access to non-discriminatory and accessible, affordable, and acceptable services?

The first evaluator notes that the intention of the Act is gender blind as it only provides access to shelter, temporary accommodation and a social worker to victims of

¹²⁸¹ GLI "An Act to Institute Policies to Eliminate Trafficking in Persons especially Women and Children. Philippines 2003. Summary", <https://www.genderlawindex.org/laws/7254c95f-b6a5-4f4b-8099-8e966a47645b/13a18925-cd31> (accessed on 29 May 2025).

violence, only after a protection order has been made.¹²⁸² The likely effect is also gender blind, as women who are victims of violence and are unable to lodge a protection order continue to be subjected to violence.¹²⁸³ CEDAW establishes appropriate and funded support services for victims of all gender based violence, on a short and long-term basis.¹²⁸⁴ Comprehensive services are provided and include financial aid, free or low-cost, high-quality legal aid, medical, psycho-social and counselling services, accessible shelters and crisis centres in both rural and urban areas.¹²⁸⁵ The provisions of CEDAW regarding ensuring the provision of services even before a protection order is lodged are not reflected in the Act, as it only avails services after a protection order has been lodged. The third evaluator agrees with the first evaluator's rating of the intention and likely effect as gender blind, as the Act fails to provide specific services for aggrieved women.¹²⁸⁶

The second evaluator differed from the first and third evaluators. The second evaluator rated the intention of the Act as gender responsive.¹²⁸⁷ The Act explicitly provides for a range of protection services for survivors of domestic violence.¹²⁸⁸ The likely effect is that survivors of domestic violence are most likely to benefit from these services.¹²⁸⁹

I tend to agree more with evaluators one and three, who rated the intention and likely effect as gender blind. The Act is highly commendable as it provides vital legal protection and comprehensive services. However, the Act does not align with CEDAW obligations for a comprehensive gender responsive system. The Act requires that a survivor can only access services after they have lodged a protection order. The Act fails to take into consideration the fact that some survivors might experience a

¹²⁸² GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 3", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/152ab58d-9484-4420-a01a-e26e9169cd6e> (accessed on 30 May 2025).

¹²⁸³ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 3", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/152ab58d-9484-4420-a01a-e26e9169cd6e> (accessed on 30 May 2025).

¹²⁸⁴ CEDAW 2017:par. 40(c).

¹²⁸⁵ CEDAW 2017:par. 40(c).

¹²⁸⁶ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 3", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/152ab58d-9484-4420-a01a-e26e9169cd6e> (accessed on 30 May 2025).

¹²⁸⁷ Vijayarasa "Evaluator 2 Evaluation" <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/c0ff6324-2acf-47e6-a345-9ae24b69d245> (accessed on 30 May 2025)

¹²⁸⁸ *The Prevention of Domestic Violence Act* 34/2005:sec. 5(2),11(2), 12(1).

¹²⁸⁹ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 2", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/c0ff6324-2acf-47e6-a345-9ae24b69d245/effect> (accessed on 30 May 2025).

challenge with reporting matters due to fear of retaliation, not being aware of the services or the Act, and limited access to remote areas.

5.4.4.1.3 Does the Act guarantee access to information and education or require providing information and education on the issue?

All three evaluators agreed that the Act's intention and likely effect are gender-blind. Evaluator one observed that the Act does not provide for information and education unless a protection order has been lodged and the court is reasonably satisfied that it is necessary.¹²⁹⁰ The likely effect is that most survivors who are either not yet ready to lodge a protection order, stay in remote areas and are not able to report the domestic violence they suffered, will not be able to access the much-needed services.¹²⁹¹

The second evaluator noted that the Act did not mention the issue.¹²⁹² CEDAW states that the Act must ensure that victims receive adequate and timely information in a language they understand on available support services and legal measures.¹²⁹³

Evaluator three argues that the Act fails to guarantee women access to information about their rights. The likely effect is that women will not know about their rights.

My rating for the intention and likely effect is gender-blind. The Act fails to ensure that all the survivors, especially those who have not yet applied for a protection order, have access to information and support services and can make informed decisions about their safety. The Act does not align with CEDAW, which requires explicitly that all survivors of gender based violence have access to support and legal services regardless of whether they had applied for a protection order.

¹²⁹⁰ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 1", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/e41bab31-c52e-4059-9e65-2352afebc35d> (accessed on 30 May 2025).

¹²⁹¹ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 1", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/e41bab31-c52e-4059-9e65-2352afebc35d> (accessed on 30 May 2025).

¹²⁹² GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 2", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/c0ff6324-2acf-47e6-a345-9ae24b69d245/effect> (accessed on 30 May 2025).

¹²⁹³ CEDAW 2017:par. 43.

5.4.4.1.4 Does the Act guarantee non-coerced and informed decision-making and, where relevant, protect women's confidentiality?

All the evaluators rated the intention and likely effect of the Act as gender regressive.

Evaluator one noted that although the Act observed the right to confidentiality, the challenge was that it could instruct the survivor to participate in counselling sessions without informed consent.¹²⁹⁴ The likely effect is that a woman's right to provide consent is undermined.¹²⁹⁵ CEDAW explicitly states that free and informed consent must be obtained for alternative dispute resolutions such as mediation and conciliation.¹²⁹⁶ The second and third evaluators echo the same sentiments expressed by the first evaluator. The provision in the Act that mandates a woman's participation in the counselling sessions violates her right to free and informed consent.¹²⁹⁷

I agree with the three evaluators that the intention and likely effect are gender regressive. The Act disregards women's right to consent as international law requires. Women are placed in a less developed state in terms of their social, economic, and political status and overall well-being.

5.4.4.1.5 Does the Act promote equal relations between men and women?

The three evaluators all agreed that the intention and likely effect of the Act are unclear. The first evaluator argues that the Act does not make provision for public information and education programmes to overcome attitudes that perpetuate violence against women.¹²⁹⁸ According to CEDAW, the Act requires that public information and

¹²⁹⁴ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 1", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/e41bab31-c52e-4059-9e65-2352afebc35d> (accessed on 30 May 2025) & the *Domestic Violence Act*:sec. 20.

¹²⁹⁵ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 1", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/e41bab31-c52e-4059-9e65-2352afebc35d> (accessed on 30 May 2025) the *Domestic Violence Act*:sec. 5(2)a) & (b).

¹²⁹⁶ CEDAW 2017:par. 45.

¹²⁹⁷ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 2", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/c0ff6324-2acf-47e6-a345-9ae24b69d245/effect> (accessed on 30 May 2025) & GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 3", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/152ab58d-9484-4420-a01a-e26e9169cd6e> (accessed on 30 May 2025).

¹²⁹⁸ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 1", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/e41bab31-c52e-4059-9e65-2352afebc35d> (accessed on 30 May 2025).

education programmes be implemented to overcome attitudes, customs and practices that perpetuate violence against women.¹²⁹⁹

The second and third evaluators concur with the first evaluator and add that the Act fails to provide services that promote equal relations between men and women.¹³⁰⁰

I agree with the three evaluators that the intention and likely effect are gender blind. The Act shows a lack of awareness of men's and women's specific and different needs. The Act does not include any provision which attempts to challenge the stereotypes, attitudes and customs which perpetuate violence against women.

5.4.4.1.5 Does the Act protect women from situations of vulnerability linked to their gender?

The three evaluators agree that the intention and likely effect are gender-responsive. The Act provides an interim order and a protection order to be issued.¹³⁰¹ The likely effect is that women who institute legal action to get a protection order are protected from situations of vulnerability.¹³⁰² The second and third evaluators agree, adding that the Act indirectly addresses the specific circumstances of women.¹³⁰³

I agree with the evaluators that the Act's intention and likely effect are gender responsive. While access issues persist, the Act's intention and likely effect are aligned with gender responsive principles.

¹²⁹⁹ CEDAW 1992:par. 24(f) , (t).

¹³⁰⁰ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 2", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/c0ff6324-2acf-47e6-a345-9ae24b69d245/effect> (accessed on 30 May 2025) & GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 3", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/152ab58d-9484-4420-a01a-e26e9169cd6e> (accessed on 30 May 2025).

¹³⁰¹ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 1", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/e41bab31-c52e-4059-9e65-2352afebc35d> (accessed on 30 May 2025).

¹³⁰² GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 1", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/e41bab31-c52e-4059-9e65-2352afebc35d> (accessed on 30 May 2025) & the *Domestic Violence Act*:sec. 4.

¹³⁰³ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 2", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/c0ff6324-2acf-47e6-a345-9ae24b69d245/effect> (accessed on 30 May 2025) & GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 3", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/152ab58d-9484-4420-a01a-e26e9169cd6e> (accessed on 30 May 2025).

5.4.4.1.6 Does the Act provide accessible and effective remedies?

Evaluator one notes that the intention of the Act is gender blind.¹³⁰⁴ The Act intends to provide access to justice to prevent gender based violence.¹³⁰⁵ Important to note is that the Act does not make provision for the reparations to be equal to the violations of a victim's rights, as it only relates to protective orders.¹³⁰⁶ The Act does not provide another piece of legislation that would, in fact, penalise domestic violence.¹³⁰⁷ In the case of *AT v Hungary*, the CEDAW Committee noted that the law needs to ensure that reparations are proportionate to the physical harm undergone and the gravity of the violation of the victims' rights.¹³⁰⁸ CEDAW further states that effective remedies include penal sanctions, civil remedies and compensatory provisions.¹³⁰⁹ The likely effect of the Law is also gender blind as it does not make provisions for reparations which are proportionate to the violations of the victim's rights, except for a protection order.¹³¹⁰

The second evaluator states that the intention of the Act is gender responsive as it provides for a protection order to prevent domestic violence.¹³¹¹ The likely effect is gender responsive, as women have enhanced access to justice and appropriate services.¹³¹²

The third evaluator agrees with the second evaluator and maintains that the intention of the Act is gender responsive and makes provision for women victims to be able to

¹³⁰⁴ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 1", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/e41bab31-c52e-4059-9e65-2352afebc35d> (accessed on 30 May 2025).

¹³⁰⁵ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 1", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/e41bab31-c52e-4059-9e65-2352afebc35d> (accessed on 30 May 2025).

¹³⁰⁶ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 1", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/e41bab31-c52e-4059-9e65-2352afebc35d> (accessed on 30 May 2025).

¹³⁰⁷ The *Domestic Violence Act*.

¹³⁰⁸ CEDAW Committee, *AT v Hungary* 2005, par. 9, 6 (1) (b).

¹³⁰⁹ CEDAW 1992:par. 24(t).

¹³¹⁰ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 1", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/e41bab31-c52e-4059-9e65-2352afebc35d> (accessed on 30 May 2025).

¹³¹¹ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 2", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/c0ff6324-2acf-47e6-a345-9ae24b69d245/effect> (accessed on 30 May 2025).

¹³¹² GLI "Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 2", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/c0ff6324-2acf-47e6-a345-9ae24b69d245/effect> (accessed on 30 May 2025).

apply for protection orders.¹³¹³ The survivor is allowed to apply for civil action or institute criminal proceedings even if she has applied for a protection order.¹³¹⁴ The likely effect is that women victims have access to legal and appropriate services.¹³¹⁵ The Act makes provision for penalties where a protection order is breached.¹³¹⁶

I agree with the second and third evaluators that the Act is gender responsive in its intention and likely effect. The Act ensures that after a survivor lodges a request for a protection order, she has access to the required services. This is likely to increase the chances for women survivors to access justice.

5.4.4.1.7 Does the Act promote gender disaggregated data?

All three evaluators agree that the Act does not provide for gender disaggregated data and is therefore gender blind in its intention and likely effect.¹³¹⁷ The Act fails to provide gender disaggregated data on how women are affected by domestic violence. This makes it difficult to monitor the situation of women survivors.

¹³¹³ GLI “Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 3”, <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/152ab58d-9484-4420-a01a-e26e9169cd6e> (accessed on 30 May 2025).

¹³¹⁴ The *Domestic Violence Act*.

¹³¹⁵ GLI “Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 3”, <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/152ab58d-9484-4420-a01a-e26e9169cd6e> (accessed on 30 May 2025).

¹³¹⁶ The *Domestic Violence Act*.

¹³¹⁷ GLI “Prevention of Domestic Violence. Sri Lanka 2005. Evaluator 3”, <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759/152ab58d-9484-4420-a01a-e26e9169cd6e> (accessed on 30 May 2025).

Intention vs Likely effect

Table 0.4: Prevention of Domestic Violence Act No. 34 of 2005¹³¹⁸

	Inconcl usive	Gender regressi ve	Gender Blind	Gender Neutral	Gender respons ive		Inconcl usive	Gender regressi ve	Gender Blind	Gender Neutral	Gender respons ive
1. Does the law guarantee access to non-discriminatory and accessible, affordable, acceptable services?	0/3	0/3	2/3	0/3	1/3		0/3	0/3	2/3	0/3	1/3
2. Does the law guarantee access to information and education or require the provision of information and education on the issue?	0/3	0/3	3/3	0/3	0/3		0/3	0/3	3/3	0/3	0/3
3. Does the law guarantee non-coerced and informed decision-making and, where relevant, protect women's confidentiality?	0/3	3/3	0/3	0/3	0/3		0/3	3/3	0/3	0/3	0/3
4. Does the law promote equal relations between men and women?	0/3	0/3	3/3	0/3	0/3		0/3	0/3	3/3	0/3	0/3
5. Does the law protect women from situations of vulnerability linked to their gender?	0/3	0/3	0/3	0/3	3/3		0/3	0/3	0/3	0/3	3/3
6. Does the law guarantee accessible and effective remedies (i.e. access to justice)?	0/3	0/3	1/3	0/3	2/3		0/3	0/3	1/3	0/3	2/3
7. Does the law promote the comprehensive monitoring of the situation of women? This includes promoting gender-disaggregated data collection on the nature of the problem.	0/3	0/3	3/3	0/3	0/3		0/3	0/3	3/3	0/3	0/3

5.5 STRENGTHS AND WEAKNESSES OF THE GENDER LEGISLATIVE INDEX

The GLI was used in 4 countries and has been used to evaluate 134 laws.¹³¹⁹ Evaluation has taken place over seven areas of law. Uniquely, the GLI is founded on the idea that all areas of the law need to consider gender at the outset of the drafting process.¹³²⁰ Whilst this contention may be acceptable when it comes to areas of the law typically considered from a gender perspective, domestic violence or reproductive health, A gender lens has been less commonly deployed in areas such as bankruptcy

¹³¹⁸ GLI "Prevention of Domestic Violence. Sri Lanka 2005. Summary", <https://www.genderlawindex.org/laws/161aaa84-f49e-4b5a-9321-2b7ee2970759> (accessed on 30 May 2025).

¹³¹⁹ Gender Legislative Index, <https://www.genderlawindex.org/>, accessed 20 September 2025.

¹³²⁰ Vijayarasa 2022:23.

or taxation.¹³²¹ For examples laws related to taxation and assessed by the GLI are often erroneously considered as gender-neutral.¹³²² The GLI assesses the extent to which the law adopts a woman's standpoint, challenges gender norms and addresses intersectional discrimination.¹³²³ An example is a law that requires a woman to obtain her husband's consent before opening a bank account.

Vijayarasa concedes that the gender legislative index is limited when examining a law's actual implementation.¹³²⁴ Additionally, some experts contend that while the gender legislative index provides a helpful measure of the degree of gender responsiveness incorporated in legislation, it is restricted in its ability to analyse the execution of laws and their impact on gender-equal outcomes in practice. A law can appear progressive on paper, meeting criteria for gender responsiveness, but may ultimately fail to be implemented in ways that promote genuine equality and social change.¹³²⁵ As stated by UN Women (the United Nations Entity for Gender Equality and the Empowerment of Women), there are often considerable gaps between rights granted in law and lived reality for women. Systemic impediments established in institutions and social norms may hamper the achievement of legal rights. By focusing primarily on the language of statutes, it is argued that the gender legislative index cannot reflect the structural and systemic hurdles that perpetuate gender inequity and women's disempowerment despite progressive legislation. However, although the gender legislative index cannot assess how effectively laws are implemented, it can determine the likely effect of the law.¹³²⁶

It is fundamental, however, to note that a gender legislative index can assess the intention against the likely effect. GLI can conduct detailed textual analysis clause by clause, assessing the intention and likely effect of the law. This is especially important when laws are being drafted, as it can assist in avoiding laws which have the likely effect of being gender blind or regressive. Where the intention and likely effect are gender-responsive, women's rights are adequately protected. However, in situations where the purpose of the law is gender-responsive but specific provisions have been

¹³²¹ Vijayarasa 2022:23.

¹³²² Vijayarasa 2022:23.

¹³²³ Vijayarasa 2022:168.

¹³²⁴ Vijayarasa 2019:277.

¹³²⁵ Merry 2006:38-51.

¹³²⁶ Vijayarasa 2019:277.

left out, the law's stated intention may be furthered or undermined.¹³²⁷ For instance, if a law seeks to criminalise sexual harassment at work but fails to include provisions to educate women on sexual harassment or protect the confidentiality of women reporting such cases, then the likely effect will be that women will not report such cases due to the stigma and discrimination they might face. The law's potential impact will be regressive for women and will fail to meet international standards. A law, on the other hand, provisions that ensure women are provided and trained on sexual harassment and reporting procedures, their confidentiality is protected and accessible and effective remedies to justice are most likely to have a gender-responsive effect. Women are more empowered, able to report offences without fear, and are guaranteed that perpetrators will be punished.

Furthermore, countries that have ratified CEDAW can establish monitoring bodies to oversee the implementation of the laws. In the case of South Africa, this role would be filled by the Commission for Gender Equality (CGE). It was established in Section 187 of the Constitution of the Republic of South Africa to promote respect for gender equality and the protection, development and attainment of gender equality.

The Commission for Gender Equality aims to advance, promote and protect gender equality in South Africa through undertaking research, public education, policy development, legislative initiatives, effective monitoring and litigation. The CGE, through its public education duty, conducts public awareness campaigns to educate women migrant workers about their rights and the legal protections available to them. Its role would also include training judges, lawyers, and law enforcement officials on gender sensitivity and the specifics of laws protecting the rights of women migrant workers. The CGE also plays a crucial role in encouraging NGOs and civil society organisations to monitor the implementation of these laws and report any deficiencies or violations. The CGE's role would also be to submit reports about women migrant workers to the CEDAW Committee, which have not been submitted in recent years.

The discussion reveals that the GLI is more effective when accompanied by a statutory body that monitors the implementation of gender-responsive laws.

¹³²⁷ Vijayarasa 2019:277.

Vijayarasa acknowledges that several global indices are designed to monitor women's development and well-being.¹³²⁸ In other cases, gender is an integral part of the broader indices used to measure overall development progress.¹³²⁹ However, indices that measure gaps in gender equality based on proxies such as parliamentary or labour force participation, or those that only measure inequalities in the Global South, are insufficient to evaluate the effectiveness of the law itself as a tool for tracking inequality.¹³³⁰ Proxy indicators only measure key outcomes such as parliamentary representation or labour force participation. Similarly, geographically limited indices that measure inequalities in the Global South prevent comparative lessons because they only focus on the Global South. These indices are inadequate for evaluating the effectiveness of the law itself, as they cannot assess the law's content, enforceability, implementation, or enable cross-regional comparisons; in contrast, the GLI possesses that capability.

Many global indexes measure, for example, the number of girls enrolled in and completing primary and secondary education, the percentage of the workforce that is female, or the number of seats in parliament occupied by women. However, we lack global or international standards to assess and score our laws.¹³³¹ Moreover, when good practice laws are debated, the focus tends to be on issues such as domestic violence, reproductive health, or family law. Rarely do we consider what a gender perspective might look like in areas such as financial regulation, trade, climate change, the extractive industry, or taxation, and we rarely evaluate our progress in making laws in these fields gender-responsive. The study favours the GLI in comparison to some of the indices that have been used in Africa.

The African Gender and Development Index is only able to aggregate broad legal categories and indicators; it is not able to analyse specific legal texts as the GLI does. The Social Institutions and Gender Index focuses more on customary norms and

¹³²⁸ GLI "Scoring legislation and ranking countries", <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

¹³²⁹ GLI "Scoring legislation and ranking countries", <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

¹³³⁰ GLI "Scoring legislation and ranking countries", <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

¹³³¹ GLI "Scoring legislation and ranking countries", <https://www.genderlawindex.org/scoring> (accessed on 23 October 2024).

overall discrimination, and not migration-specific issues. It is not able to dissect actual legal texts. The Women, Business and Law Index is limited to economic/legal barriers, focusing more on issues that concern labour, finance, and family; it does not cover migration or asylum laws.

The GLI is grounded in CEDAW, which contains women's rights. In contrast to other broader indices, the GLI uses methodologically sound standards grounded in international women's rights law, primarily CEDAW. Using CEDAW standards as the basis for the GLI has formidable advantages. The first is that CEDAW is the only international human rights treaty dedicated exclusively to women's rights. Second, it is a global treaty ratified by all except six UN member states.¹³³² CEDAW, therefore, contains agreed principles that apply across jurisdictions and cultural boundaries, which states have themselves agreed to.¹³³³ Vijayarasa describes CEDAW as the only foundation for a human rights index with near-universal commitment.¹³³⁴ For laws to be deemed gender-responsive, they must meet the seven criteria derived from CEDAW's 39 General Recommendations. The seven criteria apply to civil, criminal, and public law at the domestic and national levels.¹³³⁵

Atrey, Nussbaum, and Mullins argue in favour of the GLI, as they describe it as an indispensable tool grounded in the infallible framework of CEDAW.¹³³⁶ The GLI seeks to assess the extent to which the law adopts a woman's standpoint, challenges gender norms and addresses intersectional discrimination.¹³³⁷ However, this perspective has been questioned, highlighting potential limitations. Some argue that prioritising women's rights over other marginalised groups is not always justifiable.¹³³⁸ Vijayarasa argues that legislation responsive to women's needs simultaneously affects the lives of people with different identities.¹³³⁹

Additionally, CEDAW has faced criticism for reflecting Western biases that overlook cultural differences affecting women and for imposing a Western framework that may

¹³³² Vijayarasa 2019:275.

¹³³³ Vijayarasa 2019:275 & LaBarbera 2019.

¹³³⁴ Vijayarasa 2019:276.

¹³³⁵ Vijayarasa 2019:276; CEDAW 2020.

¹³³⁶ Atrey 2018:862; Nussbaum 2016:589& Mullins 2018.

¹³³⁷ Vijayarasa 2022:68.

¹³³⁸ Collins & Bilge 2020:107.

¹³³⁹ Vijayarasa 2019:277.

not resonate with local cultural norms and values in some post-colonial states.¹³⁴⁰ They argue that relying heavily on CEDAW may promote a universal perspective on women's rights that ignores intersections of gender, race, culture, and religion.¹³⁴¹

CEDAW is an international bill that has received almost universal recognition. CEDAW is considered the International Bill of Rights for Women and is a pivotal instrument in enshrining women's equality and non-discrimination in international law.¹³⁴² Ongoing debates exist about whether rights-based initiatives, such as CEDAW, have limited relevance and applicability in non-Western cultures. For instance, scholars like Merry argue that CEDAW reflects Western assumptions that may not align with cultural norms in post-colonial contexts.¹³⁴³ Related to this is the concern raised by authors such as Collins and Bilge¹³⁴⁴ As already mentioned in section 3.41 CEDAW does not effectively address the intersections between different aspects of identity that impact women's experiences. By relying mainly on CEDAW as the standard, the gender legislative index may promote a universalistic perspective on women's rights that does not account for variations in experiences. Vijayarasa, in defence, argues that patriarchy and women's unequal status are universal challenges for women.¹³⁴⁵ By grounding itself in CEDAW, the gender legislative index provides an initial starting point for defining and measuring legislative progress among the 189 state parties committed to the rights outlined in CEDAW.¹³⁴⁶ The inevitable outcome is a unified and comprehensive framework that integrates women's concerns and avoids fragmenting them with issues of race, class, religion, ethnicity, sexuality and disabilities, among other identities.¹³⁴⁷

This section demonstrates that the GLI cannot monitor the implementation of laws it has assessed. The following section fills the gap by discussing how the laws evaluated by the GLI can be monitored.

¹³⁴⁰ Merry 2009:72;.

¹³⁴¹ Banda 2019:268.

¹³⁴² Vijayarasa 2022:66.

¹³⁴³ Merry 2006.

¹³⁴⁴ Collins & Bilge 2020:107-134.

¹³⁴⁵ Vijayarasa 2019:277.

¹³⁴⁶ Vijayarasa 2019:277.

¹³⁴⁷ Vijayarasa 2019:277.

5.6 MONITORING THE IMPLEMENTATION OF LAWS ASSESSED BY THE GLI

As discussed in the first section of this chapter, the GLI's role is to assess laws regarding gender responsiveness. The GLI also measures the law's intention against its likely effect. The only gap with the GLI is its inability to monitor the implementation of laws. International and national bodies can fill this role. These include the International Labour Organisation, the CEDAW Committee and the South African Commission for Gender Equality.

The Migration for Employment Convention (adopted in 1949), in Article 1, states that each member state of the ILO needs to make information on national policies, laws, and regulations relating to emigration and immigration available upon request. Secondly, the ILO also requires each member state to provide, upon request, information on special provisions concerning migration for employment, including conditions of work and the livelihood of migrants for employment. This is evidence that from a very early stage, the ILO had serious consideration for migrant workers. At an international level, the ILO can monitor its member states. As South Africa is a member state, it would be mandatory for the country to submit a report on all its migration and labour laws, especially as far as they affect migrant workers. The next chapter discusses in greater detail the application of the GLI to assess the gender responsiveness of laws of migration and labour laws in South Africa. The country would be required to provide information on any special provisions it would have made, including conditions of work. This would enable the ILO to effectively monitor South Africa and ensure that it is transparent and accountable in implementing its laws.

The CEDAW Committee requires state parties to submit yearly reports on the conditions of women. South Africa has not submitted a report to the CEDAW Committee despite the situation of women migrants in the country. The CEDAW Committee is another international monitoring body that can be used to assess laws that the GLI would have evaluated. The effectiveness of the CEDAW Committee is evidenced by its assistance to Italy, Cyprus, and Cambodia in improving the situation of women migrants in the respective countries. The same practice could also be replicated in South Africa however Adegalu and Mitchell noted that South Africa has often been slow or hesitant in implementing recommendations from the CEDAW

Committee, such as the Women Empowerment and Gender Equality Bill and a unified family code.¹³⁴⁸

The Commission for Gender Equality promotes, protects, monitors, and evaluates gender equality through research, public education, policy development, legislative initiatives, effective monitoring, and litigation. As its role states, the Commission for Gender Equality would also monitor the implementation of laws assessed by the GLI to ensure that they were adhered to and offenders arrested and persecuted. Laws assessed by the GLI require that provisions containing gender-disaggregated data be collected and reported. This would enable the Commission for Gender Equality to compile a report with data on women migrants' experiences in South Africa and submit reports to the ILO and CEDAW Committee.

When the GLI assesses laws, they can be monitored at international and local levels, further enhancing the GLI's credibility. The tool is credible to such an extent that it can play a significant role in attaining the 2030 SDGs and Agenda 2063. The following section discusses this role in detail.

5.7 THE GLI'S ROLE IN ATTAINING SDG 2030 AND AGENDA 2063

The following section discusses the GLI's role in achieving the 2030 SDGs and Agenda 2063 goals. The Sustainable Development Goals (SDGs), also known as the Global Goals, were adopted by the United Nations and are a universal call to action to end poverty, protect the planet, and ensure that by 2030, all people enjoy peace and prosperity.¹³⁴⁹ Countries are committed to prioritising progress for those who are furthest behind. The SDGs are designed to end poverty, hunger, AIDS, and discrimination against women and girls.¹³⁵⁰

¹³⁴⁸ Adegalu & Mitchell 2019:1118.

¹³⁴⁹ UN "Transforming our world: the 2030 Agenda for Sustainable Development", <https://sdgs.un.org/2030agenda> (accessed on 20 June 2021).

¹³⁵⁰ UN "Transforming our world: the 2030 Agenda for Sustainable Development", <https://sdgs.un.org/2030agenda> (accessed on 20 June 2021). Migrant women often face multiple layers of vulnerability, including gender-based discrimination, economic inequality.

The 2030 Agenda for Sustainable Development recognises that migration is a powerful driver of sustainable development for migrants and their communities.¹³⁵¹

The Agenda recognises that migration brings significant benefits in the form of skills, strengthens the labour force, and improves investment and cultural diversity. By transferring skills and financial resources, migration also contributes to improving the lives of communities in their countries of origin.

The Sustainable Development Goal (SDG) 5 states that all forms of discrimination against women and girls must be eliminated by 2030. This goal recognises that gender equality is a fundamental human right. It is also a response to the fact that gender inequality remains a global challenge, considering that women and girls still suffer disproportionately from discriminatory practices and violence worldwide. Substantive equality and transformative change must be achieved by 2030 to benefit the most vulnerable and marginalised.¹³⁵² Finally, the scope of SDG 5 is not limited to a static vision of gender equality; it also includes a more forward-looking notion of women's and girls' empowerment.¹³⁵³ A forward-looking approach in SDG 5 emphasises transforming systems and investing in opportunities that ensure sustainable empowerment for women and girls.

Criterion one, used through the GLI to assess laws for their gender responsiveness, prohibits the inclusion of discriminatory clauses that deny women access to, and affordable services. This criterion is particularly essential for women, with a special emphasis on migrant women who face intersecting forms of discrimination. Prohibition of discriminatory clauses on its own is not sufficient. Criterion two of the GLI requires the law to include provisions that ensure that women, especially migrant workers, are provided with information or education on their rights. This ensures that they are empowered and able to identify rights violations or instances of discrimination against them. Criterion four aligns with SDG 5 as it requires that the law contain provisions promoting equal relations between men and women. Criterion six requires that the law

¹³⁵¹ UN "Transforming our world: the 2030 Agenda for Sustainable Development", <https://sdgs.un.org/2030agenda> (accessed on 20 June 2021).

¹³⁵² UN "Transforming our world: the 2030 Agenda for Sustainable Development", <https://sdgs.un.org/2030agenda> (accessed on 20 June 2021).

¹³⁵³ UN "Transforming our world: the 2030 Agenda for Sustainable Development", <https://sdgs.un.org/2030agenda> (accessed on 20 June 2021).

include provisions guaranteeing women migrant workers accessible and effective remedies. When remedies are accessible and practical, perpetrators are brought to book, which acts as a deterrent against committing the offence.

Sustainable Development Goal 8.8 is a target under the United Nations Sustainable Development Goal 8, which focuses on promoting sustained, inclusive, and sustainable economic growth, full and productive employment, and decent work for all. Target 8.8 aims explicitly to protect labour rights and promote safe and secure working environments for all workers, including migrant workers, particularly women migrants.

As discussed in Chapter 2, migrant women are employed in domestic and farm work sectors, where labour protections are often weak or unenforced. Target 8.8 advocates for more substantial labour rights to prevent exploitation, underpayment, unfair dismissals, and unsafe working conditions. Migrant women, especially those in informal or low-wage sectors, often work in hazardous conditions. SDG 8.8 promotes safer workplaces, which include access to health and safety training, protective equipment, and protocols that minimise risks. A secure work environment also helps reduce the likelihood of sexual harassment and gender-based violence that women migrants may face.

Migrant women often lack access to legal protections or social services in host countries, limiting their ability to seek help if their rights are violated. SDG 8.8 advocates for policies that provide migrant workers, including women, access to labour unions, legal recourse, and support services, enabling them to defend their rights and access resources when needed. Achieving SDG 8.8 for women migrants is crucial for ensuring they experience dignity, equality, and safety in the workplace, which also positively impacts their families, communities, and host countries' economies. As seen in Chapter Two, women migrants frequently experience economic marginalisation, with limited access to fair wages, secure jobs, and financial services.

Criterion five requires that the law contain provisions to protect women from vulnerability linked to their gender. Criterion six of the GLI is also relevant to this SDG. When the law guarantees women migrants accessible and effective remedies, they can have recourse to the law when they are exploited through working long hours, being underpaid, and other forms of discrimination.

SDG 10 promotes policies for equitable income distribution and inclusive economic participation, which can help lift migrant women out of poverty, offer better employment opportunities, and reduce income inequality between women migrants and host communities.

Women migrants frequently encounter discrimination based on both gender and origin, often compounded by origin and race. SDG 10 advocates for policies that actively combat discrimination and promote equal rights, which can foster greater social cohesion and create a more inclusive environment in countries of destination and host countries for migrant women. This complements the GLI's first criterion, which prohibits discriminatory legal clauses. Together, SDG 10 and GLI reaffirm the need for the development of laws and policies that actively prevent discrimination, recognising the challenges faced by women migrant workers who encounter intersecting forms of discrimination in the labour market.

Sustainable Development Goal 16 promotes peaceful, just, and inclusive societies by strengthening institutions, ensuring access to justice, and reducing violence, corruption, and discrimination. This goal is vital for protecting the rights and well-being of vulnerable groups, including women migrants, who are often exposed to unique threats related to their gender and migration status.

Women migrants are disproportionately at risk of violence and exploitation, especially in situations where they lack legal status or social protection. SDG 16 promotes the reduction of all forms of violence, advocating for policies and support systems to protect women migrants from gender-based violence, harassment, human trafficking, and other forms of abuse.

Many women migrants face barriers to legal representation and may struggle to access justice due to language, legal knowledge, or fear of deportation. SDG 16 emphasises ensuring that justice is accessible to all, including migrant women, advocating for legal aid, fair judicial processes, and the right to report crimes without fear of retribution.

Criterion seven of the GLI requires that the law promote comprehensive monitoring of women's situations by collecting gender-disaggregated data. As encouraged by the CEDAW Committee, disaggregation must be considered on different levels to understand best how women's intersecting and multiple identities affect the full

realisation of their rights. The data collected will be used to ascertain how far each country is from meeting the SDG 2030 targets. Without the data, measuring how far a country is from its goals can be challenging, and interventions may need to be implemented to cover the identified gaps. The GLI converts the SDGs from broad policy aims into specific obligations, ensuring that the legislation prohibits discrimination, promotes rights education and substantive equality, provides accessible and effective remedies, and collects gender-disaggregated data.

Agenda 2063, spearheaded by the African Union (AU), is Africa's blueprint for transforming the continent into a global powerhouse of the future.¹³⁵⁴ With aspirations for inclusive growth, sustainable development, and shared prosperity, Agenda 2063 addresses numerous challenges, including gender equality, youth empowerment, and fair migration policies, which directly impact women migrant workers.

One of Agenda 2063's key goals is to achieve full gender equality across Africa. This includes equal rights, opportunities, and protections for women migrants, ensuring they can contribute to and benefit from development on the continent. By promoting gender-responsive policies, Agenda 2063 aims to address the unique challenges that women migrants face in accessing employment, education, and social services.

As discussed in section 4.2.2.1, the GLI aims to measure the gender responsiveness of laws. Therefore, the GLI serves as a tool to ensure that regulations are drafted appropriately and amended when key provisions are missing. The GLI comprehensively examines different aspects of the law to ensure that they are gender-responsive.

Agenda 2063 promotes policies that ensure safe, orderly, and regular migration within and outside the African continent. As discussed in sections 5.3.1, 5.3.5, and 5.3.6, the first, fifth, and sixth criteria of the GLI require that when laws are being drafted or amended, they include clauses that prohibit discrimination, guarantee access to services, protect women from vulnerabilities related to their gender, and provide accessible and effective remedies for women. By evaluating whether South Africa's migration and labour laws meet these criteria, the GLI helps ensure that migration is

¹³⁵⁴ African Union "Agenda 2063: The Africa we want", <https://au.int/en/agenda2063/overview> (accessed on 14 October 2024).

not only safe and orderly for women migrants but also gender-responsive, aligning well with Agenda 2063's aim to protect women migrants from exploitation, harassment, and abuse.

Agenda 2063 prioritises eradicating all forms of violence against women and children. The GLI includes criteria to ensure that laws guarantee women's confidentiality, accessible and effective remedies, and the collection of gender-disaggregated data (see sections 5.3.6 and 5.3.7). When these criteria are used to evaluate South African migration and labour laws, GLI directly supports Agenda 2063's aim of eliminating violence and exploitation in migration contexts. When women migrants have assurance of confidentiality when reporting different forms of violence they are subjected to, perpetrators are brought to account. The availability of accessible and effective services ensures that they receive the much-needed support. The collection of gender disaggregated data guides policymakers in coming up with evidence-informed programmes to eliminate violence and exploitation.

Agenda 2063 envisions a prosperous Africa where all citizens, including migrants, benefit from inclusive economic growth and sustainable employment opportunities. The GLI criteria discussed in section 5.3.4 promote substantive equality, ensuring that women migrants are not excluded from the issuance of work permits, social protections, or workplace rights. Furthermore, the GLI plays a significant role in translating Agenda 2063's economic aspirations into enforceable protections.

Agenda 2063 emphasises the importance of education and skills development for empowering women and youth across the continent. The GLI in section 5.3.2 discusses the GLI's second criterion, which requires that laws provide information and education on women's rights, protection, and remedies available to them. For migrant women, access to education and vocational training enhances employability, economic independence, and social integration. This aligns with transforming African economies and promoting sustainable development through a well-trained and skilled workforce.

A key goal in Agenda 2063 is the realisation of continental transformation through evidence-based governance. The GLI requirement to collect gender-disaggregated data, as discussed in Section 5.3.7, ensures that policymakers have the evidence

needed to design responsive strategies for women migrant workers. The GLI supports Agenda 2063's vision of data-driven development and inclusive monitoring.

By systematically implementing the GLI in South Africa's migration and labour laws, policymakers can shift from broad ambitions under Agenda 2063 to concrete, enforceable protections for women migrant workers. The GLI is vital in translating Agenda 2063's commitments into action by ensuring that laws are not only gender-responsive in theory but also effective in practice, promoting a continent where women migrants are safe, respected, and economically empowered with real equality.

5.8 APPLICATION OF THE GLI TO SOUTH AFRICAN MIGRATION AND LABOUR LAWS

In the next section, I apply the GLI to South African migration and labour laws to help them become gender-responsive. I utilise the GLI's seven criteria assessments, as discussed in section 5.3.

A recap of section 5.3 shows that for a law to be considered gender-responsive, it needs to make provisions and guarantee the following:

- a. A non-discriminatory clause that ensures accessible, affordable and acceptable services;
- b. make provision for education or information on the matter;
- c. non-coerced and informed decision-making and, where relevant, protect women's confidentiality;
- d. promote equal relations between men and women;
- e. protect women from situations of vulnerability linked to their gender;
- f. accessible and effective remedies; and
- g. Comprehensive monitoring of women's situation, including the collection of gender-disaggregated data on the nature of the problem.

5.8.1 *Immigration Act 13 of 2002*

A recap from Chapter 5, Section 5.3.2. The preamble of the *Immigration Act* clearly states that immigration control should issue permits through simplified procedures, not only satisfying security considerations and human rights, but also countering xenophobia.¹³⁵⁵ The Act is rather more administrative, as it aims to facilitate various forms of migration, including visits, vacations, studies, and the movement of skilled labour.¹³⁵⁶ It is essential to note that the Act acknowledges the need for migrant labour to stimulate the nation's economy.¹³⁵⁷ This indicates that the drafters of the *Immigration Act* were aware of the value that migrant workers bring to the South African economy.

The *Immigration Act* does not consider gender in its administrative process, especially when issuing work permits. The Act is silent on whether special consideration is taken when permits are issued. No provision in the *Immigration Act* mentions gender, non-discrimination, or a provision that obliges the Department of Home Affairs to ensure that its services are accessible, affordable, or acceptable to women migrants. The *Immigration Act* does not differentiate between men and women; it adopts a gender-neutral approach, treating both men and women the same. Hence, the use of terms like “foreigner” and “permit holder.”¹³⁵⁸

The Act adopts formal equality, treating men and women the same, regardless of context or circumstances. From Chapter Two, the study reveals that women suffer multiple layers of discrimination, and yet they are treated identically to men. Important to note is the fact that failure to consider gender in cases where it should be regarded as relevant leads to gender blindness and serves to reinforce gender inequality. The intention of the Act can thus be said to be gender blind, the reason being that from the beginning of the drafting process of the Act, it fails even to consider gender, and this has the likely effect of being gender blind.

CEDAW mandates states to enact gender-sensitive laws.¹³⁵⁹ When laws are gender-sensitive, they recognise the different needs and experiences of men and women and how such experiences influence societal interactions. As discussed in section 4.5.1,

¹³⁵⁵ Preamble of the *Immigration Act*:p.4.

¹³⁵⁶ *Immigration Act*:sec. 9-25.

¹³⁵⁷ *Immigration Act*:sec. 13; Fish 2013:234.

¹³⁵⁸ *Immigration Act*:p.8, 10.

¹³⁵⁹ CEDAW 2008:par. 23-26.

Sweden and Canada incorporated gender concerns into their immigration and asylum laws and policies.

For the *Immigration Act* to comply with this criterion and be gender responsive, it must be amended to include a non-discrimination and accessibility clause. The clause should state that all immigration services and procedures must be non-discriminatory, accessible and affordable. To ensure this is possible the clause must also guarantee the removal of barriers that disproportionately affect women, including language barriers, the cost of applications, and access to travel and service centres. To ensure gender sensitivity, the *Immigration Act* should require that all immigration officials receive training on gender sensitivity. Furthermore, the Home Affairs department should ensure that information and services are provided in different languages and are accessible in remote areas.

CEDAW mandates states to ensure that vulnerable groups such as women migrant workers have access to information and education on their rights, protections and available support services.¹³⁶⁰ The CEDAW General Recommendation mandates that laws contain provisions that provide information on women migrants' rights in a language they understand.¹³⁶¹ As seen from Chapter 2, women migrant workers encounter multiple layers of discrimination, gender based violence and labour exploitation. This is also confirmed through Crenshaw's intersectionality theory. When women migrant workers have access to information and education on their rights, they become empowered. They are in a better position to protect their rights and report rights violations to the authorities. International law mandates countries to make provision for public information and education programmes to overcome attitudes, customs and practices that perpetuate violence against women.¹³⁶² As a result, education on the rights of women migrant workers should also be extended to employers and civil society through public awareness campaigns. This is essential as it serves to decrease vulnerability and exploitation faced by women migrant workers on the labour market. States are encouraged to design educational programs that not only advance but also protect women's rights.¹³⁶³

¹³⁶⁰ CEDAW 2008:art. 10.

¹³⁶¹ UN OHCHR 2017:par. 43.

¹³⁶² CEDAW 1992:par. 24 (f) (t).

¹³⁶³ UN Declaration on the Elimination of Violence Against Women (1993).

South Africa's *Immigration Act* has an unimaginably narrow focus and is not comprehensive. It only concentrates on regulating entry, stay, and status. The *Immigration Act* is silent on and does not guarantee access or require the provision of information and education for women migrant workers on labour rights, gender-based violence and access to remedies.

Although the Act does not primarily refer to education, it also instructs law enforcement agencies on how to detect and report illegal foreigners to the relevant department.¹³⁶⁴ Secondly, the *Immigration Act* requires that only communities and organs of civil society be educated on the rights of foreigners, illegal foreigners and refugees and further conduct activities to prevent xenophobia.¹³⁶⁵ The Act does not contain provisions to educate or provide information to women migrants on specific human rights violations they may encounter at work.

The intention of the *Immigration Act* 13 of 2002 can thus be said to be gender blind. Failing to include provisions which guarantee education or access to information on the rights and protections of women migrant workers demonstrates a lack of awareness of issues which negatively affect women. The likely effect is also gender blind, as women migrant workers miss the opportunity to be educated and empowered on their rights and the avenues they can take for redress. Women migrant workers continue to suffer rights violations and are not able to report perpetrators for fear of losing their jobs.

For the *Immigration Act* to meet this criterion and be gender-responsive, a clause must be included that states the Department will provide accurate, accessible, and gender-sensitive information to migrants at all stages of the migration process. The information to be provided must be explicitly stated in terms of labour rights, gender-based violence, and remedies. Information must be made available upon arrival and during the migrant's residence. Secondly, it should also include a clause that obliges the Department of Home Affairs, in collaboration with non-governmental organisations, to conduct public information campaigns through radio, print, and social media, primarily targeting migrants and their employers. The campaigns should aim to educate them on the rights and obligations of migrants.

¹³⁶⁴ *Immigration Act*:sec. 2(2)(ii).

¹³⁶⁵ *Immigration Act*:sec. 2(2) (f).

CEDAW's General Recommendation explicitly states the importance of confidentiality for women, especially women migrant workers and survivors of gender-based violence.¹³⁶⁶ State parties are urged to ensure that the complaints procedure and support services for victims/survivors are not only safe and confidential but also accessible to all women.¹³⁶⁷ Women, including migrant workers, who want to report violence at the workplace need to be protected and provided with appropriate support services. From Chapter Two, there is evidence which shows that women migrant workers working on a farm in the Western Cape suffered sexual harassment. They were afraid to report this sexual abuse as the farm supervisor was the perpetrator, and they feared losing their jobs.

The intention of the *Immigration Act* 13 of 2002 is, therefore, gender-blind. It fails to acknowledge specific gender vulnerabilities faced by women migrant workers. The likely effect is also gender blind, as women migrant workers who are subjected to gender-based violence at work do not report abuses and suffer in silence despite violations of their constitutional rights to equality, dignity, and security of the person.

To remedy this defect, the Act should include explicit provisions for the availability of a safe and confidential complaints procedure, as well as support services for women. The Department of Home Affairs should also coordinate with the departments of health, police, and social services to offer shelters, counselling, medical aid, and legal assistance to support victims through these ordeals. Women, including migrant workers, who want to report violence at the workplace need to be protected and provided with appropriate support services.

The Act also needs to contain provisions which show how compliance will be monitored. Ensuring the availability of a safe, accessible and confidential complaints system as well as comprehensive support services for women migrant workers who report violence at the workplace will enable the Act to meet criteria three and be gender responsive.

¹³⁶⁶ Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 on Gender-Based Violence against Women, updating General Recommendation No. 19 (2017) CEDAW/C/GC/35.

¹³⁶⁷ Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 on Gender-Based Violence against Women, updating General Recommendation No. 19 (2017) CEDAW/C/GC/35 para 31©.

The *Immigration Act* fails to promote equal relations between men and women. The Act is gender-blind in its intent as it does not attempt to acknowledge the different needs and interests of men and women, especially in issuing work visas to both male and female migrant workers. The Act fails to consider the challenges faced by women migrant workers or to relax work visa regulations, thereby ensuring that more women migrants have access to work visas. The likely effect is that due to the stringent conditions for one to obtain a work visa in South Africa, many women migrants remain undocumented and vulnerable to rights violations.

To meet this criterion, the Act should include a clause incorporating substantive equality. A clause could be added that states that visas are allocated without discriminating against women migrants.

The focus of the *Immigration Act* is to protect its borders, and it is silent on protecting women migrants from situations linked to their vulnerability. The Act does not have provisions which protect migrant workers from exploitation, sexual harassment, assault or other forms of gender-based violence, or any form of abuse by their employers.¹³⁶⁸ The intention of the Act is thus gender-blind, with the likely effect being a gender-blind approach. The *Immigration Act* fails to consider gender where it should have.

For the Act to meet criterion five, a clause could be amended to include a clause prohibiting the exploitation, gender based violence or any form of abuse at the workplace. An additional clause to ensure that this law is gender-responsive could be to require employers and recruitment agencies to register and comply with labour laws concerning minimum wages, working hours, and occupational safety.

Crush and Ramachandran also weigh in and argue that the *Immigration Act* has failed on occasion to defend the rights of marginalised groups, such as women migrant workers.¹³⁶⁹ but also guarantee women migrant workers accessible and effective remedies. General recommendation 26¹³⁷⁰ mandates states to promulgate and enforce laws that include legal remedies and easily accessible dispute resolution mechanisms, which protect both documented and undocumented women migrant

¹³⁶⁸ Fish 2013:237.

¹³⁶⁹ Crush & Ramachandran 2014:1-25.

¹³⁷⁰ CEDAW 2008:par. 24 (c)

workers. Section 8 of the *Immigration Act* provides a mechanism for appeal and review of immigration decisions; however, it does not grant migrant workers access to a dispute resolution for documented and undocumented migrant women. The intention of the *Immigration Act* and its likely effect are therefore gender blind.

The *Immigration Act* could be amended to include a clause that migrant workers have access to labour and civil remedies, and this can be done by ensuring that women migrant workers have access to legal aid so that they have representation in disputes with employers.

The *Immigration Act* contains a clause that establishes an internal anti-corruption monitoring unit tasked with preventing, deterring, detecting, and exposing any instances of corruption, abuse of power, xenophobia, and dereliction of duty by individuals employed by the department.¹³⁷¹ Nowhere in the law is there mention of monitoring the situation of women migrant workers through the collection of gender-disaggregated data. This presents a challenge, as it becomes difficult to report on the number of women migrants who were provided with work visas and the experiences of women migrant workers in the labour market. Such data is essential as it informs policymakers if there is a need to review and amend laws. It also informs civil society of the need to include awareness campaigns to educate communities and law officials on the importance of protecting and promoting the rights of women migrant workers.

The CEDAW Committee, in its General Recommendation 26¹³⁷² mandates states to conduct qualitative and quantitative research, data collection, and analysis on women migrant workers throughout all stages of migration.¹³⁷³ This was supported by a United Nations Policy brief, which emphasises that data collection is necessary to ensure that policies are gender-responsive and that women's rights are protected.¹³⁷⁴ The intention and likely effect are therefore gender blind.

For the *Immigration Act* to meet criteria seven and be gender responsive. A gender disaggregated data clause should be included. The clause should indicate that the Department of Home Affairs collects and publishes an annual report on gender-

¹³⁷¹ Section 47 of the *Immigration Act*.

¹³⁷² CEDAW 2008:par. 23 (c)

¹³⁷³ CEDAW 2008:par. 23 (c).

¹³⁷⁴ CCP "Improve data & accountability for girls and women", http://www.ccpsom.org/wp-content/uploads/2020/10/Brief_Data.pdf (accessed on 2 July 2025).

disaggregated statistics, including the number of work permits issued to women migrant workers, the sectors in which they are employed, and the experiences of these women migrant workers.

The *Immigration Act* thus fails to meet international standards. If the suggested amendment clauses can be added, the laws will become gender responsive and meet international standards.

5.8.1.1 Immigration Amendment Act of 2004

In 2004, the *Immigration Amendment Act*¹³⁷⁵ reinforced the restrictive nature of the original *Immigration Act* and expanded the powers of the Minister and the Director-General of Home Affairs. It reduced the number of permits available and adjusted the work permit policy to apply only to persons in a particular “occupation or class.”¹³⁷⁶

The 2004 Immigration Amendment Act affects both skilled and unskilled women migrants by reducing the number of work permits available and further ensuring that only migrants with certain types of occupations are granted permits. This discriminates against both groups of women migrants. Gubba and Chisale attribute the de-skilling of professional women migrant workers to migration policies and immigration regulations.(see discussion in section 2.3.5.4.) Women migrant workers often end up in the informal sector, where they earn low wages and face multiple layers of discrimination, either because they cannot obtain a permit or because their occupations are not included on the list. Unskilled women migrants are already disadvantaged as they are unable to secure permits or to fit into any occupational categories.

Gubba and Chisale attribute the deskilling of highly skilled professional women to migration and immigration policies. They further argue that migration and immigration policies do not integrate them into the knowledge market or jobs that align with their careers; hence, they are forced into the second category of employment, which is characterised by low wages and unfavourable working conditions. The intention of the

¹³⁷⁵ *Immigration Amendment Act.*

¹³⁷⁶ *Immigration Amendment Act.*

Amendment Act is thus gender blind; it fails to incorporate gender considerations, with the likely effect also being gender blind, as the issues concerning women migrants are overlooked. The *Immigration Amendment Act* of 2004 shows that a formal equality approach was adopted as the drafters failed to take into account the situation of women migrant workers.

The reduction of work permits and the creation of a new occupations list were the only amendments to the 2004 *Immigration Act*. The 2004 *Immigration Act* did not consider amending provisions of the Act so it could guarantee the education of women migrants on their rights, protect women from situations of vulnerability linked to their gender, ensure that women migrants were protected from conditions related to their gender, have accessible and effective remedies, nor promote the monitoring of the situation of women through the collection of gender-disaggregated data. This would be essential in monitoring the experiences of women migrants. The collection of gender disaggregated data of women migrants' experiences would have aided lawmakers in getting a sense of the experiences of women migrant workers.

5.8.1.2 Immigration Amendment Act 3 of 2007

This was an amendment to the *Immigration Act* 13 of 2002. The purpose of this Amendment was to improve documentation, border management, and streamline the permit processes for migrants.¹³⁷⁷ This Amendment Act introduced government dispensation projects for Zimbabweans, Angolans, and people from Lesotho.¹³⁷⁸ The project aimed to document low-skilled international migrants so that they could work or study in South Africa without the complexity of the *Immigration Act* visa options.¹³⁷⁹ Whilst the Amendment Act was a great relief as it improved the management of migration since most undocumented migrants became documented, it did not change the situation of women migrant workers in South Africa, as many women migrant workers continue to be subjected to exploitation, GBV and limited access to legal protection (see section 2.3.4). Secondly, while most migrants were documented, it did not address gender specific vulnerabilities and structural inequalities faced by women

¹³⁷⁷ *Immigration Amendment 3/2007*.

¹³⁷⁸ Section 6 (2) of the *Immigration Amendment Act*.

¹³⁷⁹ Zimbabwe Dispensation Programme now Zimbabwe Exemption Permit, Lesotho Exemption Permits; Angolan Special Permits.

migrant workers. Since many low-skilled migrants were reported to be documented, more value would have been added to the *Immigration Amendment* if clauses required by the GLI had been incorporated.

An analysis of the *Immigration Amendment* shows that no gender considerations were incorporated. The study, supported by the intersectionality theory, showed that women migrant workers face multiple layers of discrimination, but the Amendment did not consider this fact. A formal equality approach was applied, which treated men and women migrants from the three countries the same. This is evident by the use of gender neutral terms such as “person”, “spouse”, and “foreigner”.¹³⁸⁰ Whilst the *Immigration Amendment Act*’s intention was gender neutral, the likely effect was that it ended up being gender blind, as it ought to have factored in gender considerations, taking into consideration women migrant workers’ historical and structural disadvantage. It does not align with South Africa’s Constitutional obligations.¹³⁸¹ It also does not align with South Africa’s commitments under CEDAW, which mandates states to protect women migrants from gender discrimination.

To meet the requirements for criterion one of the GLI, a clause incorporating gender considerations must be included, acknowledging the gender specific vulnerabilities of women migrants.

No clause which guaranteed access to informal education or information on women migrants’ rights was included. The special permits were designed to document low-skilled workers, including women migrant workers. Education continued to be restricted only to law enforcement agencies and community members. This left out women migrants who suffer multiple layers of discrimination. As discussed above, educating women migrants on their rights leads to empowerment and the ability to protect their rights. The intention of the law is thus gender-blind, with the likely effect also being gender-blind.

¹³⁸⁰ Section 2(2) of the *Immigration Amendment Act*.

¹³⁸¹ Section 9(2) of the *Constitution*.

Most of the women migrants who got the special permits were low-skilled migrant workers who were in South Africa illegally. A clause to guarantee their non-coerced decision-making would have been essential. The reason is that many suffer different forms of gender-based violence (see discussion in Chapter 2) and are often afraid to report their employers for fear of losing their jobs. The clause would, in other words, help to reassure them. The intention of the Amendment is thus gender-blind, with the likely effect being a gender-blind approach.

The *Amendment Act* did not include any provisions regarding the rights of men and women. There is also no evidence in the *Amendment Act* to show that there were provisions which contained laws and policies to provide the public with information and education programmes to overcome attitudes, customs and practices that perpetuate violence against women. The *Amendment Act* is thus gender blind, and the likely effect is that it will also be gender blind, as no gender considerations are factored in when it comes to vulnerabilities that women migrant workers are subjected to.

There is no evidence which shows how low-skilled women migrant workers who were given these permits would be protected from situations of vulnerability linked to their gender. Intention is gender blind, with the likely effect also being gender blind. Furthermore, there is no evidence of a clause that ensures women migrant workers have access to accessible and effective remedies. Since in the first instance gender is not even considered, the intention is therefore gender blind, with the likely effect also gender blind. No clause guarantees the collection and disaggregation of experiences of women migrant workers by gender. This is especially important as it will provide information on the experiences of women migrant workers. The dispensation programme was launched in 2011. Fifteen years later, no gender-disaggregated data was collected to show how many women migrants from Zimbabwe, Lesotho, and Angola benefited from the Special Dispensation programme and their experiences, which would have guided law and policy makers in future laws.

5.8.1.3 Immigration Regulation R413 of 2014

The Immigration Regulation served to reinforce a gendered labour market. Chisale notes that South Africa's immigration policy does not align with international, regional, and national standards that protect and promote gender equality. The Immigration Regulation applies a formal equality approach, which is contrary to South Africa's constitutional obligation. An application of substantive equality in line with Section 9(2) of the *Constitution* would consider the gender-specific and structural vulnerability of women migrant workers, ensuring that visa pathways are relaxed to include them, even if not under critical skills but under general visas.

The only amendment it introduced affecting women migrant workers' rights was the introduction of the critical skills visa, which made it very difficult for women migrants in the domestic, farming and other informal sectors to regularise, as they were omitted. Its intention was gender blind as it did not consider the vulnerability of women migrant workers, with the likely effect that it is gender blind. There is no evidence from the Immigration Regulation that it included an amendment clause which made provision of information or education on women migrant workers' rights, guaranteed women's confidentiality or privacy when they reported violations, protected women from situations of vulnerability, contained information on accessible and effective remedies or even requested gender disaggregated data. The intention and likely effect are thus gender blind and do not meet international standards.

5.8.2 Refugee Act 130 of 1998

The *Refugee Act* contains a non-discrimination clause, which ensures that refugees enjoy all rights in the Bill of Rights, including protection from discrimination based on gender, race, or origin. The Act further explicitly states that Refugees have access to healthcare, education and basic services.¹³⁸² The *Refugee Act* guarantees constitutional rights to equality, as outlined in the *Constitution*.¹³⁸³ This section is significant for women migrant workers as it protects them from discrimination based on gender, race or social origin.¹³⁸⁴ The intention is thus gender neutral as it is meant to benefit both male and female migrants, with the likely effect being gender

¹³⁸² Section 27(b) of the *Refugee Act*.

¹³⁸³ Section 9 (1)-(3) of the *Constitution*; section 27 (d) of the *Refugee Act*.

¹³⁸⁴ Section 9 (3) of the *Constitution*.

responsive, that both male and female migrant workers will benefit. The *Refugee Act* thus meets criterion one of the GLI.

The *Refugee Acts* make provision for basic education.¹³⁸⁵ However, the basic primary education is not specifically targeted at women migrant workers who are refugees.¹³⁸⁶ The *Refugee Act* does not explicitly mention whether the education will inform women, migrant workers, on the rights of women or provide information to that effect. Whilst the intention of the *Refugee Act* was gender neutral, as the primary basic education being alluded to is for both men and women refugees. The likely effect is that it is gender blind, as there is no provision to ensure that women migrant refugees are educated about their rights or that information about their rights is available. To be gender responsive, the Act would need to include a clause guaranteeing the provision of education or information on the rights of women migrant workers.

The *Refugee Act* guarantees the confidentiality of asylum applications and the information contained therein at all times.¹³⁸⁷ The Act lacks reference to women's confidentiality. CEDAW General Recommendation emphasises the importance of confidentiality for women, especially survivors of gender--based violence.¹³⁸⁸ State parties are urged to ensure that the complaints procedure and support services for victims/survivors are not only safe and confidential but also accessible to all women.¹³⁸⁹ The *Refugee Act* is silent on this. Whilst it intends to cover both male and female asylum seekers/refugees, the likely effect is gender blind in that it omits to consider the gender specific vulnerabilities and structural inequalities that women migrants suffer.

The *Refugee Act* does not contain any provisions which promote equality between men and women. Whilst the Act is gender neutral, it uses terms such as "asylum seeker" and "refugee."¹³⁹⁰ It does not explicitly address gender equality. It does not contain additional clauses or safeguards addressing the specific gender vulnerabilities faced by women asylum seekers and refugees. Its intention is, therefore, gender-blind in this respect as it fails to incorporate gender concerns. The likely effect is that the

¹³⁸⁵ Section 27 (b) of the *Refugee Act*.

¹³⁸⁶ Section 27 (b) of the *Refugee Act*.

¹³⁸⁷ Section 21(5) of the *Refugee Act*.

¹³⁸⁸ CEDAW 2017.

¹³⁸⁹ CEDAW 1992.

¹³⁹⁰ Section 1 (v) &(xv) of the *Refugee Act*.

Act is also gender blind, as the gender specific and structural inequalities faced by women asylum seekers and refugees are not addressed.

The *Refugee Act* does not contain any clauses protecting women asylum seekers and refugees from situations of vulnerability linked to their gender. From chapter 2, women migrants suffer multiple layers of discrimination, including gender - based violence. They are often afraid to report as they fear losing their jobs or being deported, especially for those whose asylum seeker permit has expired and still need to renew their asylum or are awaiting refugee status. Whilst the intention of the *Refugee Act* is gender neutral, the likely effect is gender blind, as it leaves women asylum seekers and refugees vulnerable by not addressing situations linked to their vulnerabilities.

The *Refugee Act* guarantees procedural safeguards, including the right to appeal, the right to status determination, and the right to seek judicial review.¹³⁹¹ Many migrant women workers encounter barriers to accessing justice because of fear of losing jobs or deportation. I discuss this in detail in Chapter 2. The CEDAW committee explicitly mandates state parties to remove both legal and practical barriers, including language barriers, lack of information, and fear of retaliation for accessing justice. The CEDAW Committee has, on various occasions, raised concern over the need for refugees and migrants to access legal remedies. In its review of Lebanon, Malaysia, Saudi Arabia, Qatar and Kuwait, the Committee expressed concern that women migrant domestic workers faced significant obstacles in accessing the courts or seeking legal remedies following abuse, wage theft or sexual violence.¹³⁹² The CEDAW Committee also expressed concern in its review of South Africa by stating that there was limited legal protection for migrant and refugee women who are exposed to multiple forms of discrimination.¹³⁹³ Whilst the *Refugee Act* is gender neutral, the likely effect is gender blind as the Act fails to address the practical barriers that result in women asylum seekers and refugees not accessing accessible and effective remedies.

It is therefore essential to ensure that there is a clause guaranteeing women asylum seekers and refugees access to legal aid and the courts, as well as a further guarantee

¹³⁹¹ Section 26 of the *Refugee Act*.

¹³⁹² CEDAW 2008:par. 26.

¹³⁹³ Satterthwaite 2005; Briddick, 2002:224-243.

that once a grievance is lodged, their confidentiality is protected. They are protected from losing their jobs.

No provision guarantees the collection of data or monitors the specific experiences of women asylum seekers and refugees. The intention of the *Refugee Act* is therefore gender blind, and its likely effect is also gender blind, as there is no information which shows the experiences of women asylum seekers and refugees that policy makers can use to improve their conditions.

The *Refugee Act* can therefore be said to meet international standards partially. To be fully compliant with international law it should include the following clauses which guarantee access to information or education on the rights of women, confidentiality when they report a violation of their rights, equality between men and women must be explicitly stated, address the situations which are linked to women's vulnerability, address the barriers which hinder women from accessing legal remedies and also make provision for gender-disaggregated data collection.

5.8.3 Immigration policies

The 2017 South African White Paper on International Migration (WPIM) provides a non-binding policy framework to guide the review of immigration and related legislation. The WPIM portrays international migration as valuable if managed in a manner that is efficient, secure and respectful of human rights.¹³⁹⁴ It is silent on the gendered nature of migration. The 2017 WPIM includes a general rights-based approach for asylum seekers and refugees, providing access to healthcare, employment and education.¹³⁹⁵ Whilst the WPIM acknowledges the feminisation of migration,¹³⁹⁶ it does not propose gender-specific services or implement strategies to ensure that services are available for women migrants. The 2024 White Paper on Citizenship, Immigration and Refugee Protection (WPCIRP) aims to harmonise laws and align them with human rights standards. However, the drafters of the WPCIRP lack gender sensitivity, as the proposal does not ensure that women migrants are not discriminated against in accessing services.

¹³⁹⁴ WPIM:37.

¹³⁹⁵ WPIM:68.

¹³⁹⁶ WPIM.

The WP NLMP proposes to control inward labour migration but fails to propose strategies on how to avoid gender discrimination in employment or make provision for women migrants to access services.

The WPIM lacks education and information on the rights of women migrant workers, as well as remedies available to empower them and better protect their rights. The WPCIRP does not contain any proposal which makes provision for the education or availing of information on women migrant workers' rights and remedies available to them, despite the multiple layers of discrimination that they encounter. The WP on NLMP provides an outline of its administrative reforms and data needs, but does not propose a strategic intervention on how women migrants will be educated on their rights and remedies available to them.

The WPIM fails to include confidentiality protection for women migrant workers. It does not provide any information on the procedure that should be taken to protect female migrants from being coerced. On the other hand, the WP CIRP proposes improving governance and efficiency. Unfortunately, there is no proposal to protect women's confidentiality or decision-making autonomy. The WP on NLM is silent on protections against coercion or abuse, particularly in the gendered labour market.

Migration is a gendered experience, with men and women experiencing the different stages of migration in various ways. The WPIM fails to promote gender equality in migration policy. Whilst the WPCIRP, proposes the observance of human rights, it neglects to acknowledge the gender specific vulnerabilities experienced by women migrant workers or propose gender-specific strategies that promote equal relations between men and women. The WP on NLMP does not propose promoting equality between men and women. Whilst it proposes a quota system and sector regulation applies broadly to migrant workers, there are no gender specific considerations factored in.

The WPIM does not propose a strategic intervention which can protect women from situations of vulnerability linked to their gender. There is no reference in the WPIM to a gender-specific complaints mechanism or legal remedies for women migrants facing exploitation and GBV. The WPCIRP discusses border control and biometrics but ignores the unique vulnerabilities faced by women migrants at every stage of the

migration process.¹³⁹⁷ The WP on NLMP fails to address gender specific vulnerabilities, such as exploitation or GBV, which disproportionately affect women migrant workers.

The WPIM does not propose accessible and accessible remedies. The WPCIRP does not propose accessible or effective remedies for women migrant workers facing discrimination or any form of abuse. The WP on NLMP fails to propose accessible and effective remedies for women migrant workers.

The WPIM does not mention the need for gender disaggregated data, collection or monitoring of the situation of women migrant workers. The WPCIRP does not contain any proposal for gender disaggregated data or monitoring of the experiences of women migrants. Whilst the WP on NLMP recognises the need for evidence-based policy making and improved data, there is no proposal for gender disaggregated data.

5.8.4 Labour Relations Act 66 of 1995

The LRA contains several provisions that reflect a rights-based approach to work. The Act is non-discriminatory and intends to ensure that every employee has the right to participate in forming a trade union or federation of their choice.¹³⁹⁸ The Act is thus gender-neutral in this regard. The likely effect is that all employees, including women migrants, can freely participate in forming a trade union of their choice. It contains the right to freedom of association of employees and non-discrimination in exercising their rights.¹³⁹⁹ The Act also legalised domestic worker unionisation,¹⁴⁰⁰ which means that most women migrant domestic workers are protected and able to negotiate for better salaries.

The *Labour Relations Act* does not have provisions that mandate the provision of information and education. It therefore does not provide for gender-specific information and education. It, however, establishes institutions like the Commission for Conciliation, Mediation and Arbitration, and labour courts, which educate parties about their rights in the dispute resolution process. This, however, is not helpful for women

¹³⁹⁷ WPCIRP.

¹³⁹⁸ LRA:ch. 2 (4) 1; ch 7 (1)-(4).

¹³⁹⁹ LRA:ch. 5, 11.

¹⁴⁰⁰ LRA:ch. 2(4).

migrant workers who need to be informed and educated about their rights upon arrival in South Africa. The intention of the Act is thus gender blind, with the likely effect also being gender blind as it fails to make provision for the education of women migrant workers of their rights. When women are educated and empowered, they are in a better position to protect their rights.

The Act is gender neutral regarding its intention to guarantee coerced and informed decision-making. It also guarantees non-coerced and informed decision-making and further protects employees' confidentiality.¹⁴⁰¹ The likely effect is that the rights of women, more especially migrant workers, to make decisions are protected.

The Act ensures that men and women are treated equally in matters of dismissal, discipline and collective bargaining. Important to mention that the Act clearly protects women against dismissal due to pregnancy or family responsibility. This is a critical area where women migrant workers benefit. The Act thus promotes formal equality as no discrimination is allowed based on sex, and also equal access to a dispute resolution mechanism. The Act, however, does not explicitly mention affirmative action or female representation. The intention of the Act can be said to be gender-neutral, with the likely effect of gender neutrality benefiting women migrant workers, especially in terms of maternity and family responsibilities.

The Act applies to all employees in South Africa, regardless of nationality or migrant status. This essentially means that women migrant workers benefit from the same protections against unfair dismissal, discrimination and harassment as South African women workers. The Act does not, however, address the unique vulnerabilities of women migrants, such as irregular status or dependency on employers for work permits. Since protections exist for women migrant workers, such protection is not targeted towards women migrant workers specifically. The intention of the Act in this regard can be said to be gender neutral, as the Act attempts to cover all employees. The likely effect is gender blind, as the specific vulnerabilities faced by women migrant workers are neglected.

The Act also establishes internal redress mechanisms for any employee who has been aggrieved. This is particularly important for women migrant workers, who are often

¹⁴⁰¹ *LRA*:art. 201, 133.

vulnerable. Where the Act falls short, however, it appears the law does not promote gender balance in certain representative bodies. While the law requires workers to be made aware of their rights to be represented, there is no acknowledgement of the relevance of gendered representation, for instance, being represented by women or ensuring the concerns of women workers are represented. The law also appeared to be blind to the differentiated obstacles that women may face in the workplace and whether the law sufficiently protects women from situations of vulnerability linked to their gender. When the law is blind to obstacles women/women migrants may face in the workplace, the likely effect is that the law will not guarantee accessible and effective remedies.

Furthermore, no provisions promote the comprehensive monitoring of women's situations by collecting gender-disaggregated data. This means it becomes challenging to monitor the challenges women are faced with, especially vulnerable migrant workers.

The Act partly meets international standards by seeking to protect both male and female workers against unfair labour practices.

5.8.5 The *Basic Conditions of Employment Act 75 of 1997*

The purpose of the *Basic Conditions of Employment Act (BCEA)* is to give effect to the right to fair labour practices referred to in Section 23(1) of the *Constitution* by establishing and making provisions for the regulation of basic conditions of employment. Thus, the Republic is complying with its obligations as a member state of the International Labour Organization and providing for matters connected.

The Act sets legal minimum working conditions for all employees in South Africa. It covers the number of working hours, overtime, leave, and termination of contracts.¹⁴⁰² The *BCEA* was expanded to include domestic workers, particularly migrant women. Nevertheless, it is still challenging to enforce these rules. Many domestic workers, including many foreigners, are still subject to conditions that do not comply with legal

¹⁴⁰² Twala 2023:30.

requirements, such as minimum wages and hours worked, as stated by Skinner.¹⁴⁰³ The problem is that the legislative framework is at odds with its implementation.

There is little information to conclude whether the law guarantees access to non-discriminatory, accessible, affordable and acceptable services. The law is also silent on whether it provides education or information on the primary conditions of employment to women and other vulnerable groups, like women migrant workers. The law contains provisions that protect women from vulnerability linked to their gender. The Act provides maternity leave, protection of employees before and after birth and family responsibility.¹⁴⁰⁴ The intention of the Act can thus be said to be gender responsive, with the likely effect in this respect also gender responsive, as the BCEA caters for gender specific needs.

Whilst the Act guarantees procedures for disputes, it is not clear if they are sufficient for women migrants who face intersecting forms of discrimination. The intention of the Act can thus be said to be gender blind in this regard, with the likely effect of gender blindness. The Act fails to explicitly mention detailed procedures for disputes, also addressing the intersecting forms of discrimination faced by women migrants.

The Act also does not have provisions for gender-disaggregated data. The collection of gender-disaggregated data will assist in monitoring women's situations. This Act partly meets international standards. A review of the law and inclusion of provisions for effective and accessible remedies, in other words, must be evident in providing free legal aid to women migrants and include provisions for monitoring the situation, especially for women migrant workers.

5.8.6 *Employment Equity Act 55 of 1998*

The *Employment Equity Act* is another landmark statute prohibiting workplace discrimination and promotes equitable practices.¹⁴⁰⁵ The *EEA* prohibits unfair discrimination on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, disability, religion, HIV status, culture, language (section 6), and it encourages employers to take steps to eliminate unfair

¹⁴⁰³ Skinner 2014:150-163.

¹⁴⁰⁴ BCEA:ch. 25, 26, 27.

¹⁴⁰⁵ *Employment Equity Act*.

discrimination. With the feminisation of migration, the *EEA* is silent on women migrant workers, more especially the undocumented ones who are still subject to multiple forms of discrimination. Whilst the intention of the *EEA* is gender-responsive, as it aims to cater to all genders. The issues or gender specific vulnerabilities of women migrant workers are not addressed.

The *EEA* mandates employers to prepare employment equity plans and report on them. They are required to share these plans with employees and trade unions. There is no obligation in the *EEA* to provide information and educate migrant women workers, specifically about their rights. Therefore, the intention of the Act, whilst gender neutral as it seeks to cover all employees, the likely effect is gender blind as it neglects to address the gender specific vulnerabilities faced by women migrant workers and other vulnerable workers.

The *EEA* makes provision for confidentiality testing in the context of medical testing and HIV status, and psychological testing. (section 7). The *EEA* does not contain any explicit provision which guarantees confidentiality for women migrant workers in relation to gender based violence. Furthermore, the *EEA* does not make provision or guarantee non-coercion in recruitment or employment practices. This is particularly important as from the discussion in Chapter 2, women migrant workers suffer various rights violations and in most instances do not report, as they fear losing their jobs, as there is no guarantee of confidentiality or non-coercion. The intention of the *EEA* is thus gender blind, with the likely effect being also gender blind, as women migrant workers are not protected.

The *EEA* makes provision for gender equality as its main purpose. Employers are mandated to implement affirmative action measures in order to advance women and other designated groups (Sections 12-27). The challenge with the *EEA* is that it does not acknowledge women migrant workers. Women migrant workers do not benefit from the affirmative action initiative, as it is reserved for South Africans. Its intention, whilst gender responsive, has the likely effect of being gender blind, as the challenges faced by women migrant workers are not addressed.

The *EEA* does not directly address gender based violence or sexual harassment, as this is dealt with in the *LRA*. Whilst protection exists against dismissal due to pregnancy or discrimination based on sex/gender, this is more general and not

targeted specifically towards women migrant workers (Section 6). The *EEA* is silent on the abuse subjected to women migrant workers in the informal sectors. Therefore, the intention, whilst it is gender neutral, has the likely effect of being gender blind as women migrant workers continue to suffer rights violations, especially in the informal sectors.

The *EEA* makes provision for access to legal services. Workers can lodge discrimination complaints with the Commission for Conciliation, Mediation and Arbitration(CCMA) or the Labour Court. The intention of the *EEA* in this regard is gender responsive, with the likely effect being gender responsive, as women migrant workers can also lodge their complaints. Important to mention that access to legal services is limited for women migrants, particularly in the informal sectors, as they tend to fear reporting cases due to fear of losing jobs or deportation.

The *EEA* requires employers to submit Employer Equity Reports to the Department of Employment and Labour. Although these reports are disaggregated by race, gender and occupational category, they do not include migrant status as a reporting category. This poses a challenge as it is not possible to collect data on women migrant workers' experiences, which will, in turn, assist the government in coming up with targeted interventions.

5.8.7 The Occupational Safety and Health Act

The *Occupational Safety and Health Act*¹⁴⁰⁶ provides for the safety and health of persons at work and in connection with using plants and machinery.

The *Occupational Health and Safety Act (OHSA)* applies to all employees without explicit reference to sex, gender or migration status. It does not prohibit discrimination against women migrants in health and safety contexts. No targeted protections for women migrants are contained in the Act. The intention of the *OHSA* is therefore gender neutral as it is intended to cover all employees; however, the likely effect is gender blind. The reason is that women migrants in precarious forms of employment continue to be subjected to intersecting forms of discrimination. Evidence of this is discussed in chapter 2, where women migrant workers on farms were injured and told

¹⁴⁰⁶ *Occupational Safety and Health Act.*

that they must not report it as a workplace injury. Due to the fact that women migrants fear losing jobs or deportation, such violations of their rights are not reported.

Section 8 of the *OHS*A makes provision for information, instruction, training and supervision necessary to ensure workplace safety. However, there is no provision which guarantees gender sensitive education, especially focused on women migrant workers, such as sexual harassment or reproductive health. Therefore, whilst the *OHS*A, intention is gender neutral, its likely effect is gender blind as migrant women are likely to be left out.

The *OHS*A does not guarantee or make provision for confidentiality, especially in health assessments, reporting abuse or medical fitness exams. The *OHS*A is also silent on non-coerced decision-making. This is particularly crucial for women migrant workers who are often pressured into signing unsafe employment terms. The *OHS*A intention in this regard is thus gender blind as it does not consider women migrant workers' vulnerable position. The likely effect is that the issues that women migrant workers suffer are not addressed and are thus not protected by the law.

The *OHS*A makes provision for gender equality. It, however, does not acknowledge the different risks, such as sexual violence, reproductive health risks, that women migrant workers are subjected to. It was shown in Chapter 2 that women migrant workers are sexually assaulted by their supervisor but are not able to report such a matter because they fear losing their jobs. Women migrants are targeted, and yet the *OHS*A fails to acknowledge the fact. The intention of the *OHS*A can thus be said to be gender neutral as it attempts to cover all employees. The likely effect, however, is that the women migrant workers are left out, as the issues they encounter are not addressed.

The *OHS*A does not have any provisions protecting women migrant workers against gender based violence, sexual harassment or reproductive risks at work. Women migrants in domestic work and on farms remain vulnerable, still the *OHS*A remains silent on the issues. The intention of the Act is thus gender blind, with the likely effect that it is also gender blind, as women migrants are left out and don't benefit from the *OHS*A.

The *OHS*A makes provision for employees to report violations to the Department of Employment and Labour. Inspectors also have the power to enforce compliance.

There is, however, no special provision which ensures that women migrant workers, who are most likely to struggle with language, legal status, are able to access justice. The intention, whilst it is gender neutral as it aims to cover all employees, its likely effect is gender blind as most women migrants will be hindered or access to justice may be limited.

The *OHSA* does not make any provision for the collection of gender disaggregated data on workplace injuries, accidents or occupational illness. This poses a significant challenge, as it is difficult to track the specific experiences of women migrants. The intention of the *OHSA* is thus gender blind, with the likely effect of being gender blind, as the experiences of women migrant workers are not monitored.

5.9 CONCLUSION

This chapter has provided an in-depth examination of the GLI as a crucial methodological tool for assessing gender responsiveness in legislation. We began by establishing the foundational framework of the GLI, highlighting its unique ability to evaluate laws on a continuum from gender-regressive to gender-responsive, and critically, its capacity to discern between a law's intention and its likely effect. This distinction is important, as it exposes instances where seemingly neutral or well-intentioned legislation may, in practice, perpetuate or worsen gender inequalities due to a lack of specific provisions or oversight mechanisms. The detailed analysis of the GLI's seven key criteria showed its comprehensive approach to identifying and addressing gender-blindness in legal texts. These criteria serve as a robust framework for ensuring that laws are not merely formally equal but substantively gender-responsive, actively promoting equality and challenging discriminatory norms.

The chapter further solidified the GLI's credibility by showcasing its successful implementation across diverse jurisdictions, including Australia, Indonesia, the Philippines, and Sri Lanka, demonstrating its adaptability and effectiveness in varied legal and socio-cultural contexts. While acknowledging the GLI's strengths in textual analysis, I also addressed its inherent limitations in directly monitoring the implementation of laws. This led to a critical discussion on the necessity of complementary monitoring mechanisms, emphasising the vital roles of international

bodies, such as the ILO and the CEDAW Committee, as well as national entities, including the South African Commission for Gender Equality, in ensuring accountability and transparency in legislative outcomes.

Ultimately, this chapter has positioned the GLI not just as an academic tool but as a practical instrument with significant implications for global development. Its alignment with the Sustainable Development Goals (SDGs) 2030 Agenda, particularly SDG 5 on gender equality, and the African Union Agenda 2063, demonstrates its potential to translate high-level commitments into tangible legislative reforms. This practical application demonstrates how the GLI can effectively identify specific legislative gaps and inform targeted interventions to better protect and empower migrant women workers. In conclusion, the GLI emerges as an indispensable tool for evaluating laws and policies, offering a systematic approach to fostering gender-responsive legislation that is essential for achieving gender equality and sustainable development globally. South African migration and labour laws, when evaluated using the GLI, reveal a lack of clauses specifically addressing gender vulnerability. The laws rely on formal equality, which ultimately results in gender blindness, leaving women migrant workers vulnerable to exploitation, discrimination, and restricted access to remedies. This contradicts both constitutional and international commitments.

CHAPTER 6 :GENERAL CONCLUSIONS AND RECOMMENDATIONS

6.1 GENERAL CONCLUSIONS

The research questions that arise from this primary research problem are as follows: First, what are the causes and types of violations experienced by women migrant workers in South Africa? I examine this research question in Chapter 2. The second research question examines the normative framework for protecting women migrant workers under international and regional instruments that safeguard the rights of women migrant workers. I addressed this research question in Chapter 3. The third research question examines an appropriate methodological tool for measuring the gender responsiveness of laws, which is addressed in Chapter 4. The final research

question examines South African migration and labour laws to determine whether they sufficiently protect the rights of women migrant workers. It assesses what action can be taken to make the laws more gender-responsive. The issues arising from this research question are discussed in Chapter 5.

The analysis of Chapter 2 demonstrates that the violations endured by women migrants in South Africa are not isolated incidents but stem from deeply rooted and interconnected systems of structural inequality. Patriarchy, capitalism, racism, and restrictive migration policies collectively create environments where exploitation and marginalisation continue. Many women work in the domestic and agricultural sectors, where they face low wages, a lack of formal contracts, excessively long hours, and generally poor working conditions. They are also highly vulnerable to sexual and gender-based violence, especially in domestic service, agricultural labour, and sex work, where abuse by employers, clients, and even law enforcement officials is common. Additionally, women involved in sex work encounter criminalisation and social stigma, which further marginalise them and hinder their access to justice. Educated migrant women are often excluded from skilled professions, forcing them into insecure, low-paid jobs that deprive them of financial independence and social recognition. Although South Africa's Constitution guarantees equality, dignity, and freedom, these rights are often denied in practice. The findings highlight a stark gap between legal principles and lived realities, as judicial rulings such as *Harksen v Lane* and *Khosa v Minister of Social Development* affirm non-discrimination but fail to address the structural and intersectional disadvantages faced by women migrants. Therefore, genuine protection and empowerment require transformative strategies that go beyond acknowledging formal rights. Consequently, formal equality has fails to provide meaningful protection. The findings demonstrate that substantive equality necessitates law and policy to engage with context, address socio-economic disadvantages, dismantle stereotypes and violence, enhance participation, and facilitate structural change. Substantive equality is the most appropriate constitutional approach for women migrant workers because it not only addresses discrimination through law but also confronts the systemic and intersectional barriers they face. Findings also show that Fredman's multidimensional framework and MacKinnon's critique of power relations, substantive equality tackle both the material and structural realities of women migrant workers. The cases of *Bhe* and *Mahlangu* illustrate how

substantive equality operates in practice, while the minority judgment in *Union of Refugee Women* emphasises that women migrants remain inadequately protected. Transformative equality builds upon substantive equality, calling for a radical overhaul of socio-economic systems that sustain subordination. For women migrant workers, this involves transforming migration systems, labour markets, and gendered divisions of work. This conclusion paves the way for the following chapter, which assesses international and regional legal frameworks as potential mechanisms to bolster South Africa's commitments to safeguarding the rights of migrant women.

Chapter 3 showed that international and regional legal instruments collectively acknowledge the importance of protecting the rights of migrant workers, including women. Still, they do so in ways that remain incomplete and inconsistent. The ILO was the first organisation to call for migrant protection, reflected in the Migration for Employment Convention and the Supplementary Convention for Migrants. Yet, because these were drafted at a time when women migrated mainly for family reunification, they fail to recognise or address the particular vulnerabilities women face in the labour market. The ICRMW represents a more comprehensive framework, establishing key principles of non-discrimination and equitable treatment. Still, its effectiveness is weakened by limited ratification and the lack of strong enforcement mechanisms. Broader human rights instruments, such as CEDAW, the ILO Declaration on Fundamental Principles and Rights at Work, and the Manila Call to Action, reinforce essential protections against discrimination, inequality, and violence, while promoting access to justice and gender-responsive policymaking. However, their implementation depends heavily on the political will and commitment of member states. At the regional level, African and sub-regional frameworks, including the African Charter on Human and Peoples' Rights, the Maputo Protocol, and the SADC Protocols on Gender and Development and on Employment and Labour, emphasise non-discrimination, justice, and the elimination of violence against women. Still, their protective potential is undermined by persistent barriers to ratification, domestication, and enforcement. The South African Constitutional Court, however, has held that even without ratification, the instruments still have interpretive weight. Taken together, these frameworks provide a crucial but limited foundation for advancing the rights of women migrant workers, as they remain overly general and insufficiently tailored to the

gender-specific challenges faced by women migrants. They require reinforcement through the explicit inclusion of women migrants' rights, gender-responsive frameworks, and substantive equality measures. Greater collaboration among states, international organisations, and civil society is essential to ensure that these instruments move beyond symbolic recognition toward meaningful protection.

The analysis in Chapter 4 shows that, although South Africa has constitutional, migration, and labour laws meant to protect women migrant workers, these frameworks remain inadequate in practice. While the Constitution guarantees equality, dignity, and fair labour rights, these protections are not effectively experienced by women migrants. The *Immigration Act* and related policies are drafted in mostly gender-neutral terms, neglecting the specific vulnerabilities women face and continuing to reflect exclusionary legacies from colonialism and apartheid, such as those introduced by the *Native Land Act*. Current migration strategies emphasise control and skills-based entry, rather than inclusive protections. Labour legislation sets minimum standards, but enforcement is particularly weak in the informal sector, where most women migrant workers are employed. When evaluated against international and regional human rights standards, it becomes clear that South Africa's legal framework does not fully ensure substantive equality, adequate remedies, or meaningful gender-responsive protection for women migrant workers. Addressing this gap requires the urgent adoption of GLI. This approach would enhance existing laws, enabling them to move beyond formal equality and provide substantive protection that better reflects the realities and vulnerabilities of women migrant workers in South Africa.

Chapter 5 demonstrates that the GLI provides a vital framework for assessing the gender responsiveness of laws. By evaluating legislation along a spectrum from gender regressive to gender responsive, the GLI allows for distinguishing between a law's intention and its actual effect in practice, thereby revealing how gender-neutral laws can unintentionally reinforce gender inequality. The seven evaluative criteria of the GLI ensure a comprehensive approach to identifying gender-blindness in law, moving beyond formal equality to actively promote substantive gender equality and challenge discriminatory norms. The credibility of the GLI is evidenced by its

application in countries such as Australia, Indonesia, the Philippines, and Sri Lanka, showcasing its adaptability and effectiveness across diverse legal and socio-cultural contexts. While the strength of the GLI lies in its systematic textual analysis, it cannot directly monitor law implementation, which highlights the need for complementary oversight by international organisations like the ILO and CEDAW Committee, as well as national bodies such as the South African Commission for Gender Equality. The GLI also aligns with global and regional development agendas, including the UN Sustainable Development Goals, particularly Goal 5 on gender equality, and the African Union's Agenda 2063, reaffirming its relevance in advancing gender justice worldwide. Notably, its application to South Africa's migration and labour laws demonstrates its capacity to identify gaps and guide gender-sensitive reforms that directly advance the rights of women migrant workers. In conclusion, the GLI emerges as a crucial tool for attaining gender equality. While it requires supplementary mechanisms to monitor implementation, it contributes to national reforms and broader sustainable development objectives. South African migration and labour laws, when evaluated using the GLI, reveal a lack of clauses specifically addressing gender vulnerability. The laws rely on formal equality, which ultimately results in gender blindness, leaving women migrant workers vulnerable to exploitation, discrimination, and restricted access to remedies. This contradicts both constitutional and international commitments.

Considering the above findings and conclusions, I discuss the recommendations, which are set out below.

6.2 RECOMMENDATIONS

6.2.1 Introduction and orientation of the GLI Framework to Lawmakers

This study recommends creating a standardised GLI training manual. The manual should provide clear steps on how to embed the GLI criteria into migration and labour laws to make them gender-responsive. It will serve as a practical guide, not only providing a reference but also promoting consistency, clarity, and sustainability in its use. Additionally, the study suggests that the Department of Home Affairs,

Employment and Labour, and Women and Youth Development should lead in developing the manual, launching it, and facilitating orientation on the GLI. Independent oversight bodies, such as the Commission for Gender Equality and the South African Human Rights Commission, are well-placed to co-facilitate training, given their constitutional mandates to protect human rights.

Another key recommendation from this study is that the introduction and orientation of the GLI in South Africa should involve lawmakers and key stakeholders. Members of Parliament, especially those on the Home Affairs, Labour, and Gender committees, along with parliamentary legal advisors and research staff, should be trained to apply the GLI criteria during the drafting, amending, or implementation of migration and labour laws. Within the executive branch, essential departments such as Home Affairs, Employment and Labour, and Women, Youth, and Persons with Disabilities should also be engaged to ensure gender responsiveness is incorporated into legislation and policies. Additionally, oversight bodies such as the Commission for Gender Equality, the South African Human Rights Commission, and civil society organisations should be equipped to utilise the GLI in advocacy, monitoring, and shadow reporting. Such a comprehensive approach is crucial, as it ensures that migration and labour legislation progress from formal equality to substantive equality, addressing the structural, gendered vulnerabilities faced by women migrants.

6.2.2 Practical Application of the GLI to Reform Migration and Labour Laws and Policies in South Africa

To make migration and labour laws more gender-responsive and address the specific vulnerabilities faced by women migrant workers, this study recommends the following changes to South African migration and labour laws and policies. The following section sets out recommendations for reforming South Africa's migration and labour laws, each accompanied by a draft clause using the GLI to show how the law can be more gender responsive.

6.2.2.1 *Immigration Act 13 of 2002 (and its Amendments Act 19 of 2004, Act 3 of 2007 & Reg 413 of 2014)*

As discussed earlier in sections 5.8.1, 5.8.1.1, 5.8.1.2, and 5.8.1.3 of the study, the *Immigration Act* and its 2004, 2007, and 2014 amendments were rated poorly through the GLI with a gender-blind rating under the criteria of equality and non-discrimination. To address this gap, it is recommended that the *Immigration Act* be amended to include a detailed non-discrimination clause, obligating the Department of Home Affairs to ensure equal and responsive access to immigration services. The following draft clause is recommended,

“The Department of Home Affairs shall ensure that all immigration services and permit issuance shall be conducted in a manner that is non-discriminatory, accessible, affordable, and gender-responsive. Consideration shall be given to removing barriers that disproportionately affect women, such as language, financial, and geographical inaccessibility.”

The GLI analysis, as discussed in the sections mentioned above, revealed that the *Immigration Act* and its amendments were gender blind in terms of access to information and education. This shows, as previously discussed, that women migrants lacked sufficient information about their rights, available remedies, and protective services. To address this gap, this study recommends that migration and labour frameworks must include an obligation to provide gender-sensitive education and information to women migrants in accessible formats and languages. The following draft clause is recommended,

“The Department of Home Affairs, in collaboration with the Department of Employment and Labour, shall ensure that all migrant workers, especially women, receive accurate, accessible, and gender sensitive information about their legal rights, working conditions, and available remedies in a language and format they can understand.”

A recap from sections 5.8.1, 5.8.1.2, and 5.8.1.3 further demonstrates through the GLI analysis that the *Immigration Act* and its amendments were gender blind in relation to non-coercion, decision-making, and protection of confidentiality. This reveals that the *Immigration Act* lacks a system for women migrants to report exploitation, harassment, or gender-based violence safely without fear of retaliation. Section 2.3.4.2 discussed this in more detail. This study recommends that the *Immigration Act* be amended to establish safe reporting mechanisms for women migrant workers supported by legal

protection. It also suggests the following draft clause to be incorporated into the *Immigration Act*,

“The Department of Home Affairs shall ensure that every woman migrant worker shall have the right to report any incident/s of exploitation, harassment or gender based violence in a safe and confidential manner without fear of retaliation, job loss or deportation. Furthermore, relevant authorities shall ensure the provision of shelter, counselling and legal assistance for women migrants who might have been affected.”

As discussed in section 5, the GLI analysis showed that the *Immigration Act* was gender blind and did not encourage equal relations between men and women. The Act failed to explicitly promote substantive equality or address women’s gender-specific vulnerabilities. This study recommends that the *Immigration Act* explicitly guarantee equality between men and women and offer substantive protections for women in vulnerable positions, especially migrants. It also suggests adding a draft clause to the *Immigration Act*.

“In the allocation of work permits and labour opportunities, the Department of Home Affairs shall pursue substantive equality, ensuring that no provision or administrative practice shall indirectly disadvantage women migrant workers, particularly those in domestic, agricultural or informal sectors”

The GLI analysis in section 5.8.1 found that the *Immigration Act* did not contain any clauses guaranteeing women migrant workers access to and effective remedies. This study therefore recommends that the Immigration Act include provisions that guarantee women migrant workers access to remedies, including legal representation without discrimination based on migration status. It further suggests the inclusion of a draft clause which states,

“The Department of Home Affairs, in collaboration with relevant institutions, shall ensure that women migrant workers have access to courts, tribunals and other mechanisms of redress, which include free or affordable legal aid where necessary, irrespective of migration status.”

An analysis by the GLI showed that the *Immigration Act* did not contain any guarantees for the monitoring and collection of gender disaggregated data on women migrant workers. This study, therefore, recommends the collection of gender-disaggregated data. A clause guaranteeing this could be incorporated into the Act, which states,

“The Department of Home Affairs and the Department of Employment and Labour shall collect, analyse, and publish gender-disaggregated data on all migrant workers, including their sectors

and employment conditions, access to services, for the purpose of monitoring laws and informing policies.”

6.2.2.2 *Refugee Act 130 of 1998*

As discussed in section 5.8.1, a GLI analysis of the *Refugee Act* identified several gaps in the legislation. Although the *Refugee Act* provided basic education, it did not enable women refugees to understand their rights or access remedies and protections. Secondly, the *Refugee Act* lacked explicit guarantees of confidentiality for women survivors of gender-based violence. It did not explicitly promote substantive equality nor address women’s unique vulnerabilities. Although accessible and effective remedies existed, they remained inaccessible to women refugees due to barriers such as language, fear of deportation, and lack of legal aid. Lastly, the *Refugee Act* failed to include provisions for gender-disaggregated data collection to monitor women refugees’ experiences.

This study, therefore, recommends that the *Refugee Act* be amended to include gender sensitive rights education for women refugees and asylum seekers. The study recommends the following draft clause,

“The Department of Home Affairs shall ensure that all women refugees and asylum seekers are provided with accessible, gender sensitive education and information regarding their legal rights, remedies, and protective services in a language and manner they can understand.”

This study also recommends that the *Refugee Act* should explicitly guarantee women refugees and asylum seekers’ confidentiality and establish safe reporting and protection mechanisms for them. A draft clause could read as follows,

“The Department of Home Affairs shall establish safe, confidential reporting mechanisms for women refugees and asylum seekers to report incidents of exploitation, harassment or gender based violence and be provided with access to shelters, counselling and legal assistance without risk of deportation.”

The study recommends that the *Refugee Act* should guarantee equality between men and women and further provide explicit substantive protection for women in vulnerable situations. A draft clause could read as follows,

“In all matters relating to refugee protection, the Department of Home Affairs shall adopt special measures to address the gender specific vulnerabilities of women asylum seekers and refugees, ensuring substantive equality in law and practice.”

This study recommends that women refugees and asylum seekers have accessible and effective remedies. A draft clause could read as follows,

“The Department of Home Affairs shall ensure that women refugees and asylum seekers have access to courts, and other complaint systems, including free or affordable legal assistance, irrespective of their migration status.”

The study recommends a mandated systemic collection of gender disaggregated data on refugees and asylum seekers. The proposed clause could read as follows,

“The Department of Home Affairs shall collect, analyse and publish gender disaggregated data on the status and experiences of refugees and asylum seekers to inform evidence-based policy making and law reform.”

6.2.2.3 Labour Laws (LRA, BCEA, EEA & OHSA)

The GLI, in its analysis of Labour Acts as discussed in section 5.8.4-7, identified several gaps: there were no guarantees of gender-sensitive education or awareness campaigns specifically targeted at women migrant workers. The Labour Acts failed to explicitly provide confidentiality or anti-coercion guarantees related to gender-based violence in the workplace. Thirdly, the Labour Acts focused on formal equality, overlooking the structural gender inequalities faced by women migrants. While remedies existed, barriers prevented migrant women from accessing the CCMA, Labour Court, and labour inspections. The Labour Acts also did not guarantee or provide for the collection and monitoring of gender-disaggregated data.

This study recommends that the Labour Acts should contain provisions for educating women migrant workers on their rights and remedies. A draft clause could read as follows,

“The Department of Employment and Labour shall provide gender sensitive education and awareness programmes for women migrant workers with a specific emphasis on the rights protections and remedies available to them.”

The study further recommends that the Labour Acts contain provisions which guarantee confidentiality and protection specific to women migrant workers. The draft clause could read as follows,

“The Department of Employment and Labour shall ensure that women migrant workers have the right to confidentiality when reporting workplace harassment, exploitation, or gender-based violence, and shall in all circumstances be protected from retaliation or deportation as a result of such reporting.”

Women migrant workers should also be included under the affirmative action measures. This will ensure that substantive equality for women migrant workers is achieved. A proposed clause would be as follows,

“The Department of Employment and Labour shall ensure that affirmative measures are adopted in employment and permit allocation processes to ensure that women migrant workers, particularly those in the informal sector, have equitable access to employment opportunities, protections, and benefits.”

The study also recommends strengthening access to remedies for women migrant workers, including legal aid. The draft clause could read as follows,

“The Department of Employment and Labour shall ensure that women migrant workers shall have access to the Commission for Conciliation, Mediation and Arbitration, the Labour Court, including the provision of free or affordable legal assistance and interpretation services.”

The Labour Acts should explicitly guarantee the collection and monitoring of gender disaggregated data to track the experiences of women migrant workers. A draft clause could read as follows,

“The Department of Employment and Labour shall collect, analyse and publish gender disaggregated data on women migrant workers, including working conditions, wages and access to remedies.”

6.2.2.4 Integration of White Paper proposals with gender responsiveness

The 2024 White Paper on Citizenship, Immigration and Refugee Protection represents a significant step in synchronising South Africa’s disintegrated legal framework by

combining the Citizenship Act, Immigration Act and Refugee Act into a single policy proposal. Important to note at this point is the fact that the White Paper fails to incorporate feminisation of migration or acknowledge the gender specific vulnerabilities faced by women migrant workers. This study recommends that the statute's provisions must explicitly address the distinct experiences of women migrants in sectors such as domestic work, caregiving, and agriculture, and provide targeted protections for these vulnerable groups.

Likewise, the 2025 White Paper on the National Labour Migration Policy introduces crucial reforms, which include the quota system for documenting migrants in key sectors. Whilst this White Paper seeks to standardise inward migration for economic purposes, this study recommends that gender sensitive measures must be made use of to ensure that the quotas do not further marginalise women, who are already overly concentrated in informal and precarious employment. Any regulatory framework which emerges from the NMLP must explicitly guarantee equal treatment and access to rights for women migrant workers, despite their legal status.

6.2.3 Monitoring and accountability measures at an International Level

The International Labour Organisation and the CEDAW Committee should strictly monitor the implementation of migration and labour laws in South Africa, as it is a member state, as far as these relate to the protection of women migrant workers' rights. The South African Commission for Gender Equality and Civil Society can monitor the implementation at a national level.

Submitting annual reports to these two international bodies should be mandatory for South Africa's Department of Employment and Labour and Home Affairs, not optional. This study recommends that the duty to submit these reports be incorporated into the performance indicators of both departments (Employment and Labour and Home Affairs). Non-compliance should lead to consequences such as being recognised for poor performance, potential disciplinary action, and, where appropriate, dismissal of responsible officials.

The following section discusses the monitoring of the implementation of these laws at a global and national level.

6.2.2.1 *International Labour Organisation*

As discussed in Chapter 4, the GLI's role is to assess laws regarding gender responsiveness. The GLI also measures the law's intention against its likely effect. The only gap with the GLI is its inability to monitor the implementation of laws. International and national bodies can fill this role.

An ILO treaty, namely the Migration for Employment Convention, in Article 1, states that each ILO member must make information on national policies, laws, and regulations relating to emigration and immigration available upon request. Secondly, the ILO also requires each member state to provide, upon request, information on special provisions concerning migration for employment, including conditions of work and the livelihood of migrants for employment.

At an international level, the ILO can monitor its member states. As South Africa is a member state, it would be mandatory for the country to submit a report once a year on all its migration and labour laws, especially as far as they affect migrant workers. The country would be required to provide information on any special provisions it would have made, including conditions of work. This would enable the ILO to effectively monitor South Africa and ensure that it is transparent and accountable in implementing its laws.

6.2.2.2 *CEDAW Committee*

As already discussed in section 3.4.1.1, the CEDAW Committee requires state parties to submit yearly reports on the conditions of women. South Africa has not submitted a report to the CEDAW Committee despite the situation of women migrants in the country. The CEDAW Committee is another international monitoring body that can monitor laws that the GLI would have assessed. The effectiveness of the CEDAW Committee was also discussed in detail in section 3.4.1.1.

6.2.2.3 South African Commission for Gender Equality

The Commission for Gender Equality promotes, protects, monitors, and evaluates gender equality through research, public education, policy development, legislative initiatives, effective monitoring, and litigation. As its role states, the Commission for Gender Equality at a local level should monitor the implementation of laws assessed by the GLI to ensure that they are adhered to, and offenders are arrested and prosecuted. The CEDAW Committee mandates that state parties in the countries of destination must take active measures to protect women migrant workers by preventing, prosecuting and punishing all migration-related human rights violations that occur under their jurisdiction, whether perpetrated by public authorities or private actors.¹⁴⁰⁷

The Gender Equality Commission should also collect gender-disaggregated data on the situation or experiences of women migrant workers. This would enable the Commission for Gender Equality to compile a shadow report with data on women migrants' experiences in South Africa and submit it to the ILO and CEDAW Committee. The Commission would also ensure that feedback from the ILO and CEDAW Committee is actioned.

6.2.2.4 Civil society

Civil Society must conduct awareness-raising campaigns in the community to educate lawmakers, community leaders, and elders on the importance of protecting and promoting the rights of women migrants in South Africa. The CEDAW Committee encourages state parties to provide mandatory awareness-raising programmes concerning the rights of migrant women workers and gender sensitivity training for relevant public and private recruitment agencies, employers, relevant state employees, such as criminal justice offenders, border police, immigration authorities, social services and healthcare providers.¹⁴⁰⁸

¹⁴⁰⁷ CEDAW 2009:par 25 (b), p.11.

¹⁴⁰⁸ CEDAW 2009:par. 26(g), p.12.

6.2.4 Accessible and effective remedies

Enhancing access to justice for women migrant workers in South Africa involves addressing the systemic barriers that hinder their ability to seek redress and protection. Establishing clear and accessible channels for reporting abuses will include online platforms and hotlines. For example, Lawyers for Human Rights in South Africa aids migrants, including women, with legal and social needs. Women migrants should be provided with information about their contact details and services. This study recommends that the Home Affairs Department, in coordination with Lawyers for Human Rights, establish an information and referral system to ensure that women migrant workers are informed of and can access free legal aid services and other available services.

6.2.5 Protection of Women in Informal and Precarious Sectors

The study shows that the majority of women migrant workers are employed in sectors such as domestic, farm and sex work, as well as the informal trade market, where laws are poorly regulated. South Africa should ratify and implement the ILO Domestic Workers Convention and proceed to introduce regulatory frameworks that make provision for social security, wage protections and workplace safety standards to informal and precarious forms of employment. Targeted interventions should include mandatory written contracts for domestic and farm workers, as stipulated in the Sectoral Determination for Domestic Workers in South Africa, established under the Basic Conditions of Employment Act. This should also include protection against unfair dismissal and an accessible complaints system. Failure by an employer to comply with issuing a written contract should attract a fine or imprisonment.

6.2.5.1 Strengthening Enforcement in Informal and Invisible Labour Sectors

Ensuring effective enforcement in informal labour sectors requires a paradigm shift away from conventional labour-law enforcement models towards rights-based, indirect, and community-embedded mechanisms. The key recommendations are as follows:

- 1. Decoupling labour enforcement from immigration control**

Labour rights enforcement should be institutionally separated from immigration control. When labour inspectors, police, and immigration authorities operate

jointly, migrant women workers are deterred from reporting abuse. Establishing a clear firewall between labour and immigration enforcement would ensure that access to remedies does not expose workers to arrest or deportation.

2. Worker-centred and community-based enforcement mechanisms

Given that the state cannot directly access informal workplaces, such as private homes, farms, and street-based trading spaces, enforcement should rely on trusted intermediaries, including NGOs, trade unions, women's organisations, and community paralegals. These actors can play a critical role in identifying violations, supporting complaints, and serving as conduits between women migrant workers and state institutions.

3. Sector-specific regulation and presumptive protections

Rather than relying exclusively on individual complaints, the law should impose presumptive obligations on employers in high-risk sectors, including domestic work, caregiving, and agriculture. These obligations should include mandatory written contracts, compliance with minimum wage requirements, and social security registration, irrespective of a worker's migration status.

4. Gender-responsive monitoring and evaluation tools

Traditional enforcement mechanisms largely fail because they are gender-neutral. The systematic application of the Gender Legislative Index (GLI) would enable lawmakers and oversight bodies to assess not only whether laws formally exist but also whether they are likely to be effective for women migrant workers in informal and precarious settings, where fear, dependency, and power asymmetries inhibit self-reporting.

In this context, enforcement in the informal sector cannot rely solely on visibility. It must instead be built on accessibility, trust, non-criminalisation, and gender-responsive institutional design.

6.2.6 Strengthen regional cooperation

The Migrant Workers Convention encourages countries to cooperate in addressing challenges related to worker migration, with a particular focus on women migrant workers. Neighbouring countries should streamline migration processes and protect women migrants at all stages of migration. This study recommends that countries document the challenges, successes, and lessons they have learnt and organise regional symposiums where this information can be shared and replicated. South Africa can also utilise these platforms to share success stories from the use of GLI in helping laws become more gender-responsive.

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